IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 116/2022

In the matter between:

TELKOM SA SOC LIMITED	Applicant
and	
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	First Respondent
CHAIRPERSON: INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Second Respondent
MINISTER OF COMMUNICATION AND DIGITAL TECHNOLOGIES	Third Respondent
VODACOM (PTY) LTD	Fourth Respondent
MOBILE TELEPHONE NETWORKS (PTY) LTD	Fifth Respondent
CELL C (PTY) LTD	Sixth Respondent
RAIN NETWORKS (PTY) LTD	Seventh Respondent
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LTD	Eight Respondent
COMPETITION COMMISSION OF SOUTH AFRICA	Ninth Respondent
SOUTH AFRICAN COMMUNICATIONS FORUM	Tenth Respondent
SOUTH AFRICAN BROADCASTING CORPORATION LIMITED	Eleventh Respondent
NATIONAL ASSOCIATION OF BROADCASTERS	Twelfth Respondent
COMMUNITY INVESTMENT VENTURES HOLDINGS (PTY) LIMITED	Thirteenth Respondent
e.tv (PTY) LIMITED	Fourteenth Respondent
SOUTH AFRICAN RADIO ASTRONOMY OBSERVATORY	Fifteenth Respondent
PAUL HJUL	Sixteenth Respondent

ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS	Seventeenth Respondent
ICT SMME TELECOMMUNICATIONS (PTY) LIMITED	Eighteenth Respondent
SONKE TELECOMMUNICATIONS (PTY) LIMITED	Nineteenth Respondent
INSTITUTE FOR TECHNOLOGY AND NETWORKS ECONOMICS	Twentieth Respondent
B- BBEE ICT SECTOR COUNCIL	Twenty- First Respondent

THIRD RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. Telkom seeks this Court to review and set aside the decision of ICASA to license the spectrum in the 2021 Auction ITA, and the decision to defer the licensing of the WOAN to a later date. Telkom submits that it is well aware of the extensive delay in licensing of spectrum. Despite acknowledging that Telkom mobile network carries more data than any other operators since 2017[1], Telkom submits that the 2021 Auction ITA simply does not favour it as the manner in which it is designed will result in a market structure in which Vodacom and MTN will be entrenched[2].

2. At the outset, we submit that Telkom's case lacks any merit as the decision taken by ICASA is lawful, procedural and substantively fair. Telkom approached this Court to further its own interest. First, this application ignores the realities that have been brought about by the impact of Covid- 19 pandemic due to lack of adequate spectrum. Telkom seeks this Court to usurp the powers of ICASA and to substitute the decision of ICASA

[1] Page 001- 63 Founding Affidavit para 126.
[2] Page001- 104 to 106 Founding Affidavit para 254.

with the decision that will further its commercial interests. This will be interfering with the independence of ICASA.

3. Second, this application tramples the entrenched constitutional rights of the public to have the full and equal enjoyment of all rights which includes the right to have access to information and communication technologies irrespective of social standing. The release, licensing and assignment of high frequency spectrum has the potential to promote universal provision of electronic communications services and connectivity to the majority of South Africans and to ensure broadband service coverage.

4. Third, the spectrum licensing process has been ongoing since at least 2010. The delay in digital migration and spectrum allocation is the single biggest constraint on the growth of the telecommunications sector and is a bottleneck for broader economic growth. The release and allocation of spectrum has the potential to promote the interest of public with regard to price and quality of service.

5. Fourth, Telkom's arguments that ICASA failed to conduct a meaningful public participation has no merit. The Minister, ICASA and some of the operators, including Telkom have been engaging in the process leading to the IM 2021. Operators were eager for the release and allocation of the spectrum. This is evident from the Record.

6. Fifth, the 2021 Auction ITA auction allows Telkom to have the opportunity to bid for the 1GHz spectrum as the switch over from analogue to digital will release the much -needed spectrum in the sub 1GHz spectrum. Therefore, there is no merit in the assertion that the 700MHz and 800MHz spectrum bands are not available for allocation.

7. Viewed objectively, this application is self- serving. It is motivated purely by Telkom's commercial interests in total disregard to the benefits that the release and allocation of the high spectrum to the economy and public will bring. Deferring the awarding of spectrum to a later date will have far reaching consequences for the public as this will constrain the measures to eliminate the market efficiency gap through the allocation of high frequency spectrum.

8. We submit with respect that each of the contentions raised by Telkom and the co-applicants are without merit and unsustainable. This application stands to be dismissed with costs, including those of two counsel.

9. In what follows, we deal with the following issues:

9.1. The factual background on national policy on spectrum;

9.2. Government's interest in the licensing of the high frequency spectrum;

9.3. The department is on track with digital migration;

9.4. The procedure to publish the 2021 Auction ITA;

9.5. The decision to publish the 2021 Auction ITA; and

9.6. The decision to defer the WOAN.

9.7. The principle of separation of powers

9.8. The relief sought

FACTUAL BACKGROUND ON NATIONAL POLICY ON SPECTRUM

10. South Africa is a signatory to the Constitution and Convention of the ITU. This is an international treaty binding on all member states. The provisions of the ITU Constitution and the Convention are further complemented by Administrative Regulations such as Radio Regulations, which also have international treaty status. In accordance with the ITU Constitution, South Africa shall endeavor to limit the number of frequencies and the spectrum used to the minimum essential to provide in a satisfactory manner the necessary services and to apply the latest technical advances as soon as possible.

11. The ITU table of frequency allocations forms the basis of the South African Table of Frequency Allocation (SATFA). As a result, all stations, whatever their purpose, must be established and operated in such a manner so as not to cause harmful interference to the radio services or communications of other countries.

12. The GE06 Regional Agreement[3] was adopted by a hundred and nineteen ITU Member States at the Regional Radiocommunication Conference held in 2006 for the planning of digital radio and television services in Europe, Africa, Middle East, Central Asia and Islamic Republic in the frequency bands 174- 230 MHz and 470- 862 MHz. The agreement was adopted to facilitate the transition to digital TV broadcasting in the regions mentioned by ensuring the availability of coordinated spectrum at the end of the transition from analogue to digital TV.

13. The Minister exercises oversight over ICASA and is responsible for ensuring compliance with the Republic's obligations and undertakings under bilateral, multilateral or

[3] Page 004- 298 to 354: Regional Agreement Relating to the planning of the digital terrestrial broadcasting service in Region 1 and in the frequency bands 174- 230 MHz and 470- 862 MHz.

international treaties and conventions, including technical standards and frequency matters[4].

14. Electronic communications in the Republic is regulated under the ECA[5] in the public interest. Its main objects include, *inter alia*:

> *"(a)…*
>
> *(b)…*
>
> *(c) promote the universal provision of electronic communications networks and electronic communications services and connectivity for all;*
>
> *(d) encourage investment, including strategic infrastructure investment and innovation in the communications sector;*
>
> *(e) ensure efficient use of the radio frequency spectrum;*
>
> *(f) promote competition within the ICT sector;*
>
> *(g)…*
>
> *(h)…*
>
> *(i)…*
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> *(j)…*
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> *(k)…*
>
> *(l)…*
>
> *(m) ensure the provision of a variety of quality electronic communications services at reasonable prices;*
>
> *(n) promote the interests of consumers with regard to price, quality and the variety of electronic communications services*

[4] Section 3(1) (c) of the ECA.
[5] The Electronic Communications Act, No. 36 of 2005.

(o)…

(p)…

(q) ensure information security and network reliability."

15. It is submitted that the continued failure to release and allocate the high frequency spectrum negatively impacts on the fulfilment of the objectives of the ECA. The public mainly continues to bear the consequences of having to contend with the high costs of telecommunications and unreliability of the network. In other areas, there continues to be lack of telecommunications services. Thus, it is essential that the spectrum be released and allocated in next to no time as this will allow investments in new infrastructure to cater for the needs of the public.

16. Section 3(1) of the ECA provides that the Minister may make policies on national policy in relation to:

"*(a) the radio frequency spectrum;*

(b) universal service and access policy;

(c) the Republic's obligations and undertakings under bilateral, multilateral or international treaties and conventions, including technical standards and frequency matters;

(e)…

(f) promotion of universal service and electronic communications services in under- serviced areas;

(g) mechanisms to promote the participation of SMME's in the ICT sector."

17. In this regard, section 3(2) of the ECA empowers the Minister to issue to ICASA policy directions consistent with the objects of the ECA, national policies in relation to:-

> *"(a) the undertaking of an inquiry in terms of section 4B of the ICASA Act on any matter within the Authority's jurisdiction and the submission of reports to the Minister in respect of such matter;*
>
> *(b) the determination of priorities for the development of electronic communications networks and electronic communications services or any other service contemplated in Chapter 3;*
>
> *(c) the consideration of any matter within the Authority's or Agency's jurisdiction reasonably placed before it by the Minister for urgent consideration;*
>
> *(d) guidelines for the determination by the Authority of the spectrum fees; and*
>
> *(e) any other matter which may be necessary for the application of this Act or the related legislation."*

18. In relation to ICASA

18.1. It was established to regulate broadcasting in the public interest and to ensure fairness and diversity of views broadly representing South African society, as required by section 192 of the Constitution and to regulate electronic communications in the public interest[6]. Section 3(3) of Independent

[6] The Independent Communications Authority of South Africa Act, No. 2 of 2000.

Communications Authority of South Africa Act[7] ("ICASA") enjoins ICASA to act independently, and subject only to the Constitution and the law and to be impartial and perform functions without fear, favour or prejudice. Section 4, further provides that ICASA must function without any political or commercial interference.

18.2. Section 4(3)(c) empowers ICASA to control, plan, administer and manage the use and licensing of the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic.

19. In a nutshell, the process leading to the decision to publish the 2021 ITA was preceded by regulatory interventions dating as far back as 2010.

20. First, the Minister published the National Radio Frequency Policy[8] ("*National Policy*") after a series of consultations with interested parties. Paragraph 2.1.14 of the national policy is of great importance in that it (a) provides guidance on issues related to the radio frequency spectrum and the establishment and review of the national frequency plan; (b) establishes principles for spectrum management; (c) contributes to the promotion of national interests within the framework of Government strategic objectives; (d) provides for the allocation of spectrum for safety of life services; (e) provides for the allocation of spectrum for government services; and (f) provides for the allocation of spectrum for scientific research.

21. Second, in 2013, the Minister published the SA Connect: Creating Opportunities Ensuring Inclusion- South Africa's Broadband Policy[9] ("SA Connect"). It gives

[7] No. 2 of 2000.
[8] Page 003- 2642 to 2662: Part A: Government Gazette No. 33119 (16 April 2010).
[9] Page 003- 2663 to 2720 Government Gazette No. 37119 (6 December 2013).

expression to the broader vision of the NDP, the 2020 Vision for broadband that by 2020, 100% of South Africans will have access to broadband services at 2.5% or less of the population's average monthly income.

22. Third, in 2015, ICASA approved the Radio Frequency Spectrum Regulations[10], with the aim, *amongst others*, to establish the framework through which the Authority may allocate and assign radio frequency spectrum under the South African National Radio Frequency Plan; (a) establish standard terms and conditions which will be applicable to all frequency bands and applications as well as radio frequency spectrum licences; (b) establish transparent, fair and efficient procedures and processes for radio frequency spectrum licence applications; (c) allow for greater flexibility such that special conditions and procedures for specific frequency bands can be applied; (d) provide for circumstances in which the use or possession of radio apparatus does not require a radio frequency spectrum licence; and (e) provide procedures and criteria for awarding radio frequency spectrum licences for competing applications or instances whereby there is insufficient spectrum available to accommodate demand.

23. Fourth, on 27 September 2018, the Minister published the invitation to provide written comments on the proposed Policy and Policy Directions to ICASA on Licensing of Unassigned High Demand Spectrum ("the proposed Policy Direction"). Inputs were made by ICASA on 21 November 2018.

24. Fifth, on 26 July 2019 the Minister published the Policy Direction on High Demand Spectrum and the Policy Direction ("*2019 Policy Direction*)" on the licensing of a Wireless Open Access Network ("*WOAN*"). The 2019 Policy Direction gave effect to

[10] Page 003- 2721 to 2822 Government Gazette No. 38641 Vol 597 (30 March 2015).

National Integrated ICT Policy White Paper, 2016 ("*the White Paper*") which sets out the open access policy, spectrum policy and a policy framework to address the assignment of spectrum where there is insufficient spectrum to accommodate demand (high demand spectrum) to a wireless open access network.

25. The above process was however met with challenges which culminated in the further delay of the release and allocation of high frequency spectrum.

25.1. On 22 December 2020, Telkom launched legal proceedings seeking that ICASA be interdicted from proceeding with the auction process. E-tv joined these proceedings as co-applicant. MTN further launched an application in which it challenged certain provisions relating to the classification of the Tier 1 and Tier 2 operators and the inclusion of an Opt- In Scheme.

25.2. Vodacom thereafter launched a counter- application in which it sought clarity to confirm the correct interpretation of the Opt- In Scheme.

25.3. On 15 September 2021, the consent court order was granted reviewing and setting aside the ITA remitting the matter back to ICASA for reconsideration. We note that there is disagreement with regard to the expectations of the each of the parties from the consent court order.

GOVERNMENT'S INTEREST IN THE SPEEDY LICENSING OF THE HIGH FREQUENCY SPECTRUM

26. Chapter 2 of the Bill of rights guarantees the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom. This equality refers to the full and equal enjoyment of all rights which includes the right to have access

to information and communications technologies irrespective of social standing. Equitable access to consumers means access to network services and should not be dependent on social advantages.

27. Section 85 of the Constitution vests the executive authority of the Republic in the President acting together with other members of the cabinet, which includes, the constitutional authority of developing and implementing national policy and preparing and initiating legislation.

28. The Minister recognises the urgent need to speed up the process of digital migration to release the high- speed spectrum for auctioning as soon as possible as this has the potential to encourage investment and innovation in the communications sector. This will furthermore maximise the efficient use of radio frequency spectrum – in that it will improve the quality of service that the public receives from communications operators.

29. The President continues to highlight the importance of the release of high efficiency spectrum to bring about the economies of scale. In his speech, he urges government to accelerate the auctioning of the digital spectrum[11]. He noted that "*...the auctioning of South African's telecommunications spectrum has significant potential to boost investment in the telecommunications sector, will see the roll- out of high speed 5G connectivity and will have the potential to improve overall economic productivity and competitiveness by improving internet access for firms, households, schools, hospitals, higher education institutions, etc.".*

[11] Page 004- 618 Ministers Affidavit in Part B.

30. The delay in the licensing of the spectrum has become critical for the country, given the impact of the Covid-19 pandemic which continues to highlight the importance of electronic communications networks for the growth of the economy. Spectrum has the potential to promote competition and to ensure enhanced communications services and reach to the public. The release and allocation of spectrum is now overdue by more than 10 years and the impact of Covid-19 pandemic continues to highlight the importance of promoting competition, ensuring geographic spectrum coverage so as to ensure enhanced communication services and reach. The unlocking of spectrum has the potential of leading to a sustainable economic growth where there is better life, jobs and greater social cohesion.

THE DEPARTMENT IS ON TRACK WITH DIGITAL MIGRATION PROCESS

31. Telkom argues that the 2021 Auction ITA involves the auction of portions of spectrum in the 703- 733 MHz paired with 758- 788 MHz ("700 MHz or IMT 700") and the 791- 821 MHz paired with 832- 862 MHz ("800 MHz or IMT800") frequency bands, while these bands are not yet available for use nationally by any party who may successfully bid for any of these frequencies. These frequencies are currently occupied by television broadcasters and are used for providing broadcasting services[12].

32. Telkom is minimal with the truth. As it stands, Telkom and many other operators have been allocated the provisional sub- 1 spectrum for use to cater for the impact of Covid-19 pandemic as more and more services moved to online services. This provisional allocation of spectrum continues to benefit the public at large.

[12] Page 001- 116 Founding Affidavit para 281.

33. At the time of the 2021 Auction ITA, ICASA was fully aware of the plans put in place by the Minister to switch off from analogue to digital. ICASA therefore, did not act irrationally to include the spectrum bands IMT 700 and IMT 800 in the 2021 Auction ITA as these bands will be fully available for commercial use by the end of March 2022[13]. In this regard;

33.1. The Minister constantly engages with the department to ensure that the switch off from analogue to digital is completed as per the updated plan[14]. The Department has already switched off five (5) provinces without an outcry from the public with no notable interference.

33.2. The Department has shifted from staggered provincial approach towards a consolidated national approach where STB installations and Analogue Switch-Off ("ASO") will happen simultaneously in all nine provinces of South Africa. Restacking has already been completed in the Free State for the SABC, with the exception of 3 services run by e.tv which still occupy the dividend bands. All the dividend bands are available for use in the Northern Cape and in the Free State (except for only 3 services run by e.tv)[15].

33.3. Sentech has also completed the digital-to-digital migration in the Free State Province of all SABC transmitters. The dividend spectrum will be fully available after the full completion of the digital migration ASO as soon as the full restacking process is concluded[16].

[13] Page 004- 629 to 653 answering affidavit.
[14] Page 003- 2823 to 2848 Analogue Switch-off Plan.
[15] Page 004- 255 answering affidavit to Part B para 60.
[16] Page 004- 255 answering affidavit to Part B para 60.

33.4. The department has also ramped up installer capacity in line with the MiM as per the approved plan. Furthermore, Sentech's installer capacity for the remaining provinces has been created, and this will intensify installations in all the remaining provinces.

34. Consequently, there is no truth in Telkom's assertion that there is no clear guideline or roadmap setting out how the migration plan will be implemented in accordance with the Minister's deadline[17].

35. Telkom further bemoans the price payable for the 700 MHz and 800 MHz since there is no certainty about the availability of these bands for optimal commercial use on a national basis[18].

36. It is submitted that these bands are available in large parts of the country for roll out of mobile services immediately and where these bands are not yet available, operators who would have prepared their networks will proceed to prepare for roll out immediately after the bands are freed. This is not irrational- in fact- operators would not be delayed by an auction process that would be expected to commence after full migration[19].

37. Telkom's argument that the digital migration is the subject of the pending litigation between e.tv, the Minister and ICASA[20] has no merit. As indicated in the answering affidavit, there has not been any frequency interference encountered by e.tv on their existing services. e.tv furthermore switched off some of their analogue services and have

[17] Page 001- 117 Founding Affidavit para 282.
[18] Page 001- 116 Founding Affidavit para 2.2.
[19] Page 004- 260 Answering Affidavit to Part B para 81
[20] Page 001- 116 Founding Affidavit para 282.1.

submitted proposals to ICASA to effect their own version of a controlled analogue switch off in respect of their remaining analogue television broadcast services[21].

38. In light of the above, there is certainty with regard to the digital migration process. It is therefore, rational for ICASA to license the sub-1 spectrum bands. In the event that the spectrum bands will not be fully available by the end of March, it will be irrational for ICASA to suspend the entire process given that the department is already far ahead with the digital migration process. In the meantime, operators will continue to benefit in areas where there is complete digital migration as there would be no interference. Also, by the time the digital migration is fully complete- which is soon- operators will be ready to deploy in those areas which may have fallen behind.

THE DECISION TO PUBLISH THE 2021 AUCTION ITA

39. As is now trite, there are two review pathways in respect of decisions of public bodies. The first is PAJA[22] and the second is the principle of legality.

40. PAJA applies to all decisions that amount to "administrative action". In Minister of *Home Affairs and Another v Public Protector of the Republic of South Africa*[23], the court held the following:

> *"[38] It does not matter in this case that the application for the review is based on the principle of legality rather than on PAJA. No procedural differences arise and the grounds of review that apply in respect of both pathways to review derive*

[21] Page 004- 260 Ministers Answering Affidavit to Part B para 83
[22] Promotion of Administrative Justice Act, No. 3 of 2000.
[23] 2018 (3) SA 380 (SCA).

ultimately from the same source- the common law- although, in the PAJA, those grounds have been codified".

41. As noted above, the procedure to publish the 2021 Auction ITA in its present form and the decision to defer the WOAN are of central importance in this regard. In what follows below, it is more evident that this application has no merit and that it is brought merely to delay the process to auction the spectrum.

ICASA sufficiently engaged interested parties in the process leading to the publishing of the ITA

42. As indicated above, section 31(3) empowers ICASA to prescribe procedures and criteria for awarding radio frequency spectrum licenses for competing applications in instances where there is insufficient spectrum available to accommodate demand. The 2015 Spectrum Regulations provides for the licensing process that ICASA may follow which include (i) auction rules; (ii) beauty contest rules; or (iii) any other licensing mechanism deemed appropriate by ICASA[24].

43. Telkom decries the timetable set out for public consultation by ICASA[25]. It is important to note that the Minister, ICASA and some of the operators including Telkom had discussions at some point just before the publication of the IM 2021[26]. Interested parties were eagerly awaiting the 2021 Auction ITA. We submit that the process followed by ICASA is fair and rational as set out below.

[24] Page 0014- 246 to 247 Minister's Answering Affidavit para 27.
[25] Page 011- 122 Founding Affidavit para 289.
[26] Page 004- 261 Minister's Answering Affidavit para 85.

44. The process commenced with the publishing of the first 2021 IM[27] on 1 October 2021 in which ICASA detailed the process that it intends to embark upon the licensing of the radio frequency spectrum. It further detailed the spectrum bands that are available and the digital migration process currently underway to release the spectrum. It was clear that ICASA intended to hold workshops on the 15 October 2021 and the closing date for submissions being the 01 November 2021. The date for the publishing of the ITA was the 10 December 2021 as it happened.

45. It is clear from the above that the IM 2021 gave sufficient information about the proposed action that ICASA intends to undertake and the nature and purpose was described with sufficient particularity[28]. It further elaborated on the preferred method to award the spectrum to qualified bidders. As a result, ICASA received ten written representations from interested parties. This was followed by the second IM in which ICASA received seventeen written representations from interested parties including Telkom[29].

46. In *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others*[30], the Court cited with approval the remarks of Lord Mustill in Doody v Secretary of State for the Home Department and Other Appeals[31] where Lord Mustill summarized the duty of a public official or body to act fairly in these lucid terms:

> *"[13] 'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are*

[27] Page 005- 14 to 31 Government Gazette 45255 (1 October 2021).
[28] See Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) at para 61.
[29] Page 005- 146 Reasons Document (12 December 2021).
[30] 2001 (4) SA 511 (SCA).
[31] [1993] 3 All ER 92(HL) at 106 d-h

far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

[14] There is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts. As Sachs LJ pointed out in Re Pergamon Press:

In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand. . . .

It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate . . . the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective."

47. In *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agricultural and Another*[32], the court held that "…firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly, he must be put in possession of such information as will render his right to make representations a real, and not an illusory one".

48. As indicated above, about 17 interested parties including Telkom submitted their written representations to ICASA. They fully participated in process leading to the issuing of the 2021 Auction ITA.

49. We therefore submit that the process leading to the publishing of the 2021 Auction ITA is fair and reasonable.

ICASA considered the written submissions

50. A decision must be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken, and it must be supported by the evidence and information before the administrator as well as the reasons given for

[32] 1980 (30 SA 476 (T).

it[33]. In *Carephone (Pty) Ltd v Marcus NO*[34], Froneman DJP (as he then was) dealt with the question of rationality in the following manner:

> *"…is there a rational objective basis justifying the conclusion made by the administrative decision- maker between the material properly available to him and the conclusion he or she eventually arrived at?"*

51. The reasons document plainly shows that ICASA considered the written submissions and adequately dealt with all the issues raised therein- there is no doubt about that[35].

52. It is submitted that the assessment of compliance with the procedures should consider whether the steps actually taken by ICASA were effective, measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirements in particular. ICASA did just that in respect of the issues below, amongst others.

52.1. The WOAN- what is evident is that after considering all the written submissions, ICASA saw it necessary to engage in further engagements regarding the WOAN. It did not, at any stage, indicate that it will proceed with the licensing of the WOAN. Instead, it made it clear that it will set aside spectrum for the WOAN[36].

52.2. Competition- ICASA considered this when it classified operators under Tier- 1 and Tier- 2. Tier 2 operators, like Telkom are able to acquire the sub- 1 spectrum whilst Tier 1 operators will not be able to participate in the auction process of the sub- 1

[33] See Administrative Law in South Africa, Third Edition by Cora Hoexter and Glenn Penfold.
[34] 1993 (3) SA 304 (LAC): See also Liberty Life Association of Africa Ltd v Kachelhoffer NO 2005 (3) SA 69 (C) at para 45.
[35] Page 005- 146 to 243.
[36] Page 005- 154 para 4.10.

spectrum. ICASA explained its position regarding the commercial arrangements which operators concluded with either MTN and Vodacom as Telkom clearly is of the view that these distort the spectrum caps. The same sentiments were raised by Hujl who is clearly more biased in favour of Telkom[37].

52.3. IMT 700 and IMT 800- ICASA explained the rationale for the inclusion of the spectrum bands. It indicated that the Minister is committed to complete the digital migration process by 31 March 2022. Further that should the deadline not be met, it will continue to auction the spectrum bands based on availability of the bands[38].

53. Given the above, ICASA has apprised itself of the representations of all interested parties and considered the issues raised prior to publishing the 2021 Auction ITA. Clearly, it acted within its legislative mandate as its decisions are free from bias and are made independently.

54. Consequently, the decision is lawful and rational.

The decision to defer the WOAN

55. Rationality review "is about testing whether there is sufficient connection between the means chosen and the objective sought to be achieved"[39]. This involves a "fact driven inquiry having regard, inter alia, to the information available to the administrator, the considerations relied on, the ends that were sought to be achieved and the effect the proposed action would have upon interested parties[40]."

[37] Page004- 267 Ministers Answering Affidavit paras 116 to 117.
[38] Page 005 -194 para 8.43.
[39] Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC) at para 69.
[40] Medirite (Pty) Ltd v South African Pharmacy Council and Another [2015] ZASCA 27 (20 March 2015) at para 10.

56. Telkom contends that the Minister created an exception to the general rule that all spectrum had to be licensed to the WOAN[41]. Telkom further argues that ICASA is acting in contravention of the 2019 Policy Directive by failing to license spectrum to operate through the auction and to the WOAN simultaneously, and that it failed to consult on the impact of the WOAN ITA[42].

57. Telkom submission was basically that the CSIR study cannot be relied upon to formulate a policy position on the spectrum needs of a sustainable WOAN. Its basis was that the study was limited to the technical criteria pertaining to the spectrum needs of the WOAN and did not cover the economic and commercial aspects of a viable WOAN[43].

58. It is submitted that deferring the WOAN to a later date does not render ICASA's decision unlawful and irrational. In *Electronic Media Network v e.tv (Pty) Ltd*[44], the court held that when the authority chooses to depart from national policy, it must offer a full and substantial justification for its actions. ICASA addressed its approach to defer the licensing of the WOAN in the Reasons Document.

59. There are a number of reasons in which ICASA's decision to defer the licensing of the WOAN is rational.

60. First, the 2021 Auction ITA and the process of licensing of the WOAN relate to separate and distinct decisions.

[41] Page 001- 88 Founding Affidavit para 206.
[42] Page 001- 109 Founding Affidavit para 266.
[43] Page 004- 253 Minister's Answering Affidavit para 51.
[44] [2017] ZACC17; 2017 (9) BCLR 1108 (CC) at para 30.

61. Second, ICASA is not bound by the recommendations of the CSIR. In any event, five years have since passed since the CSIR report was published and therefore the spectrum cap proposed by the CSIR may be redundant. The evolving environment in telecommunications necessitate for new targets to be set and or a new study to be conducted for the viability of the WOAN.

62. Third, the WOAN will still have sufficient spectrum to ensure its viability. In this regard, ICASA published a notice on 30 September 2021 with the purpose to determine the current use and usage of the frequency bands as mandated by the Radio Frequency Migration Regulations 2013 to develop an implementation plan regarding the Radio Frequency Plans, and assignment plans for the IMT frequency bands to ensure sufficient radio frequency spectrum is available for broadband and other services in the short term (within the next 3- 5 years)[45].

63. Telkom submits that it will not be possible to address a situation where the outcome of the international survey is that the WOAN should be assigned more spectrum from the bands being considered in the auction than what has currently been provisionally set aside to the WOAN. Telkom further submits that this is because the completion of the IMT Auction will mean there is no spectrum available to assign if the survey requires an additional assignment from the bands being considered in the auction[46]. There is no merit in this assertion.

64. Telkom's submission that despite changing the design of the spectrum licensing by not proceeding with the licensing of the WOAN, ICASA failed to conduct a competition assessment to determine the implications of the proposed licensing process in terms of

[45] Page 004- 258 Minister's Answering Affidavit para 72.
[46] Page 001- 109 to 110 para 267.

the 2021 Auction ITA is flawed. It is submitted that the exclusion of the WOAN in the 2021 Auction ITA will not in any way lead to a change in the state of competition in the mobile sector in the short term[47]. What Telkom suggests is that ICASA is obligated to conduct a competition inquiry every time it exercises its powers - even when there is no need.

65. Accordingly, it is not irrational to defer the licensing of the WOAN to a later date given the reasons discussed above. There is no point in Telkom arguing that the WOAN should be allocated less or more spectrum if a detailed study is not conducted to ensure its viability. Furthermore, the fact that the WOAN is not included in the 2021 Auction ITA does not in any way have an effect on the decision to design the auction process in the 2021 Auction ITA. In *Thebe ya Bophelo, in Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry*[48], the court held that "if a decision is founded upon reason, then it is difficult to see how it could be said to be so unreasonable that no reasonable person could come to it, and the converse is equally true".

THE DOCTRINE OF SEPARATION OF POWERS

66. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[49], the Constitutional Court recognized that it can be difficult to determine which actions constitute administrative action. The court held:

> *"[143] Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will,*

[47] Page 004- 259 Minister's Answering Affidavit para 77.
[48] 2010(5) SA 457 (SCA) at para 60.
[49] 2000(1) SA 1 (CC).

as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."

67. As indicated above, the Minister exercises executive authority over the telecommunications sector. In this regard, the Court is inclined to consider the powers of the Minister and where they emanate as well as the powers of ICASA.

68. In *Minister of Defence and Military Veterans v Motau and Others*[50] the court held that:

"the executive powers are in essence high policy or broad direction giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. In determining the nature of the power, it is helpful to have regard to how

[50] 2014(5) SA 69 (CC).

closely the decision is related to the formulation of policy on the other hand or its application on the other."

69. In regard to the WOAN:

70. The Minister supports the decision to defer the WOAN as this is a decision that should be referred back for consultation.

70.1. Section 7 provides that subject to subsection (8), a policy direction issued under subsection (2) may be amended, withdrawn or substituted. Section 3(5) empowers the Minister, when issuing a policy under subsection (1) or a policy direction under subsection (2) must:

"*(a) consult the Authority or the Agency, as the case may be; and*

(b) in order to obtain the views of interested persons, publish the text of such policy or policy direction by notice in the Gazette-

(i) declaring his or her intention to issue the policy or policy direction;

(ii) inviting interested persons to submit written submissions in relation to the policy or policy direction in the manner specified in such notice in not less than 30 days from the date of the notice;

(c) publish a final version of the policy or policy direction in the Gazette."

71. Cabinet has to this extent, approved the amendment to the policy on high demand spectrum and the policy direction on the licensing of a WOAN to be published for public

comment on 9 March 2022. The proposed amendments remove the requirements to license the WOAN.

72. Telkom argues that it was irrational and unreasonable for ICASA to set aside spectrum to the WOAN when it has not finalized the investigations or processes that would determine how much spectrum and from which frequency bands should be assigned to the WOAN to ensure it has positive impact on the efficiency of the market and realizes the objectives stipulated in the founding government policies and plans[51].

73. First, there should be certainty in ensuring that the WOAN is viable[52]. The WOAN is expected to play a critical role in providing access networks that are open to many service providers to render services and as an enabler to meet the targets set out in the SA Connect and the economic growth targets put forward in the National Development Plan. The aim was to establish a wireless telecommunication network built with the objective of providing network coverage and capacity to service providers on a wholesale basis.

74. Second, the CSIR report[53] on the radio frequency assignments which will be required to establish the WOAN was published on 27 September 2018. It focused on spectrum needs to meet the target for average speeds in 2030. The study did not focus on the other determinants for success such as, backhaul network, market dynamics and network economics. The study concluded that in order to serve 20% of the users the WOAN will require 40 MHz of downlink spectrum and on the extreme end in order to serve 80% each with 10 Mbps, it will require 135 MHz of downlink spectrum.

[51] Page 001- 110 Founding Affidavit para 268.
[52] Page 004- 244, Answering Affidavit para 15.
[53] Page 003- 2588 to 2590.

75. In *Hugh Glenister v President of the Republic of South Africa*[54], the court held that under a constitutional scheme it is the responsibility of the executive to develop and implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy. And it is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation. This judgment is political and may not always coincide with views of social scientists or other experts. As has been said, it is not for the court to disturb political judgments, much less to substitute the opinions of experts'.

76. In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[55], the court held that:

> *"[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."*

[54] 2011(3) SA 347 (CC) at para 67.
[55] 2012 (4) SA 618 (CC).

77. In *Albutt v Centre for the Study of Violence and Reconciliation*[56], the Constitutional Court states:

> *"[51] The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution. This is true of the exercise of the power to pardon under s 84(2)(j)."*

78. Consequently, the decision to approve the amendment to the policy on high demand spectrum and the policy direction on the licensing of a WOAN to be published for public comment on 11th March 2022 flows directly from the factors considered above in combination with the dynamics resulting from the evolving nature of the telecommunications industry.

79. In regard to the 2021 auction ITA:

[56] 2010 (3) SA 293 (CC).

80. As indicated above, the government has an interest in the allocation of high demand spectrum and ICASA has to be given space to exercise its power without any interference from the judiciary

81. When it comes to the discretion afforded to decision makers in relation to administrative decision, the SCA in *MEC for Environmental Affairs and Development Planning v Clairison's CC*[57] held that:

> *"[18] It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted."*

82. In *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others, SCA*[58] noted that "*I think it is clear from those and other cases that decisions heavily influenced by policy generally belong in the domain of the executive. It seems to me that if decisions of that kind are to be deferred to by the courts then that must necessarily be a strong guide to what falls outside 'administrative action' and the review powers given to the courts by PAJA. The more a decision is to be driven by considerations of executive policy the further it moves from being reviewable under PAJA and vice versa. That seems to me to be consistent with SARFU, in which it was said that one of the considerations to*

[57] 2013(6) SA 235 (SCA).
[58] 2013(6) SA 421 (SCA) at para 57.

be taken into account in determining what constitutes administrative action is 'how closely it is related . . . to policy matters, which are not administrative'."

83. In this matter, we have alluded to the national policy which has been promulgated from as far as 2010, with the aim of, inter alia, to contribute to the promotion of national interests. On the other hand, government continues to highlight the importance of the allocation and release of high frequency spectrum which has the potential to boost investment in the telecommunications sector. Notably, ICASA has proceeded to ensure that it achieves the above objectives within the relevant legislative prescripts as referred to above. In this regard, the Constitutional Court held the following in *National Treasury v Opposition to Urban Tolling Alliance*[59]*:*

> *"[63] There is yet another and very important consideration when the balance of convenience is struck. It relates to separation of powers. In ITAC we followed earlier statements in Doctors for Life and warned that —*
>
> *'(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'"*

[59] 2012(6) SA 223 (CC).

84. Consequently, we submit that as long as the decision to publish the 2021 Auction ITA and to exclude the WOAN, viewed objectively, is rationally related to the legitimate government purpose, this court cannot interfere with the decision simply because it disagrees with it or considered it to be inappropriate[60].

THE RELIEF SOUGHT BY TELKOM

85. Telkom seeks a structural/supervisory relief against ICASA without giving evidence of the failure of the Minister to exercise oversight over ICASA or failure to hold ICASA accountable. This point is belied by the fact that the Minister has, on a number of occasions stopped ICASA where the Minister had found that ICASA has failed to comply with the policy or to do due diligence before taking any action in relation to the Spectrum.

86. Telkom further, in its notice of motion and founding affidavit, alleges that they do not seek any relief against the Minister. This is a peculiar allegation as the mere fact that Telkom seeks structural/supervisory relief clearly goes to the heart of the functions and responsibilities of the Minister in relation to ICASA.

87. It is trite that Court will be slow to interfere with rational decisions taken in good faith by the executives and those whose responsibility is to deal with such matters.[61]

88. In *Doctors For Life Life International v Speaker of the National Assembly and Others* [62] Ngcobo J (as he then was) speaking for the majority held that:

[60] Affordable Medicines Trust and Others V Minister of Health and Others 2006 (3) SA 247 (CC) at paras 45, 75 and 77.
[61] See Soobramoney v Minister of Health (KwaZulu-Natal) 1998(1) SA 765 (CC) at para 29.
[62] 2006 (6) SA 416 (CC)

"Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, Courts have developed a 'settled practice' or general rule of jurisdiction that governs judicial intervention in the legislative process.

The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, Courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or 'settled practice'. Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object."

89. In *Democratic Alliance v President of the Republic of South Africa and Others*[63] at para [41] and para [42] the court confirmed that:

[63] 2013 (1) SA 248 (CC).

"[41] . . . The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of separation of powers is separated and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large . . .

[42] It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: it has been described by this Court as the 'minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries.' And the rationale for this test is 'to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other'."

90. The Constitutional Court in *Pheko and Others v Ekurhuleni Metropolitan Municipality and Others*[64] reasoned that any attempt to supervise the implementation of the proposed housing scheme while the High Court exercises oversight over it may result in the Court being enmeshed in disputes on technical issues that are best suited to be determined by the High Court. The Constitutional Court has also held that structural interdicts may be an appropriate remedy when a breach of the Constitution has been alleged and proven and it advances constitutional justice by ensuring that the parties themselves become part of the solution.[65]

[64] 2016 (10) BCLR 1308 (CC) at para 29.
[65] Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo 2010 (2) SA 415 (CC).

91. The same principles as enunciated by the courts in both Pheko and the Ermelo case apply in this instance.

92. It is therefore submitted that it would be inappropriate for the above Honourable Court to intervene in such case where ICASA is held accountable by both the players in the industry and the Minister who ably exercises her oversight role over it. There is clearly no case made out for the court to grant structural/supervisory relief in this case, nor is there any justification for the court to get involved in the day-to-day administration and licensing of the spectrum lest the court end up in a situation as warned by the Constitutional Court in Pheko *supra.*

93. In ***LAWSA Volume 10 (1)*** it is pointed out that:

> *"A Court may grant appropriate relief, including a declaration of rights, when a right in the Bill of Rights has been breached. This relief is typically invoked when government 'policy' is inconsistent with the Constitution. Structural interdicts are particularly suited to remedying systemic failures or inadequate compliance with constitutional duties. The purpose of a structural interdict is to compel an organ of state to perform its constitutional duties and to report from time to time on its progress in so doing. This order involves requiring an organ of state to revise an existing policy and to submit the revised policy to the court to enable the court to satisfy itself that the policy is consistent with the Constitution."*

94. We submit that the decision made by ICASA is not inconsistent with the Constitution. Actually, ICASA is acting the way that it is mandated by the Constitution and the ICASA Act and Telkom is actually trying to block ICASA from fulfilling its mandate. The court

can therefore not be invited to set aside a decision that does not violate the Constitution, the enabling legislation and the policy. The court can also not be requested to grant structural/supervisory relief where there is no failure by an organ of state to act according to its mandate.

95. An order setting aside the decision to auction the spectrum and deferring the WOAN that takes immediate effect "will be disruptive and leave a vacuum".[66] It should be borne in mind that as at the date of the hearing of this application, the auction has already taken place on 8-10 March 2022 and Cabinet has approved the amendment to the policy on high demand spectrum and policy direction on licensing of WOAN on 9 March 2022 as submitted by the Minister and the said amendments have already been published for public comment on 11 March 2022. There are moreover multiple ways in which any constitutional defect could be cured[67] if found to exist. We submit that in this case there is no constitutional defect.

96. It was held in *Chairperson, Standing Tender Committee and Others v Sapela Electronics (Pty) Ltd and Others*[68] at paragraphs 28 and 29 that

> *"in appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in Oudekraal Estates (Pty) Ltd v City of Cape Town*[69] *at para 36 at 246D:*

[66] Doctors for Life International v Speaker of the National Assembly supra at para 214.
[67] Minister of Home Affairs and Another v Fourie and Another 2006 (1) SA 524 (CC) para 139.
[68] 2008 (2) SA 638 (SCA)
[69] 2004 (6) SA 222 (SCA

'It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.'

A typical example would be the case where an aggrieved party fails to institute review proceedings within a reasonable time. See eg Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad[70] *; see also s 7(1) of PAJA which gives statutory recognition to the rule. In a sense, therefore, the effect of the delay is to 'validate' what would otherwise be a nullity. See Oudekraal Estates (Pty) Ltd, (supra) para 27 at 242E-F. In the present case, as I have found, there was no culpable delay on the part of the respondents. But the object of the rule is not to punish the party seeking the review. Its raison d'être was said by Brand JA in Associated Institutions Pension Fund and Others v Van Zyl and Others*[71] *in para 46 to be twofold:*

First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.

Under the rubric of the second I would add considerations of pragmatism and practicality.

[29] In my view the circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand. While the court a quo correctly found that the award of each of the three tenders was invalid when made, it appears not to have appreciated that it had a

[70] 1978 (1) SA 13 (A)
[71] 2005 (2) SA 302 (SCA)

discretion to decline to set aside those awards. It follows that in my view the court a quo erred in making the order it did and this court is free to set aside that order."

97. Telkom abandoned part A of its application on its own accord and opted to have only part B heard on an expedited basis. This action on the part of Telkom diluted the urgency of the application by Telkom and made this application to fit squarely into the ambit of paragraphs 28 and 29 of the Sapela case (*supra*).

98. We respectfully submit that the prayers sought by the Applicants are without basis and the court should exercise its discretion and should dismiss this application.

CONCLUSION

99. We submit that the process and decision by ICASA to publish the 2021 Auction is for the benefit for the public and in particular the economy of the Republic. To this end, the auction was conducted on 8-10 March 2022 and the award of the spectrum is pending. The benefit to the public further outweighs the commercial interest of Telkom.

100. It is further submitted that the decision to defer the WOAN is not an impediment to the licensing of the spectrum. It is in the interest of the Minister that the WOAN should be viable and be able to fully compete with other operators for the benefit of the public. There is no use in proceeding with the model that is outdated and may not achieve the desired results.

101. Finally, we further submit that if the Court were to grant the orders that Telkom seeks, there would be irreversible consequences as ICASA will fail to carry out its mandate.

The spectrum has been on the table for allocation since 2007. As it stands the lack of access to the bulk of the IMT spectrum is said to have resulted in congestion in existing networks, which in turn impacts on the quality of services that the consumers receive. It also impedes innovation and delays the launch of new networks and services.

102. We therefore pray for an order dismissing the Applicant's application with costs, such costs to include costs of two counsel.

Adv E M Baloyi- Mere SC
Adv Mankakane Violet Magagane
Counsel for the 3rd Respondent
PABASA Loftus Chambers
PRETORIA
25 MARCH 2022

LIST OF AUTHORITIES

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5. Chairman of the Board on Tariffs and trade and Others v Brendo Inc and Others 2001(4) SA 511.
6. Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC).
7. Doctors For Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC)
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9. Electronic Media Network v e.tv (Pty) Ltd [2017] ZACC 17; 2017(9) BCLRA 1108 (CC).
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12. Hugh Glenister v President of the Republic of South Africa 2011(3) SA 347 (CC).
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14. Joseph and Others v City of Johannesburg and Others 2010(4) SA 55 (CC).

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16. MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 (6) SA 235 (SCA).

17. Medirite (Pty) Ltd v South African Pharmacy Council and Another [2015] ZASCA 27 (20 March 2015).

18. Minister of Defence and Military Veterans v Motau and Others 2014(5) SA 69 (CC).

19. Minister of Home Affairs v Another Fourie and Another 2006 (1) SA 524 (CC).

20. Minister of Home Affairs and Another v Public Protector of the Republic of South Africa 2018 (3) SA 380 (SCA).

21. Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others 2013 (6) SA 421 (SCA).

22. National Treasury v Opposition to Urban Tolling Alliance 2012(6) SA 223 (CC).

23. Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA).

24. Pheko and Others v Ekurhuleni Metropolitan Municipality and Others 2016 (10) BCLR 1308 (CC).

25. President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000)1) SA 1 (CC).

26. Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC)

27. Thebe ya Bophelo, in Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for Road Freight Industry 2010(5) SA 457 (SCA).

28. Wolgroeiers Afslaers (EDMS) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A)