**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 116/2022

In the matter between:

**TELKOM SA SOC LIMITED** Applicant

and

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA** First Respondent

**AND 20 OTHERS**

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# MTN'S HEADS OF ARGUMENT

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**INTRODUCTION**

1 Over the last decade, South Africa has seen an unprecedented increase in demand for mobile data services. Mobile operators in South Africa require additional radio frequency spectrum to expand their capacity and coverage; to provide the quality and range of services demanded by South African consumers; and to roll out 5G technology.

2 The first respondent ("ICASA") is tasked with the responsibility to license radio frequency spectrum. After a delay of more than a decade, ICASA initiated a licensing process in October 2020 to assign an additional 326 MHz of high-demand spectrum for mobile telephone communications ("the 2020 ITA").

3 The applicant ("Telkom") and the fifth respondent ("MTN") challenged the legality of the 2020 ITA. By agreement between the parties, an order was granted by this Court on 15 September 2021 setting aside ICASA's decision to publish the 2020 ITA and referring the matter to ICASA for reconsideration ("the September 2021 court order").[1]

4 ICASA then commenced a fresh process of notice and comment. The process culminated in the publication of a new ITA on 10 December 2021 ("the 2021 ITA").[2]

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[1] The September 2021 court order is annexure FA8 to the founding affidavit page 003-573.

[2] The 2021 ITA is annexure FA1 to the founding affidavit page 003-139; it is also included in the rule 53 record at page 005-244. The reasons document was published

5 Telkom is the only operator that is dissatisfied with the 2021 ITA. It launched the present application in which it sought interim relief in Part A and final relief in Part B. Telkom subsequently abandoned Part A but it persists with Part B.

6 For many decades, Telkom held a monopoly on the provision of fixed-line telephony. It currently holds more spectrum than any other operator.[3] Telkom's depiction of itself as a small operator, side-lined by the regulator and seeking to ensure its survival in an anti-competitive environment, amounts to a heroic act of revisionism.[4] The fact of the matter is that Telkom's mobile network carries more data in absolute terms than any of the other operators.[5]

7 If Telkom's application were to succeed, it would delay the licensing of IMT spectrum for many years and would cause massive prejudice to mobile telecommunications in South Africa. That is why all of the mobile operators – including MTN – oppose Telkom's application. Only the 16th respondent and the 18th respondent support Telkom.

8 MTN's heads of argument are organised as follows:

8.1 We begin by explaining why the building blocks of Telkom's review application are incorrect.

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on the same date and is annexure FA3 page 003-359; the reasons document is also included in the rule 53 record at page 005-146.

3 ICASA answering affidavit para 38 page 004-887.

4 MTN answering affidavit para 15 page 004-164. See also MTN answering affidavit in Part A at pages 003-1118 to 1135.

5 MTN answering affidavit para 22.5.6 page 004-170.

8.2 Thereafter we address each of the review grounds in Telkom's heads of argument. Where a review ground was pleaded in the founding affidavit but is not advanced in Telkom's heads, we assume it has been abandoned. We show that all of Telkom's review grounds are without merit.

## THE BUILDING BLOCKS OF TELKOM'S APPLICATION

9 We begin by dealing with some legal principles that underpin Telkom's review application. These principles are either ignored or misunderstood in Telkom's heads of argument.

### *PAJA covers the field*

10 Telkom's review application is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").[6]

11 It has been held that, in such circumstances

> "an applicant for judicial review does not have a choice as to the 'pathway' to review: if the impugned action is administrative action, as defined in the PAJA, the application must be made in terms of section 6 of the PAJA; if the impugned action is some other species of public power, the principle of legality will be the basis of the application for review".[7]

12 In its heads of argument, Telkom purports to rely on review grounds in terms of PAJA and in terms of the principle of legality.[8] Telkom's stance is impermissible because PAJA covers the field.

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6 Founding affidavit para 253 page 003-104.

7 Minister of Home Affairs v Public Protector [2018] 2 All SA 311 (SCA) para 28.

8 See for example para 140, para 181 and para 186.

***The distinction between appeal and review***

13 Although PAJA has expanded the common-law grounds for review in some respects, the distinction between appeal and review remains fundamental to our law. The SCA has made the point as follows:[9]

> "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."

14 We submit that many of Telkom's submissions involve appeal grounds that have been packaged as review grounds. What was said by Gauntlett AJ in the context of a review of an arbitrator's award applies with equal force to some of Telkom's review grounds:

> "In my judgment, the attack is, in truth, obliquely but patently appellate: in substance it amounts to the contention that the award is not in all respects supported by the facts. The artificial bridge then contrived from appeal to review is that the appeal arbitrators did not consider all the facts, because these are not all rigorously iterated in the award. Even as an appeal test, that would have been misguided. … The attacks in this regard are without merit; they show little regard for first principles."[10]

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9 MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 6 SA 235 (SCA) para 18.

10 Abrahams and another v RK Kumputer BHD 2009 4 SA 201 (C) at 207.

***Telkom's review grounds are directed at ICASA's exercise of discretion***

15 There is an important distinction between a review based on the contention that a decision-maker lacked the competence in law to make a decision, and a review based on the contention that a decision-maker exercised his or her discretion irregularly. The former has to do with *vires*, while the latter has to do with the manner in which a discretion was exercised.

16 Telkom's review grounds fall into the second category. Telkom does not contend that ICASA exceeded its competence when it made the impugned decisions. Telkom's challenges are based on a different contention, namely that ICASA had the power to make the decisions but exercised its discretion improperly or made incorrect factual findings.

17 The relevance of this is that an administrator has a margin of appreciation when it comes to the exercise of discretion. The 2021 ITA involves a policy-laden decision of a specialist regulator. The Court is required to exercise deference when assessing whether ICASA exercised its discretion irregularly.

18 Deference has been described by the SCA as

> " '. . . a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the

functions of administrative agencies; not to cross over from review to appeal."[11]

19 In *Phambili Fisheries*, the SCA said the following:

"Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds."[12]

20 The Constitutional Court confirmed this principle on appeal:[13]

"In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker."

21 The Constitutional Court made the same point in *Bapedi Marota Mamone:*[14]

"Our right to just administrative action and PAJA, the legislation enacted to give effect to that right, require rigorous scrutiny of administrative

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11 Logbro Properties CC v Bedderson NO 2003 4 SA 460 (SCA) at paras 21-22.

12 Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd 2003 6 SA 407 (SCA)

13 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC) para 48

14 Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and others 2015 (3) BCLR 268 (CC) at para 78.

> decisions. But neither asks courts to substitute their opinions for those of administrative bodies. It is not required that a decision of an administrative body be perfect or, in the court's estimation, the best decision on the facts."

***Unreasonableness and irrationality are different things***

22 In its heads of argument, Telkom uses the words unreasonable and irrational as if they are synonyms.[15] That is incorrect because these words have very different meanings in law.

23 When assessing the rationality of an administrative decision, the Court is not concerned with whether the same purpose could have been achieved by less restrictive means. It is only concerned with whether there is a rational relationship between the means chosen and the end sought to be achieved.[16] If the decision furthers the administrator's purpose, then it is a rational one and it matters not that the same purpose might have been achieved by less restrictive means.[17] The principle has been formulated as follows:

> "[R]ationality entails that the decision is founded upon reason — in contra-distinction to one that is arbitrary — which is different to whether it was reasonably made. All that is required is a rational connection between the

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15 See for example Telkom heads of argument para 190 ("ICASA's decision … is irrational and unreasonable") and para 191.

16 Affordable Medicines Trust and others v Minister of Health and others 2006 3 SA 247 (CC) at para 78; Albutt v Centre for the Study of Violence and Reconciliation, and Others 2010 3 SA 293 (CC) at para 51; Democratic Alliance v President of the Republic of South Africa 2013 1 SA 248 (CC) at para 32

17 As Nugent JA has stated, "a decision is 'rationally' connected (to the purpose for which it was taken etc) if it is connected by reason, as opposed to being arbitrary or capricious" (Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry 2010 5 SA 457 (SCA) at para 58).

power being exercised and the decision, and a finding of objective irrationality will be rare."[18]

24 When it comes to unreasonableness, the bar is placed at a higher level. The SCA has explained the test for unreasonableness as follows:

> "there is considerable scope for two people acting reasonably to arrive at different decisions. I am not sure whether it is possible to devise a more exact test for whether a decision falls within the prohibited category than to ask, as Lord Cooke did in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129 (HL) at 157 - cited with approval in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* (supra) - whether in making the decision the functionary concerned 'has struck a balance fairly and reasonably open to him [or her]'."[19]

***Telkom is not permitted to stray outside of its pleaded review grounds***

25 In its heads of argument, Telkom advances some review grounds that were not pleaded in its founding affidavit. That is impermissible.[20]

26 In motion proceedings, the parties' affidavits constitute both their pleadings and their evidence.[21] They must set out the applicant's cause of action with such clarity as is reasonably necessary to alert the respondent to the case he or she has to meet. A litigant who fails to do so may not thereafter advance a contention of law or fact if its determination may depend on evidence which his or her opponent has failed to place before the Court because he or she was not

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18 Minister of Home Affairs v Scalabrini Centre 2013 6 SA 421 (SCA) at para 65

19 Calibre (supra) at para 59

20 The same applies to the heads of argument of the 16th respondent. Paragraph 9 of the 16th respondent's heads contain a list of "review grounds", many of which find no basis in the pleadings and some of which are not explained in the heads of argument.

21 International Executive Communications v Turnley 1996 3 SA 1043 (W) at 1050

sufficiently alerted to its relevance.[22] This is especially important in review applications since an applicant in a review must identify the review grounds in section 6 of PAJA on which it relies.[23]

27 To add insult to injury, the replying affidavit purports to expand on Telkom's review grounds. That is also impermissible. An applicant in a review application must make out its case in its founding affidavit and may not make or supplement its case in reply – save for in exceptional circumstances, which have not been pleaded in this case.[24] Telkom's new case in reply must therefore be ignored.

***The Plascon Evans rule applies to factual disputes***

28 As we shall indicate below, there are various factual disputes on the papers.

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22 NDPP v Phillips 2002 4 SA 60 (W) para 36 and the cases cited there.

23 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others 2004 4 SA 490 (CC) para 27.

See also Palala Resources (Pty) Ltd v Minister of Mineral Resources and Others 2014 (6) SA 403 (GP), where Keightley AJ (as she then was) held that it was "unacceptable" for litigants to leave it to the courts to work out which are the relevant PAJA review grounds and what facts speak properly to those grounds. The learned judge stated at para 29:

"It is now almost 15 years since PAJA was enacted; there is a substantial body of jurisprudence on judicial review under PAJA and it is taught in every law school. There is no acceptable reason for founding papers in a review application to fall short of identifying the facts and grounds of review clearly and with appropriate reference to the relevant sections of PAJA that are relied upon. The papers should also draw the necessary link between the material facts and the identified grounds of review."

24 See, e.g., Esau v Minister of Co-operative Governance and Traditional Affairs 2021 (3) SA 593 (SCA) para 60; Gelyke Kanse v Chairperson, Senate of the University of Stellenbosch 2020 (1) SA 368 (CC) paras 18-19; SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Ltd 2019 (1) SA 370 (CC) para 77; Mostert v Firstrand Bank Ltd t/a RMB Private Bank 2018 (4) SA 443 (SCA) para 13.

29 Since Telkom seeks final relief on motion, the *Plascon Evans* rule applies.[25] It means that relief may only be granted if the facts as stated by the respondents, together with the admitted facts in Telkom's affidavits, justify the granting of such relief. This principle is ignored in Telkom's heads of argument, which appear to assume that Telkom's version on affidavit ought to prevail.

***Conclusion***

30 We respond below to the review grounds that were properly pleaded in Telkom's founding affidavit. We do not respond to the review grounds that were impermissibly raised in reply or that were not pleaded at all. In assessing these review grounds, we emphasise that the *Plascon Evans* rule applies and that this Court is required to show deference towards the manner in which ICASA exercised its discretion as a specialist regulator.

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[25] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 3 SA 623 (A) at 634E-G

## THE ATTACK ON ICASA'S DECISION TO PUBLISH THE 2021 ITA

31 Prayer 1.1 of the notice of motion seeks an order declaring that ICASA's decision to publish the 2021 ITA is unlawful and is set aside. Telkom advances a number of review grounds in support of this relief. We consider each of them in turn.

### *First review ground: the September 2021 court order*

32 Telkom's first review ground is that ICASA's decision to publish the 2021 ITA is inconsistent with the September 2021 court order. Telkom says that, since the 2020 ITA was set aside by the September 2021 court order, "ICASA had to issue new ITAs and undertake a new licensing process which is fully compliant with the legal prescripts for the issuing of an ITA for IMT spectrum".[26] Telkom contends that ICASA did not do so but rather amended the 2020 ITA.[27] This is said to give rise to an error of law that vitiates ICASA's decision in terms of section 6(2)(d) of PAJA.[28]

<u>The effect of the September 2021 court order</u>

33 Telkom's main argument is that ICASA has misunderstood the effect of the September 2021 court order. Telkom contends that the court order must be

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26 Telkom heads of argument para 130.

27 Telkom heads of argument para 132.

28 Telkom heads of argument para 133 and 134.

interpreted in light of the notice of motion and the founding affidavit in its earlier application.[29]

34 The September 2021 court order[30] provides that ICASA's decision to publish the 2020 ITA "is reviewed and set aside and the matter is referred back to ICASA for reconsideration".

35 The September 2021 court order was granted by agreement between Telkom, ICASA, Vodacom, MTN and the Minister. The Judge who was case-managing the earlier application granted the order by consent and was not asked to consider the merits of the application. To the extent that Telkom suggests that the Judge exercised a remedial discretion in terms of section 8 of PAJA,[31] that is incorrect.

36 The Constitutional Court has held that the general principles that apply to interpreting documents are applicable when it comes to interpreting a consent order.[32] The "inevitable starting point" involves the language of the order.[33] The language of the September 2021 court order says nothing about how ICASA should go about its "reconsideration".

37 This omission is significant because Telkom's notice of motion in its earlier application had included a number of prayers for orders directing ICASA to take

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29 Telkom heads of argument para 129.

30 Annexure FA8 to Telkom's Founding Affidavit: 003-573 to 003-575.

31 Telkom heads of argument para 127.

32 ACSA v Big Five Duty Free (Pty) Ltd 2019 5 SA 1 (CC) para 29.

33 Ibid para 30.

specific steps in the reformulation of a new ITA.[34] However, those prayers did not form part of the September 2021 court order: on the contrary, ICASA was left at large to determine how it would go about the "reconsideration". Telkom's attempt to argue the matter as if those prayers formed part of the September 2021 court order, is without any foundation.

The process that was followed by ICASA on reconsideration

38 In order for its first review ground to succeed, Telkom would have to show that ICASA failed to follow the correct procedure on reconsideration. If ICASA did follow the correct procedure on reconsideration, then any mistake of law it might have made in its interpretation of the September 2021 court order would not be "material" within the meaning of section 6(2)(d) of PAJA.

39 Telkom appears to accept this. It says that ICASA "had to issue new ITAs and undertake a new licensing process which is fully compliant with the legal prescripts for the issuing of an ITA for IMT spectrum".[35]

40 It is correct that ICASA had to issue a new ITA. But this contention goes nowhere because ICASA did issue a new ITA.

41 That leaves for consideration the "licensing process" followed before the 2021 ITA was issued. Telkom's argument in this regard is difficult to understand:

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34 See Part C of the notice of motion in that application: annexure FA18 page 003-774.

35 Telkom heads of argument para 130.

41.1 Telkom contends that "it was not competent for ICASA to simply amend the 2020 ITAs, as it appears to have done".[36] There is no basis for this contention. It is correct that, once the 2020 ITA was set aside, it ceased to have force in law. However, this did not mean that ICASA had to begin from scratch when it prepared a new ITA. There is no reason why ICASA could not use the 2020 ITA as a starting point when it formulated a new document even though the 2020 ITA no longer had the force of law.

41.2 Telkom is wrong to say that ICASA was required to go back to the drawing board and to "consider afresh the decision to design the licensing process".[37] Telkom's argument is that, because the 2020 ITA was set aside, there was "no decision for ICASA to amend".[38] But ICASA was not "amending" the 2020 ITA as if it were a legally binding document; ICASA was merely using the 2020 ITA as a working draft. The setting aside of the 2020 ITA did not mean that ICASA was precluded from having regard to the document in such a manner.

42 Telkom also contends that ICASA "failed to undertake the necessary administrative process for taking the decision to publish the 2021 Auction ITA".[39] The only argument offered in support of this, is that "not all the relevant

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36 Telkom heads of argument para 132.

37 Supplementary founding affidavit para 13 page 004-29.

38 Replying affidavit para 189 page 004-1485.

39 Telkom heads of argument para 134.

committees applied their minds and considered the issues as they did for the 2020 ITAs".[40] There is no merit in this contention:

42.1 The Rule 53 record evidences the procedure that was followed by ICASA. It shows that the matter was considered by an IMT Spectrum Council Committee ("Spectrum Licensing Committee"), which had been established by the Council of ICASA and had been delegated the power to draft an ITA.[41]

42.2 The minutes of the Spectrum Licensing Committee form part of the Rule 53 record.[42] They show the following:

42.2.1 On 17 September 2021, the Spectrum Licensing Committee met and discussed a number of issues that gave rise to the setting aside of the 2020 ITA. The issues included Consultation of Competition Assessment, spectrum requirements for a WOAN, exclusion of the IMT 3500 MHz from the opt-in round and calculation of spectrum caps and floors.[43]

42.2.2 On 3 November 2021, the Spectrum Licensing Committee met to consider late submissions received from stakeholders. The

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40 Telkom heads of argument para 134.

41 ICASA answering affidavit para 12 page 004-879.

42 005-1087 to 005-1139.

43 Minutes of 17 September 2021 page 005-1100.

committee resolved to decline consideration of late submissions.[44]

42.2.3 On 1 December 2021, the Spectrum Licensing Committee met and discussed confirmation of written representations received (in respect of the Second Information Memorandum).[45]

42.2.4 On 8 December 2021, the Spectrum Licensing Committee resolved to approve the Reasons Document and the draft ITA for tabling to Council.[46]

42.2.5 On 9 December 2021, members of the Spectrum Licensing Committee signed a memorandum recommending to the Chairperson of ICASA that he sign off on the approved Reasons Document and ITA.[47]

42.3 There is nothing to suggest that the Spectrum Licensing Committee failed to apply its mind, as contended by Telkom. On the contrary, the minutes show that the Spectrum Licensing Committee diligently performed the task it had been delegated to perform.

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44 Minutes of 3 November 2021 page 005-1117.

45 Telkom founding affidavit para 248 page 003-102; Minutes of 1 December 2021 page 005-1130 and 005-1131.

46 MTN answering affidavit para 31.3 page 004-173; Minutes of 8 December 2021 page 005-1138.

47 MTN answering affidavit para 31.3 page 004-173 to 004-174; page 005-1179 and 005-1180.

Summation

43 For all the reasons set out above, there is no merit in the review ground based on non-compliance with the September 2021 court order.

***Second review ground: procedural unfairness***

44 Telkom's second review ground is that ICASA's process was unfair since it did not comply with section 4 of PAJA[48] and was procedurally irrational.[49] Telkom's complaint is that the consultation process was too truncated to allow for meaningful engagement.[50]

45 We have already submitted that, since PAJA applies, it is impermissible for Telkom to have regard to the principle of procedural irrationality (which forms part of the doctrine of legality).

46 Telkom accepts that ICASA followed a notice-and-comment procedure in terms of section 4 of PAJA.[51] However, Telkom says that section 3 of PAJA required ICASA to give "a reasonable opportunity to make representations".[52] Telkom has not provided a factual basis to sustain an argument that the section 4 procedure was inappropriate to meet the requirements of procedural fairness in the present case. In these circumstances, the only question is whether ICASA

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48 Telkom heads of argument para 137.

49 Telkom heads of argument para 140.

50 Telkom heads of argument para 150.

51 Telkom heads of argument para 138.

52 Telkom heads of argument para 139.

complied with section 4 of PAJA. We submit that the answer is "yes" for the reasons that follow.

There was no unfairness

47 It is common cause that ICASA followed a process of public consultation before it published the 2021 ITA. Telkom's complaint relates to the time periods that governed this process of consultation.

48 The relevant time periods were as follows:

48.1 The first information memorandum was published on 1 October 2021 and ICASA afforded stakeholders thirty-one days to submit written representations.[53]

48.2 On 15 October 2021, ICASA held public hearings on the spectrum licensing process.[54]

48.3 The second information memorandum was published on 16 November 2021 and ICASA afforded stakeholders two weeks (until 30 November 2021) to submit written representations.[55]

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53 Annexure FA21 page 003-808. The first information memorandum is also in the rule 53 record page 005-14.

54 ICASA AA para 24 page 004-882; ICASA Presentation page 005-1624 to 1641.

55 Annexure FA22 page 003-822. The second information memorandum is also in the rule 53 record page 005-40.

49 Telkom does not allege that it was unable to comply with these time periods. On the contrary, the Rule 53 Record shows that Telkom did comply with them:

49.1 On 2 November 2021, and in response to the first information memorandum, Telkom submitted written representations comprising 130 pages together with the first BRG Report.[56]

49.2 On 30 November 2021, and in response to the second information memorandum, Telkom submitted representations comprising 73 pages together with the second BRG Report.[57]

50 Telkom does not allege that it was prejudiced in complying with these time periods.

51 ICASA has explained why a "truncated timetable" was appropriate in the reasons document at paras 6.33 to 6.41.[58] These reasons included the fact that the ITA auction had already been significantly delayed as a result of the interim interdict obtained by Telkom. ICASA was only placed in a position to commence with the spectrum licensing process from 15 September 2021 when the interim interdict was lifted.

52 At the time the consent order was granted, "all the stakeholders were in agreement that the much-needed high demand spectrum should not be delayed

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56 Page 005-344.

57 Page 005-923.

58 Page 003-381.

any longer".[59] This made it necessary for ICASA to expedite the publication of the 2021 ITA.

53 There is nothing to suggest that the time periods were unfair:

53.1 The subject-matter was well-known to all parties. This was the third time that ICASA has released a document setting out its proposed approach for the release of spectrum. Most of the key stakeholders – and Telkom in particular – had already obtained expert advice on the relevant issues.

53.2 All parties were aware that a new process was to begin after the September 2021 court order, and all parties had agreed that this process should be expedited.[60] The parties were anticipating a revised ITA between October and December that year.[61]

53.3 The history of the matter imposed a level of urgency. As ICASA points out, the truncated timelines were justified by the urgent need to have the process go forward without delay in the public interest.[62]

54 We submit that the time periods of four weeks and then two weeks to make representations on the two information memoranda were entirely sufficient to meet the requirements of procedural fairness.[63] It is well-established that

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59 AA, para 86 at page 003-1571 and para 115 at page 003-1584.

60 See ICASA answering affidavit para 86 and 115 pages 003-1571 and 1584.

61 MTN answering affidavit para 58.3 page 004-184.

62 ICASA answering affidavit para 56 page 004-893.

63 MTN answering affidavit paras 52 to 60 pages 004-182 to 004-184.

"consultation, as distinct from negotiations geared at reaching an agreement, is not a consensus-seeking exercise".[64]

Summation

55 For all the reasons set out above, there is no merit in the review ground based on procedural unfairness.

***Third review ground: the availability of IMT700 and IMT800 spectrum***

56 Telkom's third review ground is that the 2021 ITA includes the IMT700 and IMT800 frequency bands even though those bands cannot be deployed for mobile telephony in some parts of the country without causing harmful interference with television broadcasting. Telkom says that it is irrational for ICASA to "license spectrum that is not available".[65]

57 ICASA explained this aspect of its decision in paragraph 5.3 of the 2021 ITA.[66] There ICASA said that the Minister has committed to a completion of the digital-migration process by the end of March 2022. If this deadline were not met, ICASA said that it would continue to license all the IMT spectrum bands but would implement a proportional payment regime for the IMT700 and IMT800 bands. This meant that licensees would pay a proportion of the auction fees and licence fees, based on the percentage of the population coverage on IMT700 and

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64 Electronic Media Network Limited v e.tv (Pty) Ltd 2017 9 BCLR 1108 (CC) para 37.

65 Telkom heads of argument para 162.

66 Page 003-159.

IMT800. Those fees would be adjusted as the analogue television switch-off process continued.[67]

58 Telkom's response is that this explanation "is not enough to cure the irrationality of ICASA's decision".[68] Telkom contends that it is irrational "to license spectrum that is not available under the 2021 Auction ITA".[69] But that contention is incorrect. There is nothing irrational about licensing spectrum that is not immediately available in all parts of the country as long the licensing process recognises this fact. That is what ICASA expressly recognised in the 2021 ITA. ICASA decided to conduct a single auction for all IMT spectrum; to indicate that some of the spectrum would become available at a later time in parts of the country; and to provide that licensees would pay a proportionate fee for the use of that spectrum until it became fully available. There was nothing irrational about that decision.

59 If Telkom were correct that it was irrational to license IMT700 and IMT800 spectrum that was not immediately available, it would lead to one of two outcomes. One outcome would be for ICASA to decide that there would be no auction of any spectrum at all until such time as IMT700 and IMT800 were to become available. Another outcome would be for ICASA to conduct two auctions: one auction now and another auction for IMT700 and IMT800 in the future. It was rational and sensible for ICASA to decide that both of these options

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67 2021 ITA para 5.5 and 5.6 page 003-160.

68 Telkom heads of argument para 162.

69 Telkom heads of argument para 162.

would be undesirable. That left the course of conduct that ICASA embarked on in the 2021 ITA.

***Fourth review ground: competition***

60 Telkom's fourth review ground is that ICASA failed to have regard to competition issues. This review ground has morphed over time and now takes two forms in Telkom's heads of argument.

Telkom's main argument: ICASA did not conduct a competition assessment

61 Telkom's primary argument is that ICASA did not conduct a "competition assessment" at all. Telkom complains that "ICASA's decision to publish the 2021 Auction ITAs without conducting a competition assessment is irrational and unreasonable".[70]

62 Telkom does not refer to any legislation that required ICASA to publish a "competition assessment" before publishing the 2021 ITA. We accept that ICASA was required to have regard to competition issues, but that is not the same thing as conducting a "competition assessment". It was not peremptory for ICASA to publish a "competition assessment" as long as it had regard to competition issues when it formulated the 2021 ITA.

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70 Telkom heads of argument para 190.

63 It is common cause that ICASA did, indeed, have regard to competition when it formulated the 2021 ITA. This is apparent from the reasons document, which stated, for example:

- that Telkom should be categorised as a Tier-2 Operator since this would allow Telkom to participate in the opt-in round[71] and to have "less onerous coverage obligations";[72]

- that the opt-in round would serve to "level the playing field";[73]

- that spectrum caps were intended to promote competition.[74]

64 But in any event, ICASA had conducted a "competition assessment" before it published the 2020 ITA – it was attached to the reasons document for the 2020 ITA and was published in Government Gazette 43970 of 4 December 2020. Telkom's founding affidavit says as much.[75] That document was entitled "Competition Assessment to inform the licensing of the IMT spectrum on the ICT sector". In the first information memorandum, ICASA referred to this document in express terms.[76] Inexplicably, the document has not been included in the record in the present matter. It is nevertheless accessible to the Court since it forms part of the record in the application brought by MTN in January 2021 under

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71 Reasons Document para 7.22 page 003-389.

72 Reasons Document para 7.33 page 003-391.

73 Reasons Document para 9.26 page 003-416.

74 Reasons Document para 10.23). (see also Reasons Document, para 5.5)

75 Founding affidavit para 275 page 003-113.

76 Page 005-18 para 8.

case number 3619/2021: see Caselines 003-344. We shall refer to it as "the 2020 competition assessment".

65 The September 2021 court order did not set aside the 2020 competition assessment. It was therefore unnecessary for ICASA to conduct a new competition assessment when the matter was remitted to it pursuant to the September 2021 court order.

66 It is difficult to understand how Telkom can contend that ICASA did not conduct a competition assessment in circumstances where Telkom is aware of the 2020 competition assessment. In an attempt to square this circle, Telkom argues that ICASA "did not conduct a competition assessment" because it "merely adopted Acacia's assessment".[77] In other words, Telkom says that the 2020 competition assessment had been "impermissibly copied" from an assessment of Acacia Economics.[78] This is said to render the 2020 competition assessment a nullity.

67 There is no merit in this contrived contention:

67.1 The 2020 competition assessment must be assumed to be valid unless and until a Court sets it aside. That is the *Oudekraal* rule.[79] Since the

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77 Telkom heads of argument para 187.

78 Founding affidavit para 276.1 page 003-113. See also Supplementary founding affidavit para 21 page 004-32 ("this competition assessment is almost a word-for-word adoption of the assessment done by [Acacia Economics] that assisted ICASA in the process leading to the Invitations to Apply published in December 2020").

79 Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) at para 26; MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye Lazer Institute 2014 (3) SA 481 (CC) paras 90, 92 and 97; Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC) paras 36 and 41.

2020 competition assessment has not been set aside by a Court, it is impermissible for Telkom to proceed on the basis that it is a nullity.

67.2 But in any event, it is not the case that ICASA failed to apply its mind to the 2020 competition assessment and simply incorporated the contents of the report of Acacia Economics. Telkom refers to *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 6 SA 182 (SCA) para 20. However, Telkom does not quote the full paragraph, which states as follows:

> "A functionary in whom a discretionary power is vested must himself exercise that power in the absence of the right to delegate….
>
> As to the reliance on the advice of another, the functionary would at the least have to be aware of the grounds on which that advice was given. (See *Vries v Du Plessis NO* 1967 (4) SA 469 (SWA) at 481F - G.) But it <u>does not follow that a functionary such as the DDG in the present case would have to read every word of every application and may not rely on the assistance of others.</u> Indeed, given the circumstances, Parliament could hardly have intended otherwise. What the functionary may not do, of course, is adopt the role of a rubber stamp and so rely on the advice of others that it cannot be said that it was he who exercised the power. If in making a decision he were simply to rely on the advice of another without knowing the grounds on which that advice was given the decision would clearly not be his. <u>But, by the same token, merely because he was not acquainted with every fact on which the advice was based would not mean that he would have failed properly to exercise his discretion</u>. This would be particularly so if that advice was merely one of the factors on which he relied to arrive at his ultimate decision….
>
> Whether, therefore, there has been an abdication of the discretionary power vested in the functionary is ultimately a question that must be decided on the facts of each case." (our underlining)

67.3 Telkom has not made out any case to suggest that ICASA incorporated the report of Acacia Economics into the 2020 competition assessment without applying its mind to the matter. On the contrary, Telkom accepts

that ICASA did apply its mind since it criticises ICASA for "selectively ignoring the important advice and recommendations of the experts".[80]

67.4 It is difficult to understand how Telkom can say (*a*) that ICASA merely copied the Acacia report and (*b*) that ICASA ignored some recommendations in the Acacia report. Proposition (*a*) is at odds with proposition (*b*). In colloquial terms, Telkom cannot have its cake and eat it.

Telkom's alternative argument: ICASA's competition assessment was outdated

68 Telkom's alternative argument is that, if ICASA did conduct a competition assessment, then it was outdated since ICASA relied on information that had been conducted in the lead-up to the 2020 ITA.[81]

69 Once again, Telkom's argument is difficult to understand. Telkom says that "the 2021 Auction ITA is irrational and not connected to the information before ICASA".[82] But to the extent that the information before ICASA took the form of the 2020 competition assessment, ICASA's decision was connected to that information.

70 Telkom's complaint must therefore be something different, namely that it was irrational for ICASA not to update the information contained in the 2020

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80 Telkom heads of argument para 189. See also para 198, where Telkom criticises ICASA for not heeding the advice of Acacia.

81 Telkom heads of argument para 178.

82 Telkom heads of argument para 181.

competition assessment. This is presumably why Telkom says in its heads of argument that the 2021 ITA relied on the findings in ICASA's mobile broadband services inquiry (MBSI) and the Competition Commission's data services market inquiry (DSMI), and they dated back to 2018 or 2019.[83]

71 This case was not pleaded in the founding affidavit. The supplementary founding merely affidavit averred that ICASA had relied on the findings in the MBSI, which were said to be based on information from 2017 to 2019.[84] However, the MBSI findings were published in March 2021[85] and ICASA says that it relied on those findings when it published the 2021 ITA in December 2021.[86] The findings document in the MBSI was the outcome of a lengthy investigation. It was rational for ICASA to rely on those findings when it published the 2021 ITA some nine months later.

***Fifth review ground: "spectrum arrangements"***

72 Telkom's fifth review ground has to do with so-called "spectrum arrangements" concluded by MTN and by Vodacom. Telkom says that ICASA's failure to have regard to these "spectrum arrangements" renders its decision "irrational".[87] Telkom complains that ICASA ought to have had regard to the "actual effective

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83 Telkom heads of argument para 192.

84 Supplementary founding affidavit para 22 page 004-33.

85 Reasons document para 7.18 page 003-389.

86 ICASA answering affidavit para 129 page 004-913.

87 Telkom heads of argument para 200.

spectrum capacity" of MTN and Vodacom when it determined the spectrum caps.[88]

The facts regarding "spectrum arrangements"

73 Telkom refers to the fact that MTN has concluded "spectrum arrangements" with Cell C and with Liquid.

74 *As regards the "spectrum arrangement" between MTN and Cell C:* Telkom's only complaint in its heads of argument is that "MTN has effective access to Cell C's spectrum in a situation where Cell C has very publicly stated that it no longer operates a radio access network in South Africa".[89] Although the supplementary founding affidavit averred that "MTN will gain access to Cell C's spectrum",[90] this was denied in MTN's answering affidavit. MTN stated on affidavit that "Cell C has retained its own core network and therefore does not provide MTN with any access to Cell C's spectrum".[91] Since the *Plascon Evans* rule applies, there is no evidential basis for Telkom's statement in its heads of argument that "MTN has effective access to Cell C's spectrum". [92]

75 *As regards the "spectrum arrangement" between MTN and Liquid*: Telkom says that MTN has "effective access" to Liquid's spectrum … in circumstances where

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88 Telkom heads of argument para 211.

89 Telkom heads of argument para 224.

90 Supplementary founding affidavit para 16 page 004-30.

91 MTN answering affidavit para 49.1 page 004-180.

92 Telkom heads of argument para 224.

Liquid is not understood to conduct a traditional mobile business".[93] Telkom says that the spectrum arrangement between MTN and Liquid "is not true national roaming but is instead nothing more than simple effective access to Liquid's spectrum".[94] However, the founding affidavit did not aver that MTN has "effective access" to the spectrum of Liquid. In any event, MTN's answering affidavit says that "the fact that MTN roams on the Liquid Telecom network does not mean that MTN has access to Liquid Telecom spectrum".[95] Since the *Plascon Evans* rule applies, there is no evidential basis for Telkom's statement in its heads of argument that "MTN has effective access to Liquid's spectrum". [96]

ICASA did have regard to "spectrum arrangements"

76 Telkom is wrong to say that ICASA did not have regard to the "spectrum arrangements". The documents in the record make it plain that ICASA did, indeed, consider the "spectrum arrangements" during the course of the decision-making process.

77 The reasons document explains that Telkom had advanced the same argument during the consultation process that preceded the 2021 Auction ITA.[97] ICASA gave detailed reasons for rejecting that argument.[98] In particular, ICASA found

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93 Telkom heads of argument para 195.1.

94 Telkom heads of argument para 223.

95 MTN answering affidavit para 50.1 page 004-180.

96 Telkom heads of argument para 195.1.

97 Reasons document para 7.11 page 003-387.

98 Reasons document para 7.34 to 7.35 page 003-391.

that the spectrum arrangements "help in efficient utilisation of spectrum" [99] and expand "the range of competitive options for consumers".[100] The reasons document explained:

- that roaming has historically been used by new entrants and smaller operators to augment their coverage and capacity while building their own network;[101]

- that Vodacom and MTN have also utilised roaming arrangements with the smaller operators to augment their capacity due to spectrum constraints;[102]

- that notwithstanding the simulation that shows various scenarios that appear to favour Vodacom and MTN, the agreements help in efficient utilization of spectrum;

- that they have had a real impact on competition in the market in enhancing access to facilities and minimizing capital expenditure for constrained operators with Cell C as a prime example; and

- that Telkom may also use similar agreements to in the future; and that these agreements expand the range of competitive options for consumers.[103]

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99 Reasons document para 7.43 page 003-393.

100 Reasons document para 7.45 page 003-393.

101 Reasons Document para 7.34 page 005-179.

102 Reasons Document para 7.35 page 005-179.

103 Reasons Document paras 7.38 to 7.45 page 005-180 and 005-181.

78 As Telkom itself points out, ICASA took into account the spectrum available to the two large operators when determining spectrum caps. Telkom's conclusion that it was irrational for ICASA to disregard spectrum arrangements, is at odds with Telkom's own observations of how ICASA dealt with this issue.

79 MTN has a total of 76MHz assigned IMT spectrum compared to Telkom's 142MHz assigned IMT spectrum. Even with MTN's access to the 24MHz (2x 12MHz) of Liquid's 1800MHz, Telkom would still have 40MHz more spectrum in this frequency band.[104]

Summation

80 For all the reasons set out above, there is no merit in Telkom's review ground based on "spectrum arrangements".

***Sixth review ground: the position of Cell C***

81 Telkom's sixth review ground is that ICASA failed to have regard to the fact that "Cell C is no longer a national wholesaler".[105]

82 This argument is, at best, a makeweight. ICASA has explained that, if Cell C were to exit the market, its spectrum would be reassigned at that point.[106] Until then, Cell C must be regarded as a participant in the retail market for mobile

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104 MTN answering affidavit para 50.3 page 004-181.

105 Telkom heads of argument para 230.

106 Reasons document para 7.28 page 003-391.

services because Cell C provides services to retail customers and competes with the other mobile operators.[107]

***Remedial discretion***

83 We submit that all of Telkom's review grounds are without merit. If this Court were to take a different view of the matter, however, then it would have to consider what remedy to grant in the exercise of its discretion.

84 Telkom asks for a supervisory order. That order would tutor ICASA how to go about its job by:[108]

- directing ICASA to investigate and consult the public on the licensing of spectrum and the impact of the assignment of spectrum on competition;
- directing ICASA to investigate and consult on the minimum requirements for efficacy of the WOAN;
- directing ICASA to publish a draft invitation to apply and invite submissions, and thereafter to publish a final invitation to apply;
- directing ICASA to consider remedies to address the impact of non-availability of sub-1 GHz spectrum on competition.

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107 Reasons document para 7.49 page 003-394.

108 Amended notice of motion prayer 2 page 003-879.

85 There is no basis for this level of micro-management. We submit that it would be inconsistent with the principle of separation of powers for this Court to tell ICASA how to do its job. As the Constitutional Court has held:

> "The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."[109]

86 ICASA has engaged in a concerted effort to carry out a lawful spectrum-licensing process, and has attempted a difficult balancing exercise. In the event that it were minded to uphold the review, we submit that this Court should remit the ITA to ICASA to conduct the licensing process in terms of its legal obligations

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109 Doctors for Life v Speaker of the National Assembly 2006 6 SA 416 (CC) para 37.

**THE ATTACK ON ICASA'S DECISION TO DEFER THE LICENSING OF THE WOAN**

87 Prayer 1.2 of the notice of motion seeks an order declaring that ICASA's decision to defer the licensing of the WOAN is unlawful and is set aside. Telkom complains that ICASA's decision "undermines the stated purpose for the WOAN" and is reviewable under section 6(2)(f)(ii)(aa) of PAJA.[110]

88 ICASA explained this aspect of its decision in paragraphs 4.6 to 4.10 of the reasons document.[111] There ICASA confirmed that "there will still be radio frequency spectrum set aside for the WOAN even as the [IMT] auction is taking place".[112]

89 There was nothing irrational about ICASA's decision to set aside spectrum for the WOAN while it proceeds with the IMT Auction. It is in the public interest that the IMT Auction should proceed without further delay even though ICASA has not yet finalised the ITA for the WOAN.

90 But in any event, Part B of the notice of motion distinguishes between ICASA's decision to publish the 2021 ITA and ICASA's decision to defer the licensing of the WOAN. The two decisions are severable. Even if this Court were to find that the latter is irregular, it would have no impact on the former.[113]

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110 Telkom heads of argument para 237.

111 Page 003-367.

112 Reason document para 4.20 page 003-367.

113 The 18th respondent does not appear to dispute this in its heads of argument, since it distinguishes between "the first decision" and "the second decision".

**RELIEF SOUGHT BY MTN**

91 For all the reasons set out above, MTN asks that the application be dismissed with costs (including the costs of three counsel).

92 We make the following submissions regarding costs:

92.1 Telkom relies on *Biowatch* to contend that it should be immunised from an adverse costs order.[114]

92.2 It has been held in this Division that

> "not every case for judicial review under PAJA will constitute constitutional litigation warranting an application of the general principle recognised in *Affordable Medicines Trust* and *Biowatch.* That would be stretching the principle too far, and would not serve its underlying rationale".[115]

92.3 Telkom did not assert any constitutional rights when it brought its review application, which is a garden-variety review application. There is no reason why the *Biowatch* rule should apply in such circumstances.

92.4 Telkom says that, even if it has to pay ICASA's costs, it should not have to pay the costs of the other opposing respondents because it did not seek relief against them.[116] That is incorrect. MTN was required to

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114 Telkom heads of argument para 260.

115 Barnard v Minister of Justice, Constitutional Development and Correctional Services [2015] 4 All SA 648 (GP) para 110.

116 Telkom heads of argument para 266.

oppose the review application because the relief sought by Telkom threatened a critical part of MTN's business.

92.5 MTN does not ask for costs against the sixteenth and eighteenth respondents.

92.6 Irrespective of the outcome of Part B, MTN asks for the costs in Part A. Telkom put all the parties to the expense of meeting its case in Part A and then indicated that it would not persist with that relief shortly before the hearing date. In those circumstances, Telkom must pay the wasted costs.

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**Chambers**
**Cape Town and Sandton**
**25 March 2022**