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
CHAIRPERSON: INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Second respondent
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	Third respondent
VODACOM (PTY) LTD	Fourth respondent
MOBILE TELEPHONE NETWORKS (PTY) LTD	Fifth respondent
CELL C (PTY) LTD	Sixth respondent
RAIN (PTY) LTD	Seventh respondent
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LTD	Eighth respondent
COMPETITION COMMISSION OF SOUTH AFRICA	Ninth respondent
SOUTH AFRICAN COMMUNICATIONS FORUM	Tenth respondent
SOUTH AFRICAN BROADCASTING CORPORATION LTD	Eleventh respondent
NATIONAL ASSOCIATION OF BROADCASTERS	Twelfth respondent
COMMUNITY INVESTMENT VENTURES HOLDINGS (PTY) LTD	Thirteenth respondent
e.tv (PTY) LTD	Fourteenth respondent
SOUTH AFRICAN RADIO ASTRONOMY OBSERVATORY	Fifteenth respondent

PAUL HJUL	Sixteenth respondent
ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS	Seventeenth respondent
ICT SMME CHAMBER	Eighteenth respondent
SONKE TELECOMMUNICATIONS (PTY) LTD	Nineteenth respondent
INSTITUTE FOR TECHNOLOGY AND NETWORKS ECONOMICS	Twentieth respondent
B-BBEE ICT SECTOR COUNCIL	Twenty-first respondent

RAIN'S HEADS OF ARGUMENT IN PART B

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I. INTRODUCTION

1. In March, the Independent Communications Authority of South Africa ('**ICASA**') permanently assigned radio-frequency spectrum, by way of auction, to Vodacom, MTN, Rain, Liquid, and Telkom. The auction raised over R14.4 billion for the national fiscus.

2. There is no dispute between the parties that —

   2.1. ICASA is empowered by statute permanently to assign spectrum by way of auction; and

   2.2. the assignment of the spectrum at issue is long overdue: it will likely lower data prices, improve download speeds and connection reliability, spur economic growth, and create jobs.[1]

3. Yet Telkom now approaches this Court for —

   3.1. an order reviewing and setting aside the auction; and

   3.2. a grab-bag of related structural relief.

4. Telkom is not entitled to any of this relief. Its *'grounds of review'* are either policy disagreements with ICASA (which are not cognisable grounds of review) or contrived, opportunistic, and ultimately meritless technical points.

5. Telkom claims to be acting in the public interest. It is not. The reality is that prior to the auction, Telkom held far more telecommunications spectrum than each of

[1] Rain Part A AA p 003-1390 paras 6 – 6.3. Not denied by Telkom.

its competitors.[2] The auction was intended to level the playing field. Telkom is doing nothing more than protecting the privileged position it held before the auction.

6. The record overwhelmingly shows that the auction was – and will be – a good thing. No-one except Telkom wants it to be set aside. Indeed, in this year's State of the Nation Address, President Ramaphosa stated that the release of the spectrum would *'revolutionise the country's technological development, making faster broadband accessible to more people and reducing the costs of digital communications'*, but that *'when innovation is held back by a scarcity of broadband spectrum ... companies are reluctant to invest and the economy cannot function properly'*.[3]

7. It is thus unsurprising that Telkom stands essentially alone. The review is opposed by ICASA, the Minister of Communications and Digital Technologies ('**the Minister**'), Vodacom, MTN, and Rain. Telkom is supported only by Mr Paul Hjul, a man living in Jeffrey's Bay with no discernible interest in the matter; and by the ICT SMME Chamber, an amorphous industry body of questionable *locus standi*.

8. We submit that Telkom's review application falls to be dismissed with costs, including the costs of three counsel.

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[2] Rain Part A AA p 003-1401 – 1402 paras 43 – 44.4. Not denied by Telkom at Telkom Part A RA p 003-2915 para 175. A slightly amended table setting out the spectrum holdings of the MNO is included in Rain's supplementary affidavit filed together with these heads of argument although this does not materially alter the position.

[3] Rain Part B AA p 004-107 para 71.2; not denied by Telkom.

9. We structure these heads of argument as follows:

9.1. first, we briefly summarise the relevant facts;

9.2. second, we set out the basic legal principles that must govern the assessment of Telkom's review;

9.3. third, we offer a positive defence of the auction: that it comprised an eminently reasonable process which is comparable to spectrum auctions held by regulators in other countries;

9.4. fourth, we address Telkom's argument that the auction was unlawful because it did not treat certain roaming arrangements in the manner Telkom would have preferred;

9.5. fifth we address Telkom's claim that it was unlawful to auction off sub-1GHz spectrum, on the basis that it may still be occupied by terrestrial broadcasters;

9.6. sixth, we address Telkom's argument that the auction is unlawful because ICASA earlier failed to conduct a proper competition assessment;

9.7. seventh, we address Telkom's claim that the process leading up to the auction was unfair;

9.8. eighth, we briefly deal with the relief sought by Telkom; and

9.9. finally, by way of conclusion, we deal with the question of costs.

10. We do not address all of Telkom's grounds of review. We do not address Telkom's arguments that the auction is unlawful because —

    10.1. ICASA ostensibly misinterpreted the September-2021 order of this Court in respect of an earlier ITA;

    10.2. ICASA chose not to assign spectrum to the Wireless Open Access Network (or '**WOAN**'); or

    10.3. ICASA did not properly consider the position of Cell C in the market;

11. We do not address these arguments because (a) they are not directly relevant to Rain and Rain did not plead a detailed response to them, and (b) other respondents will respond to them. Rain does not, however, concede that these arguments are good and reserves the right to deal with them at the hearing should it be necessary.

12. In the interests of brevity, we also do not deal with arguments that Telkom has pleaded but not raised in its heads. We reserve the right too to deal with these points at the hearing should it be necessary.

13. Rain does not contest that the decisions impugned by Telkom constitute *'administrative action'* as defined in the Promotion of Administrative Justice Act[4] ('**PAJA**') and that the grounds of review in PAJA apply.

[4] Promotion of Administrative Justice Act 3 of 2000.

II. THE FACTS

(a) Spectrum and spectrum licensing

14. Mobile phones (and other wireless devices) communicate with one another over radio waves, over a range of frequency bands. In a particular geographical area, only one MNO can transmit over a particular frequency – if more than one does so, the signals will interfere with one another.[5]

15. To prevent this sort of interference, under the Electronic Communications Act[6] ('**the ECA**') a licensee may only transmit radio signals over a specified frequency in a particular geographical area if it holds what is called a radio frequency spectrum licence for that frequency and that area (hereafter, a '**spectrum licence**').[7] Spectrum licences are granted by ICASA.[8]

16. When a licensee holds a long-term spectrum licence permitting it to transmit over a specified spectrum band, then it is colloquially said to hold that spectrum or to have been assigned that spectrum.[9]

17. A mobile network operator ('**MNO**') (like Vodacom, Telkom, MTN, or Rain) always wants more spectrum. This is because, all other things being equal:

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[5] Rain Part A AA p 003-1396 para 25. Admitted in Telkom Part A RA p 003-2913 para 169.

[6] Electronic Communications Act 36 of 2005.

[7] Rain Part A AA p 003-1397 para 26. Admitted in Telkom Part A RA p 003-2913 para 169.

[8] *Id* s 31(1):

> 'Subject to subsections (5) and (6), no person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum licence granted by the Authority to such person in terms of this Act.'

[9] Rain Part A AA p 003-1397 para 27. Admitted in Telkom Part A RA p 003-2913 para 169.

17.1. The more spectrum an MNO has, the better the quality of the mobile service it can offer. It can provide better coverage, fewer dropped voice calls, and better data download speeds and reliability.[10]

17.2. The more spectrum an MNO has, the cheaper it is for it to build out its network, because the more spectrum it has, the fewer base stations (colloquially, cell phone towers) it needs to build.[11]

17.3. Different spectrum bands are good for different purposes. Spectrum bands below 1 GHz ('**sub-1GHz spectrum**') travel further and are better at penetrating walls and other objects. Holding such spectrum is important for an MNO to build a national network. Spectrum bands above 1 GHz ('**above-1GHz spectrum**') carry more data and are thus important for building high-speed data networks, such as 4G or 5G networks, or networks in densely populated areas.[12]

18. If there is *'insufficient spectrum available to accommodate demand'*, section 31(3)*(a)* of the ECA empowers ICASA to *'prescribe procedures and criteria for … radio frequency spectrum licences'*. These are contained in the Radio Frequency Spectrum Regulations[13] ('**the Spectrum Regulations**').

19. Regulation 7(1) provides that where there is insufficient spectrum available to accommodate demand (colloquially called '**high-demand spectrum**'), ICASA must publish an invitation to apply ('**an ITA**') in terms of which the spectrum will

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[10] Rain Part A AA p 003-1397 para 28.1. Admitted in Telkom Part A RA p 003-2913 para 169.
[11] Rain Part A AA p 003-1397 para 28.2. Admitted in Telkom Part A RA p 003-2913 para 169.
[12] Rain Part A AA p 003-1397 para 28.3. Admitted in Telkom Part A RA p 003-2913 para 169.
[13] Radio Frequency Spectrum Regulations, 2015 GN 279 *GG* 38641 of 30 March 2015.

be assigned on a competitive basis. Regulation 7(2)*(n)* stipulates that this may be done via an auction, a beauty contest, or *'any other licensing mechanism deemed appropriate by the Authority'*.

20. The spectrum at issue constitutes high-demand spectrum. Thus, ICASA was permitted to assign it by way of an auction. There is no dispute about this.[14]

(b) The auction described in the 2021 ITA

21. The spectrum at issue (in addition to being high-demand spectrum) is approved for use in mobile telecommunications (so-called '**IMT spectrum**'). It is spectrum in the 700MHz, 800MHz, 2600MHz, and 3500MHz frequency bands. We refer to it as '**the subject spectrum**'.

22. There is no dispute between the parties that the permanent assignment of the subject spectrum is overdue in South Africa. Other countries have long ago assigned this spectrum.[15] The permanent assignment of the spectrum will likely improve the quality of mobile telecommunications and will jump-start economic growth.[16]

23. Telkom concedes this numerous times in its papers. It admits *'there is an urgent need for spectrum'*[17] and that *'[i]t is in the best interests of all licensees, including*

[14] Rain Part A AA p 003-1391 para 8.1; not denied by Telkom.
[15] Rain Part A AA p 003-1398 para 29; not denied at Telkom RA para 169.
[16] Rain Part A AA p 003-1390 paras 6 – 63; not denied at Telkom RA p 003-2909.
[17] Telkom Part B RA p 004-1496 para 214.

Telkom, as well as consumers, that this process be finalised without undue delay'.[18]

24. So, on 10 December 2021, ICASA published an ITA describing how the subject spectrum would be auctioned off ('**the 2021 ITA**' or '**the ITA**').[19] The auction would be (and was) held in March 2022 ('**the 2022 auction**' or '**the auction**').[20]

25. The 2021 ITA was preceded by two information memoranda (or '**IMs**'),[21] on which MNOs were permitted to make submissions, as well as a reasons document published together with the ITA which responded to the parties' submissions and set out ICASA's reasons ('**the reasons document**').[22]

26. Under the 2021 ITA, ICASA would auction off the subject spectrum at the 2022 auction, namely:

    26.1. 2 x 20 MHz in the 700MHz band (divided into four lots);

    26.2. 2 x 30 MHz in the 800MHz band (divided into five lots);

    26.3. 1 x 140 MHz in the 2600MHz band (divided into fourteen lots); and

    26.4. 1 x 86 MHz in the 3500MHz band (divided into ten lots);

    (together, a total of 326 MHz of IMT spectrum).[23]

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[18] Telkom FA p 003-62 para 122.

[19] Telkom FA pp 003-139 – 229 annexure FA1.

[20] 2021 ITA p 003-201.

[21] The first IM is annexed to Telkom FA as annexure FA21 pp 003-808 – 821. The second IM is annexed to Telkom FA as annexure FA22 pp 003-822 – 870.

[22] The reasons document is annexed to Telkom FA as annexure FA3 at pp 003-359 – 453.

[23] 2021 ITA p 003-159 para 5.4.

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27. The ITA incorporated two sets of pro-competitive interventions: (a) two spectrum caps and (b) the *'opt-in round'*.

28. The two spectrum caps are the following:

    28.1. first, a *'safeguard cap'* of 42 MHz for sub-1 GHz IMT spectrum (including existing IMT spectrum holdings); and

    28.2. secondly, an overall IMT spectrum cap of 187 MHz (also including existing IMT spectrum holdings).[24]

29. This means that no MNO would, after the 2022 auction, be permitted to hold more than 42 MHz of sub-1GHz IMT spectrum; or more than 187 MHz of IMT spectrum in total.

30. The second set of pro-competitive measures is the opt-in round, which would work as follows:[25]

    30.1. The opt-in round would be a separate round of the auction which would take place prior to the main auction.

    30.2. In the opt-in round, eligible bidders would be permitted to bid for spectrum so as to acquire what is defined as a *'minimum spectrum portfolio'* (or '**MSP**'), which ICASA had determined is necessary for an MNO to be a credible national wholesale operator.

[24] 2021 ITA p 003-163 para 7.

[25] The opt-in round is described at pp 003-161 – 162 paras 6 – 6.7.

30.3. The MSP was defined as 2 x 10 MHz (or 20 MHz) of sub-1GHz spectrum, and 60 MHz of above-1GHz spectrum.

30.4. Only bidders that had permanent spectrum holdings that were less than the MSP, and which were not *'Tier-1 operators'* as defined, would be permitted to participate in the opt-in round. In effect, this meant that Vodacom and MTN, the two largest MNOs, were excluded.

30.5. While any qualifying bidder could participate in the opt-in round, only two bidders could win. In other words, only two bidders would be permitted to obtain spectrum in the opt-in round to reach the MSP.

31. After the opt-in round, the so-called *'main auction'* would be held, at which the spectrum remaining after the opt-in round would be auctioned off to any eligible MNO (including Vodacom and MTN, and including the MNOs that had participated in the opt-in round).[26]

(c) The 2022 auction

32. On 5 January 2022, Telkom launched the application at issue, in two parts:

32.1. Part A; an urgent application for an interim interdict preventing the 2022 auction from going ahead; and

32.2. Part B; the review application at issue.[27]

[26] 2021 ITA p 003-159 para 5.3; p 003-162 para 6.6.

[27] The notice of motion is at pp 003-871 – 878.

33. On 21 January 2022, shortly before Part A was to be heard (25 January), Telkom removed Part A from the roll without tendering costs.[28] At a case-management meeting held with the DJP on 8 February 2022, it was agreed that Part B would be heard on an expedited basis and that Telkom would no longer pursue Part A.[29]

34. So, in March 2022, the auction went ahead.[30] In the opt-in round (rand figures are approximate) —

    34.1. Telkom obtained 20 MHz of sub-1GHz spectrum for R1.5 billion; and

    34.2. Rain obtained 20 MHz of sub-1GHz spectrum and 10MHz of above-1GHz spectrum for R1.15 billion.[31]

35. In the main auction round (rand figures are again approximate) —

    35.1. Vodacom obtained 20 MHz of sub-1GHz spectrum and 90 MHz of above-1GHz spectrum for R5.3 billion;

    35.2. MTN obtained 20 MHz of sub-1GHz spectrum and 80 MHz of above-1GHz spectrum for R5.1 billion;

    35.3. Rain obtained a further 10 MHz of above-1GHz spectrum for R280 million;

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[28] Notice of removal from the roll p 003-3018.

[29] Vodacom Part B AA p 004-663 para 5.

[30] Rain will file, together with these heads of argument, a short affidavit detailing the results of the auction, which we call the '**Rain supplementary affidavit**'. Rain will seek at the hearing that the affidavit be admitted.

[31] Rain supplementary affidavit para 12.

35.4. Telkom obtained 22 MHz of above-1GHz spectrum for R609 million;

35.5. Cell C obtained 10 MHz of above-1GHz spectrum for R288 million; and

35.6. Liquid Telecom obtained 4 MHz of above-1GHz spectrum for R111 million.[32]

36. In total, the auction raised more than R14.4 billion for the national fiscus.[33]

III. THE BASIC PRINCIPLES THAT MUST GOVERN THE REVIEW

(a) The Plascon-Evans *rule*

37. Because Telkom seeks final relief on motion, the first basic principle governing the review is the *Plascon-Evans* rule: if a factual allegation by a respondent conflicts with an allegation by Telkom, the Court must accept the respondent's version, unless it is so far-fetched that it can be rejected out of hand.[34]

38. This is fatal to most of Telkom's case. Much of that case rests on factual allegations as to the state of the industry or what the auction is likely to do to competition. The respondents contest these allegations and their response cannot remotely be regarded as so far-fetched that it can be rejected on the papers. It follows that the factual substratum of much of Telkom's case has not been established.

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[32] Rain supplementary affidavit para 15.

[33] Rain supplementary affidavit para 18.

[34] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 – 635.

(b) Rationality review

39. The second basic principle is that, because these are review proceedings, this Court cannot set the auction aside merely on the basis that it (or Telkom) disagrees with it on the merits.[35] The decision must be irrational[36] or unreasonable.[37]

40. These are difficult tests for an applicant to satisfy. As the Constitutional Court held in *Bapedi*:[38]

> '[N]either [section 33 of the Constitution nor PAJA] 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. And this is particularly so for rationality review under PAJA. Hoexter notes that:
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> > "[a] crucial feature [of rationality review under PAJA] is that it demands merely a rational connection – not perfect or ideal rationality. In a different context Davis J has described a rational connection test of this sort as *'relatively deferential'* because it calls for *'rationality and justification rather than the substitution of the Court's opinion for that of the tribunal on the basis that it finds the decision . . . substantively incorrect'*." (Footnotes omitted.)
>
> A level of deference is necessary – and this is especially the case where matters fall within the special expertise of a particular decision-making body. We should, as this Court counselled in *Bato Star*, treat the decisions

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[35] See Hoexter & Penfold *Administrative Law in South Africa* 3 ed (2021) at 85.

[36] PAJA, s 6(2)*(f)*(ii).

[37] *Id* s 6(2)*(h)*.

[38] *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* [2014] ZACC 36; 2015 (3) BCLR 268 (CC).

of administrative bodies with *"appropriate respect"* and *"give due weight to findings of fact . . . made by those with special expertise and experience"*.'[39]

41. ICASA is a specialist decision-making body with expertise in telecommunications. As we explain below, the design of a spectrum auction is a polycentric, technical exercise. ICASA must balance numerous incommensurable goals, including raising money for the fiscus, assigning spectrum to entities that can use it, and promoting competition. In review proceedings, ICASA must merely justify the auction design to this Court on a rational basis. ICASA has more than done so. That Telkom would have preferred a different method of assigning spectrum does not rise to a ground of review.

IV. A POSITIVE DEFENCE OF THE 2022 AUCTION

42. Rain's answering affidavit in Part B[40] annexes an expert report by Genesis Analytics – an independent, Johannesburg-based, specialist economics consultancy with expertise in telecommunications ('**the Genesis report**').[41] In section 3 of the Genesis report, Genesis explained the goals of spectrum auctions across the world, and the pro-competitive interventions such auctions often contain. This section of the heads draws from the Genesis report.

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[39] *Id* paras 78 – 79 (footnotes and paragraph numbers omitted), citing *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); Hoexter *Administrative Law in South Africa* (2ed) (Juta & Co Ltd, Cape Town 2012) at 342; and *Nieuwoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission* 2002 (3) SA 143 (C) at 155G – H and 164G – H.

[40] Rain Part B AA p 004-87 para 9.1.

[41] A redacted version of the report is annexed to Rain Part B AA as annexure GS5 at pp 004-111 – 147. A confirmatory affidavit confirming the contents of the report by its author, Ms Zoë van der Hoven, as well as confirming that she has the necessary expertise to give expert evidence, is at pp 004-148 – 156.

43. Spectrum auctions must serve three goals: (a) they must assign spectrum to MNOs that can put the spectrum to use,[42] (b) they must raise money for the fiscus, and (c) they must ensure that the resulting spectrum assignment preserves or promotes competition in the market.[43]

44. A spectrum auction usually incorporates one or more pro-competitive interventions to prevent dominant MNOs from obtaining disproportionate amounts of spectrum by outspending other MNOs, and so to prevent them from obtaining an unfair competitive advantage through holding too much spectrum[44] (given that, as we explain above, the more spectrum an MNO holds, the better quality of service it can provide, and more cheaply).[45]

45. Common pro-competitive interventions used across the world include the following:

    45.1. First, a spectrum cap, which is a limit on the amount of spectrum an MNO can obtain at an auction. This prevents a dominant operator from obtaining significantly more spectrum than its rivals, and so from obtaining an unfair competitive advantage.[46]

[42] A legitimate goal for ICASA under section 4(3)*(c)* of the Independent Communications Authority of South Africa Act 13 of 2000 ('**the ICASA Act**') and section 2*(e)* of the ECA.

[43] A legitimate goal for ICASA under section 2*(f)* of the ECA.

[44] Genesis report pp 004-137 – 139.

[45] See paragraphs 17 to 17.3 above.

[46] Genesis report pp 004-144 – 145 paras 72 – 76.

45.2. As explained above, the 2022 auction incorporated two spectrum caps: a global cap on all IMT spectrum of 187 MHz, as well as a sub-1GHz spectrum cap of 42 MHz.

45.3. Secondly, a spectrum set-aside, which is the reservation of some spectrum for bidders who satisfy certain criteria – usually new entrants or smaller incumbents. This prevents dominant operators from outbidding new entrants or smaller incumbents for the spectrum that has been set aside.[47]

45.4. Thirdly, a spectrum floor, which permits smaller MNOs to obtain spectrum up to a certain level, usually a level deemed by the regulator to be the minimum required for the MNO to be a credible player in the market.[48]

45.5. The opt-in round in the 2022 auction was a combination of a set-aside and a spectrum floor. Certain lots of spectrum were reserved for the opt-in round (in which only smaller MNOs could compete) and in the opt-in round the smaller MNOs could obtain spectrum until their total holdings reached the level of the floor, which was the level of spectrum ICASA deemed necessary to be a credible national player.[49]

46. In designing the 2022 auction, ICASA had to balance the need to raise money for the fiscus against the need for pro-competitive interventions to prevent Vodacom and MTN from obtaining too much spectrum. The two goals are in

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[47] Genesis report pp 004-142 – 143 paras 67 – 69.

[48] Genesis report pp 004-143 – 144 paras 70 – 71.

[49] See 2021 ITA p 003-161 para 6.1.

tension: the more pro-competitive interventions an auction has, the less money it is likely to raise. Striking the correct balance is a specialised exercise, requiring expertise in economics and telecommunications.

47. The mix of pro-competitive interventions chosen by ICASA easily pass the low thresholds of reasonableness and rationality. As stated in the Genesis report:

> 'ICASA has implemented a number of … competition safeguards (amongst other objectives of the ECA) into its auction design, which includes the use of spectrum caps and an opt-in round (a combination of a set-aside and spectrum floor) to pursue the efficient assignment of spectrum in a manner that enhances competition.
>
> This is in line with international best practice and seeks to promote a fair playing field for all competitors to viably compete post the auction rather than seeking to protect or enhance the position of any particular operator or manufacture specific market and auction outcomes.'[50]

48. That the auction was a reasonable means of assigning the subject spectrum is supported by its result. Vodacom, MTN, and Telkom have all ended up holding similar amounts of spectrum.[51] The playing field, post-auction, is level. Moreover, the auction raised more money than expected: around R14.4 billion.[52]

V. THE ROAMING ARRANGEMENTS

49. We turn to deal with the Telkom's specific arguments regarding the auction. First, Telkom impugns an agreement concluded in 2019 between Rain and Vodacom

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[50] Genesis report pp 004-145 – 146 paras 77 – 78 (paragraph numbers and footnotes removed).

[51] Rain supplementary affidavit para 17.

[52] Rain supplementary affidavit para 18.

(‘**the Rain/Vodacom roaming agreement**’) which has the following material terms:

49.1. Vodacom is permitted to roam on Rain’s 4G network layer at certain of Rain’s sites, for various fees payable by Vodacom. This means that a Vodacom customer may transmit data over Rain’s 4G data network, provided he or she does it through one of the specified sites.[53]

49.2. The agreement is non-exclusive, meaning that Rain may provide similar roaming services to other operators.[54]

49.3. The agreement does not provide for the traffic of Vodacom roaming subscribers to have any precedence over the traffic of Rain’s own subscribers.[55]

49.4. Either party may terminate on notice after the conclusion of an initial lock-in period.[56]

50. The agreement benefits the parties in the following ways:

50.1. Vodacom obtains additional data capacity in areas in which its own network is congested, enabling it to maintain a high quality of service.[57]

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[53] Rain Part A AA p 003-1416 paras 82.1 – 82.2.
[54] Rain Part A AA p 003-1416 para 82.3.
[55] Rain Part A AA p 003-1417 para 82.4.
[56] Rain Part A AA p 003-1417 para 82.5.
[57] Rain Part A AA p 003-1414 para 74.2.

50.2. Rain uses the cashflow generated by the agreement as collateral to finance the building of its own network far more rapidly than it otherwise would have been able to, so as to grow its retail business.[58]

51. Telkom makes essentially two arguments in respect of the Rain/Vodacom roaming agreement (as well as a similar agreement concluded between MTN and Liquid) (together '**the roaming arrangements**'): a substantive argument and a process argument. We respond to each in turn.

(a) The substantive argument

52. Telkom's substantive argument can be summarised as follows:

52.1. The roaming arrangements have the result that Vodacom and MTN effectively hold more spectrum than their formal licensed holdings suggest. They, in other words, effectively hold Rain and Liquid's spectrum in addition to their own licensed spectrum.

52.2. Thus, the 2022 auction's symmetrical spectrum caps permit Vodacom and MTN to obtain more spectrum than other operators. They can increase their licensed spectrum holdings up to the spectrum caps, while in addition holding Rain and Liquid's spectrum.

52.3. Thus, the 2022 auction will permit Vodacom and MTN to effectively hold far more spectrum than their competitors, and thus the auction will be bad for competition.

[58] Rain Part A AA p 003-1414 para 74.3.

53. But each premise is wrong. The argument is unsustainable. In what follows, we focus on the Rain/Vodacom agreement, but the points are valid for the Liquid/MTN agreement as well.

(i) Vodacom and MTN do not hold Rain and Liquid's spectrum

54. Vodacom does not, in any sense of the word, *'hold'* Rain's spectrum. Rain's IMT spectrum licences grant it the exclusive right to transmit over the spectrum bands specified in the licences across the whole of South Africa. It is the only entity that is permitted to do so, and it is the only entity that in fact does so.[59]

55. Vodacom does not transmit and receive radio signals using the spectrum assigned to Rain. The effect of the Rain/Vodacom roaming agreement is that Rain receives and transmits radio signals at the spectrum assigned to it from and on behalf of Vodacom customers. This is what *'roaming'* means. It does not entail Vodacom transmitting and receiving radio signals using the spectrum assigned to Rain as if it were its own, but rather to access services from the network operated by Rain.[60]

56. Vodacom's access to Rain's network is, moreover, limited and contingent:

    56.1. Its customers can only roam on the 4G layer of Rain's network. They cannot roam on Rain's 5G layer.[61]

[59] Rain Part A AA p 003-1417 paras 84 – 85.

[60] Rain Part A AA p 003-1418 para 86.

[61] Rain Part A AA p 003-1418 para 87.1.

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56.2. Its customers can only roam at specified sites. Outside of these sites, they cannot even roam on Rain's 4G layer.[62]

56.3. After the initial period, Rain can terminate the roaming agreement on notice.[63]

57. The Rain/Vodacom roaming agreement is not exclusive. Rain may enter into identical roaming agreements with other MNOs, and Rain is open to doing so.[64]

58. In short and for present purposes, an MNO *'holds'* spectrum under a spectrum licence when it has the exclusive right to transmit over that spectrum nationally. Vodacom nowhere near *'holds'* Rain's spectrum in this sense. Vodacom customers are merely entitled to access Rain's network on a non-exclusive basis at certain sites and only on Rain's 4G layer, in terms of an agreement that may be terminated on notice.

59. Telkom argues that Vodacom has *de facto* control over Rain's spectrum because the Rain/Vodacom agreement makes Rain economically dependent on Vodacom. As such, the argument goes, Rain effectively gives up its network to Vodacom – its network becomes an appendage of Vodacom's.[65]

60. But Rain denies this. Rain explains that the overwhelming majority of the traffic on Rain's network is from its own retail customers, and not from roaming Vodacom customers.[66] The share of Rain's revenue that comes from the

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[62] Rain Part A AA p 003-1418 para 87.2.
[63] Rain Part A AA p 003-1418 para 87.3.
[64] Rain Part A AA p 003-1418 para 88.
[65] Vodacom Part B RA pp 004-1439 – 1442 paras 52 – 51.
[66] Rain Part A AA p 003-1418 para 87.4.

Rain/Vodacom agreement is declining, as Rain builds its own network and its retail business grows.[67] Rain is open to providing similar roaming services to other MNOs, including Telkom.[68] Under the *Plascon-Evans* rule, Rain's version must be preferred, which is that Vodacom does not have *de facto* control over Rain's spectrum.

61. Telkom also claims that the roaming arrangements amount to spectrum-sharing – that the Rain/Vodacom agreement result in Vodacom sharing Rain's spectrum.[69]

62. This too is incorrect. Spectrum-sharing is when two MNOs each hold a licence permitting each to transmit over the same spectrum bands.[70] The Rain/Vodacom agreement does not grant Vodacom the right to transmit over Rain's spectrum.[71] As explained above, what happens is that Rain transmit over Rain's spectrum to Vodacom's customers, in return for a fee paid by Vodacom.

(ii) The roaming arrangements do not permit Vodacom and MTN effectively to exceed the spectrum caps

63. Telkom's second premise is also incorrect. The Rain/Vodacom agreement do not permit Vodacom effectively to exceed the spectrum caps, and thus to obtain more spectrum than Telkom.

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[67] Rain Part A AA p 003-1415 para 75.2.

[68] Rain Part A AA p 003-1420 paras 93.1 – 93.2.

[69] Telkom Part B FA p 004-31 paras 18 – 19.

[70] Rain Part B AA pp 004-94 – 95 paras 32 – 33.3.

[71] Rain Part B AA pp 004-95 – 96 paras 34 – 38.

64. The first reason the second premise is incorrect is that the first premise is incorrect: Vodacom does not *'hold'* Rain's spectrum.

65. But the second premise is incorrect for an additional reason, which is that Telkom is also party to an agreement like the Rain/Vodacom agreement. Telkom has an agreement with Vodacom in terms of which it roams on Vodacom's network. Telkom does not dispute that this permits it to provide better quality of service to its customers in areas where its own network is congested.[72] As such, if the roaming arrangements permit Vodacom and MTN to exceed the spectrum caps, they also permit Telkom to do so.

(iii) <u>The roaming arrangements do not have the result that the 2022 auction will be bad for competition</u>

66. Telkom's third premise is incorrect because the first and second premises are incorrect.

67. It is incorrect for an additional reason: which is that the Rain/Vodacom agreement is <u>good</u> for competition. It has given Rain access to capital which has enabled it to build out its own network, and thus grow its retail business, far faster than it otherwise would have been able to. This has enabled Rain to exert competitive pressure on other MNOs. This has been recognised by the Competition Commission.[73] Vodacom and Rain should not be punished in the design of the auction for entering into such an agreement.

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[72] Vodacom Part B AA p 004-712 para 131.2. Not specifically denied by Telkom at Telkom Part A RA p 003-2904 para 142.

[73] Genesis report pp 004-129 – 133 paras 39 – 46; Rain Part A AA p 003-1419 para 90.

68. But let us assume for the sake of argument that it would have been better for ICASA to have somehow incorporated the roaming arrangements into the auction design. ICASA could have, for example, imposed asymmetrical spectrum caps – MTN and Vodacom could have been subject to a lower cap, and Telkom and Rain to higher caps, to cater for the roaming arrangements.

69. This would not render the 2021 ITA or the 2022 auction unreasonable or irrational. Reasonableness or rationality review does not permit a court to set aside a decision because it (or litigant) believes that a different decision would have been better. This is especially so when the decision is a technical one. The decision must be irrational, or it must be so unreasonable that no reasonable decision-maker would have made it. Telkom's preference for a different auction design does not amount to irrationality or unreasonableness on the part of ICASA.[74]

(iv) Conclusion

70. Telkom's substantive argument on the roaming arrangements is without merit. Vodacom does not hold Rain's spectrum. There is no basis for the auction to have been designed as if it did.

[74] See paragraphs 39 to 41 above.

(b) The procedural argument

71. Telkom's procedural argument is that ICASA failed to consider the roaming arrangements in designing the auction.[75] As such, ICASA failed to take into account relevant circumstances and the ITA is irrational.[76]

72. As a matter of fact, Telkom is just wrong. ICASA clearly considered the roaming arrangements. In the reasons document, ICASA summarised Telkom's submissions on the arrangements (which are similar to the arguments it has made in this review),[77] and offered a detailed, reasoned response for its decision not to include Vodacom and MTN's network access under the roaming arrangements towards the spectrum caps.[78]

73. At points, Telkom's argument appears to be that ICASA failed to attach sufficient weight to the roaming arrangements, or to Telkom's submissions on them.[79] But this does not amount to a ground of review. As the Supreme Court of Appeal held in *Clairison's*:[80]

> 'The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter

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[75] See, for example, Telkom Part B RA p 004-1449 – 1450 para 72.

[76] Telkom FA pp 003-110 – 112 paras 269 – 271.3.

[77] Reasons document p 003-387 paras 7.9 – 7.12.

[78] Reasons document pp 003-391 – 394 paras 7.34 – 7.45.

[79] See Telkom FA p 003-111 para 270 (*'ICASA failed to engage with the substance of the various submissions filed in response to the First and Second 2021 IMs on the issue'*).

[80] *MEC for Environmental Affairs and Development Planning v Clairison's CC* [2013] ZASCA 82; 2013 (6) SA 235 (SCA).

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for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere.'[81]

VI. AUCTIONING OFF THE SUB-1GHZ SPECTRUM

74. Telkom argues that the ITA and auction are unlawful because sub-1GHz spectrum was auctioned off that is not fully available for use, given that it is (or will be) occupied by terrestrial broadcasters like the SABC and e.tv.

75. The argument is unsustainable. We structure this section as follows:

75.1. first, we set out what the facts are on this score;

75.2. second, we explain that it is entirely reasonable for ICASA to have auctioned off the sub-1GHz spectrum, given that ICASA has catered for its potential non-availability in the ITA and given that regulators across the world often auction off spectrum that is not fully available; and

75.3. finally, we respond to the specific arguments raised by Telkom.

(a) The facts relating to the sub-1GHz spectrum

76. The record shows that the sub-1GHz spectrum is currently fully available in five provinces (this appears to be common cause),[82] and terrestrial broadcasters are being moved off the sub-1GHz spectrum in the other four provinces.[83] The spectrum will thus progressively become available in these provinces.

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[81] *Id* para 22.

[82] Telkom HoA paras 163.1, 163.2, and 164.

[83] Minister Part B AA p 004-255 para 58.

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77. The only debate is when precisely the spectrum will become available in the other four provinces.

78. There is some uncertainty in this regard.

    78.1. The Minister alleges that the sub-1GHz spectrum will be fully available by the end of March 2022. She is the person responsible for ensuring that this is the case.[84]

    78.2. But we accept that there is some doubt in the industry as to whether this deadline will be met.[85]

79. The remainder of this section therefore assumes – purely for the sake of argument – that the sub-1GHz spectrum is partially available and will only become fully available over time. But even on this assumption in Telkom's favour, Telkom's arguments in respect of the sub-1GHz spectrum must fail.

(b) ICASA's decision to auction off the sub-1GHz spectrum is reasonable

80. The 2021 ITA caters for the eventuality that the sub-1GHz spectrum will not be cleared in time for licences to be issued. If not, the successful bidders for sub-1GHz spectrum will pay auction and licence fees on a *pro rata* basis as that spectrum becomes available.[86]

81. This is an eminently reasonable and rational solution. Successful bidders will only pay for their sub-1GHz spectrum to the extent that they can use it.

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[84] Minister Part B AA p 004-255 para 58.

[85] Rain Part A AA p 003-1423 para 98.

[86] 2021 ITA p 003-160 paras 5.5 – 5.6.

82. This is borne out by the commercial decisions of bidders in the 2022 auction. Vodacom, MTN, Rain, and Telkom each purchased 20 MHz of sub-1GHz spectrum, despite knowing that it might not be fully available by the time it is licensed.[87] The industry would not commit billions of rands to a payment scheme if it were patently irrational.

83. Moreover, none of the successful bidders will immediately seek to transmit sub-1GHz spectrum all over the country immediately. They will first have to build out the necessary network infrastructure. This will take months. They will begin in the areas in which the spectrum is already fully available. It will thus take some time before the successful bidders will even wish to transmit in areas in which the spectrum is not currently available – by which time the spectrum will likely have become available.[88]

84. Auctioning off spectrum that is not fully available is unremarkable internationally. In the last decade or so, this happened in Germany, the UK, Italy, Spain, France, Switzerland, and Japan – sometimes years before the spectrum became fully available. Germany, to pick one example, auctioned off sub-1GHz spectrum in 2015 with the expectation that it would only become fully available in 2019.[89]

85. ICASA is doing nothing more than follow international best practice. This can hardly be irrational or unreasonable.

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[87] Rain supplementary affidavit paras 12 and 15.

[88] Vodacom Part B AA p 004-718 paras 149 – 150.

[89] Vodacom Part A AA pp 003-2454 paras 184 – 184.6.

(c) Telkom's specific arguments relating to the sub-1GHz spectrum are unsustainable

86. Telkom then raises various other arguments in relation to the availability of the sub-1GHz spectrum. None are sustainable.

(i) The argument from the Sutherland and Baqwa judgments

87. Telkom refers to various *dicta* in the 2016 judgment of Sutherland J (as he then was) in *Minister v ICASA*[90] ('**the Sutherland judgment**') and the 2021 judgment of Baqwa J in *Telkom v ICASA*[91] ('**the Baqwa judgment**') to make the argument that this Court is bound by the proposition that it is intrinsically irrational (and thus unlawful) to auction off spectrum that is not yet fully available.[92]

88. But this Court is bound by no such proposition:

88.1. First, Sutherland J only held that it might be irrational to auction off spectrum that is unavailable. His findings in this regard were *prima facie*. He held that the validity of such an act is *'suspect'*[93] (and later an act of *'questionable validity'*),[94] and something that merely *'has the look of a reckless decision and for that reason an irrational decision'*.[95]

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[90] *Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa* [2016] ZAGPPHC 883.

[91] *Telkom SA SOC Ltd v Independent Communications Authority of South Africa* [2021] ZAGPPHC 120, annexed to Telkom's founding affidavit at pp 003-782 – 799.

[92] Telkom heads of argument paras 108 – 121 and para 162.

[93] Sutherland judgment above n 90 para 57.

[94] *Id* para 59.

[95] *Id* (underlining added).

88.2. A *prima facie* finding was appropriate. Sutherland J was faced with an application for an interim interdict preventing the implementation of an earlier (2016) ITA, pending a review. That it was irrational to auction off spectrum that is unavailable was one of the applicants' review grounds. Under the *OUTA* judgment,[96] it would have been inappropriate for him finally to decide this review ground at interim-interdict stage.[97]

88.3. Secondly, Baqwa J did not hold that auctioning off spectrum that would only later become available was intrinsically irrational. He held that it was irrational because ICASA had during the (2021) auction process stated that the spectrum would not be available, and then reversed its position in its answering affidavit to claim that it was already fully available. It was this change in position that was irrational and unfair – not the auctioning off of spectrum that is not fully available.[98]

88.4. In any event, it would not have been appropriate for Baqwa J to make a final holding on the rationality of auctioning off spectrum that is not fully available. Like Sutherland J, Baqwa J was faced with an interim-interdict application to restrain the implementation of an ITA (the ITA prior to the

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[96] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC) ('***OUTA***').

[97] *Id* para 31:

> 'Having granted leave to appeal, we must now decide the merits of the appeal. To do that, I need not determine the cogency of the review grounds. It would not be appropriate to usurp the pending function of the review court and thereby anticipate its decision. I have kept in mind that the rule 53 procedure20 might result in the lodging of a supplemented case record which would not be before an appellate court and which may entail new matters or disputes of fact which will best be dealt with by the review court itself.'

[98] Baqwa judgment above n 91 paras 23, 27, 29, 33, and 42.

2021 ITA). It would not have been appropriate for him to decide the Part-B review grounds.

88.5. Thirdly, both the Sutherland and Baqwa judgments are distinguishable. At the time of both judgments, digital migration had not yet begun, and there was no timetable for its conclusion before the court. In this case, digital migration is already underway, and the Minister has made an undertaking as to when it will be completed. It was thus much easier to impugn the rationality of the ITAs that were before Sutherland and Baqwa JJ than it is to impugn the rationality of the (2021) ITA that is before this Court.

(ii) <u>The argument from ICASA's duty to prevent interference</u>

89. Telkom argues as follows:[99]

89.1. section 30(3) of the ECA precludes ICASA from *'act[ing] in a manner that will cause interference or potential interference'*;

89.2. it is *'common cause that the sale of the 700MHz and 800MHz frequency bands will give rise to an interference (or potential interference)'* with terrestrial broadcasters; and

89.3. thus, it is unlawful for ICASA to auction off the sub-1GHz spectrum.

90. But both premises are false. First, Telkom's interpretation of section 30(3) of the ECA is not correct. The section obliges ICASA to *'ensure that in the use of the*

[99] At Telkom heads of argument paras 166 – 167.

radio frequency spectrum harmful interference to authorised or licensed users of the radio frequency spectrum is eliminated or reduced to the extent reasonably possible'. The section does not oblige ICASA to prevent *'potential interference'*. It must ensure that interference is eliminated or reduced to the extent reasonably possible.

91. Secondly, it is not *'common cause'* that the sale of the sub-1GHz spectrum will cause interference. An MNO holding a fresh sub-1GHz licence will not transmit in areas where terrestrial broadcasters are still transmitting because television signals will *'obliterate'* the much weaker signals of the MNO.[100] The MNO will begin transmitting in areas where the spectrum is available and move into other areas as the spectrum in those areas becomes available.[101]

(d) Conclusion

92. ICASA's decision to auction off the sub-1GHz spectrum was lawful, reasonable, and rational. Telkom's arguments to the contrary are invalid.

VII. THE COMPETITION ASSESSMENT

93. Rain does not contest that ICASA was required to consider competition in formulating the 2021 ITA.[102]

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[100] Sutherland judgment above n 90 para 28.

[101] Vodacom Part B AA p 004-715 para 140.2.

[102] ECA, s 2*(f)*:

> 'The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to … promote competition within the ICT sector'.

(a) The argument that ICASA did not consider competition

94. Telkom complains that ICASA did not sufficiently consider competition. Telkom is wrong. ICASA did.

94.1. First, in formulating the 2021 ITA, ICASA considered the results of the Mobile Broadband Services Inquiry ('**the MBSI**').[103]

94.2. The MBSI was a competition study ICASA had conducted from 2018 to 2021, the purpose of which was —

> 'to assess the state of competition and determine whether or not there are markets or market segments within the mobile broadband services value chain which may warrant regulation in the context of a market review'.

94.3. The MBSI was completed in March of 2021 with the publication of ICASA's findings ('**the MBSI findings document**'), in which ICASA concluded that competition was ineffective in various mobile-services markets and that Vodacom and MTN were dominant.[104]

94.4. ICASA embarked on numerous rounds of consultation and fact-finding in conducting the MBSI. It received submissions on more than one occasion from most major market players, as well as from the Competition Commission. It received written and oral representations from Telkom and held two one-on-one meetings with Telkom.[105]

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[103] See reasons document p 003-369 para 5.5; p 003-389 paras 7.18 – 7.21; 003-391 para 7.30; p 003-439 para 11.57.

[104] Rain Part B AA pp 004-100 – 101 paras 50 – 51.

[105] Rain Part B AA p 004-101 para 52.

94.5. Second, in the consultation process leading up to the adoption of the 2021 ITA, ICASA considered[106] the representations on competition of numerous industry players, including Telkom[107] and the Competition Commission.[108]

95. Telkom claims in its heads of argument (without referring to the record) that ICASA merely *'rubber stamped'* a competition assessment conducted in 2020 for ICASA by Acacia Economics, a private economics consultancy.[109] But this assertion from the bar is inconsistent with the evidence on record set out in the previous paragraph.

(b) The argument that ICASA did not conduct a formal competition assessment

96. Telkom appears to argue that the 2021 ITA is unlawful because ICASA did not conduct a formal competition assessment.[110] But there is no obligation on ICASA to conduct a *'formal'* competition assessment – it must merely consider competition, which it did. And in any event, the MBSI was a formal assessment of competition in the market, which ICASA considered in setting up the 2021 ITA.

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[106] That ICASA considered these representations, see reasons document pp 003-385 – 395 paras 7 – 7.52.

[107] See Telkom's submissions on the first IM at pp 005-400 – 438; and pp 005-474 – 549 (the BRG report annexed to Telkom's submissions on the first IM); Telkom's submissions on the second IM pp 003-2099 – 2128; pp 003-532 – 572 (the BRG report annexed to Telkom's submissions on the second IM).

[108] Competition Commission submissions pp 005-703 – 709.

[109] Telkom HoA para 187.

[110] See, for example, Telkom Part B RA pp 004-1421 – 1422 paras 13 – 14.

(c) The argument that ICASA's competition assessment is outdated

97. As a result, Telkom then pivots to the argument that ICASA's competition assessment is insufficient because it is outdated, on the following basis:

    97.1. ICASA's competition assessment is of the market structure in 2018, which is when the submissions upon which the MBSI was based were made.[111]

    97.2. For ICASA's competition assessment to be sufficient, it must be based on information *'about the current market structure'*.[112]

98. Telkom is wrong:

    98.1. First, it is incorrect that the MBSI is based on data up to 2018. ICASA consulted on the MBSI up to November 2020.[113]

    98.2. Second, Telkom does not explain how the market changed materially between November 2020 (when consultation on the MBSI concluded) and the end of 2021, when the 2021 ITA was adopted.

    98.3. Indeed, Telkom's own evidence indicates that it has not. Telkom concedes that Vodacom and MTN's relative dominance *'has not changed since the MBSI … completed'*,[114] and it concedes that it agrees

[111] Telkom HoA para 192.
[112] Telkom HoA para 192.
[113] Rain Part B AA p 004-102 para 57.1.
[114] Telkom Part B AA p 004-1429 para 31.

with the *'core conclusion of [ICASA's competition] assessment that competition is ineffective'*.[115]

98.4. Third, Telkom ignores the fact that ICASA again consulted on competition issues in the process leading up to the adoption of the 2021 ITA.

(d) Conclusion

99. ICASA was obliged to consider competition in setting up the 2021 ITA – no more and no less. ICASA did so.

VIII. PROCEDURAL FAIRNESS

100. Telkom argues that the process leading up to the adoption of the 2021 ITA and the March-2022 was unfair, for numerous reasons. All of its arguments are unsustainable.

(a) The process ICASA followed

101. ICASA engaged in an extensive public-participation process prior to promulgating the 2021 ITA:

101.1. On 1 October 2021, ICASA published an information memorandum ('**the first IM**') which *inter alia* —

[115] Telkom Part B AA p 004-1425 para 23.3.

101.1.1. declared that ICASA intended holding a spectrum auction in respect of the subject spectrum in March 2022;[116]

101.1.2. stated that ICASA intended auctioning off the sub-1GHz spectrum and that it would consider concessions on payment should the spectrum not be fully available by the time it is to be licensed;[117]

101.1.3. described the opt-in round ICASA intended conducting;[118]

101.1.4. disclosed that ICASA intended counting only an MNO's licensed spectrum holdings towards the spectrum caps (and not spectrum that is the subject of a roaming arrangement);[119] and

101.1.5. contained a timetable for the rest of the process.[120]

101.2. On 15 October 2021, ICASA held public hearings on the spectrum-licensing process.[121]

101.3. Submissions on the first IM were due over a month after its publication – on 2 November 2021.[122] ICASA received and considered representations from ten parties,[123] including Telkom.[124]

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[116] First IM p 003-811 para 12.
[117] First IM pp 003-812 – 813 paras 1.1 – 1.1.8.
[118] First IM pp 003-813 – 815 paras 1.2 – 1.2.13.
[119] First IM p 003-816 paras 1.4 – 1.4.2.
[120] First IM p 003-811 para 12.
[121] ICASA Part B AA p 004-882 para 24.
[122] ICASA Part A AA p 003-1573 paras 89 – 90.
[123] ICASA Part A AA pp 003-1573 – 1574 paras 91 – 92.
[124] Telkom's submissions are at pp 005-344 – 549.

101.4. On 16 November 2021, ICASA published a second information memorandum ('**the second IM**') which was *'intended to reflect the key elements to be contained in the ITA to be published'*.[125] It did – the second IM essentially contained a draft ITA.[126]

101.5. Submissions on the second IM were due on 30 November 2021.[127] ICASA received and considered representations from 16 parties,[128] again including Telkom.[129]

101.6. On 10 December 2021, ICASA published the 2021 ITA, together with the reasons document.[130]

102. ICASA thus announced its intention to hold an auction, invited written representations, held public hearings, published essentially a draft ITA (i.e., the second IM), invited further written representations, and then published the ITA, together with a document setting out its reasons. Telkom participated. This is not an unfair process.

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[125] Second IM p 003-823 para 2.

[126] Compare the table of contents of the second IM at p 003-828 to the table of contents of the 2021 ITA at p 003-146.

[127] Second IM p 003-823 para 3.

[128] ICASA Part A AA pp 003-1575 – 1576 paras 97 – 97.16.

[129] Telkom's submissions are at pp 003-2088 – 2160.

[130] The reasons document is annexed to Telkom FA as annexure FA3 at pp 003-359 – 453.

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(b) The argument that the process permitted less time for comment than previous auctions

103. We turn to deal with ICASA's specific arguments regarding procedural fairness. First, Telkom argues that the process is unfair because it permitted less time for comment than for previous auctions.[131]

104. But ICASA is not obliged to follow the timelines it followed for previous auctions. As Telkom concedes in its heads,[132] what constitutes a reasonable time for consultation depends on the context.[133] It is common cause that the auctioning off of the subject spectrum is urgent and long overdue.[134] It was thus entirely reasonable for ICASA to permit less time for consultation than with previous auctions, when the auctioning off of the subject spectrum was less overdue and less urgent.

105. It must not be forgotten, however, that ICASA still permitted over a month for parties to respond to the first IM, and two weeks in relation to the second IM. This is reasonable and sufficient.

106. By way of comparison, in the recent *Esau* matter, the Minister of Co-operative Governance and Traditional Affairs permitted only <u>two days</u> for representations on the draft Level-4 COVID-19 regulations. The Supreme Court of Appeal held that this was sufficient, given the urgency of the matter and given that more than

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[131] Telkom HoA paras 143 – 145.

[132] Telkom HoA para 142.

[133] *Esau v Minister of Co-operative Governance and Traditional Affairs* [2021] ZASCA 9; 2021 (3) SA 593 (SCA) ('***Esau***') para 96.

[134] See the record references in paragraphs 22 and 23 above.

70 000 representations were received.[135] Here, ICASA permitted much more time to consider a lesser volume of representations.

(c) The argument that the process did not permit enough time for 'substantive and meaningful comments'

107. Telkom argues that the process did not permit *'sufficient time to make substantive and meaningful comments'*.[136]

108. This argument is in truth extraordinary. Telkom's own submissions show that it had more than enough time to make fulsome representations:

    108.1. Telkom's submissions on the first IM ran to 205 pages, which included a 75-page report by a firm of economists, BRG.

    108.2. Telkom's submissions on the second IM ran to 114 pages, which included a second, 41-page report by BRG.

    108.3. In Telkom's two sets of submissions, it raised almost all of the substantive points that it has raised in this review: that ICASA misconstrues the effect of the September-2021 court order that set aside the 2020 ITAs,[137] that ICASA was obliged to publish a draft ITA,[138] that ICASA failed to conduct a proper competition assessment, Telkom's various submissions regarding the state of the competition in the

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[135] *Id* paras 76 – 100.

[136] Telkom HoA para 151.

[137] Telkom's submissions on the first IM pp 005-350 – 352 paras 3 – 13.

[138] Telkom's submissions on the first IM pp 005-358 – 359 paras 36 – 38.

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market,[139] Telkom's complaints regarding the Rain/Vodacom roaming agreement,[140] and Telkom's complaints regarding consultation timelines.[141]

109. That ICASA provided sufficient time for consultation is borne out by the fact that ICASA received ten sets of written submissions on the first IM and 17 sets of written submissions on the second IM. Of these 17 sets of submissions, only Telkom[142] and the South African Communications Forum[143] complained about the timelines ICASA had set.

(d) The argument that the process is unfair because ICASA did not engage with Telkom's representations regarding the roaming arrangements

110. Telkom argues that the process is unfair because ICASA did not engage with its submissions regarding the roaming arrangements.[144]

111. As a matter of fact, this is incorrect. ICASA did engage with these representations, in detail, in the reasons document.[145] Telkom's complaint appears to be that ICASA did not agree with its submissions. But Telkom merely has the right to be heard – not for its views to prevail.[146]

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[139] Telkom's submissions on the first IM pp 005-400 – 415 paras 174 – 210.

[140] Telkom's submissions on the first IM pp 005-415 – 438 paras 211 – 291.

[141] Telkom's submissions on the first IM pp 005-355 – 356 paras 21 – 28.

[142] Telkom's submissions on the first IM pp 005-355 – 356 paras 21 – 28.

[143] SACF's submissions pp 005-897 – 900 paras 17 – 25.

[144] Telkom HoA para 146.

[145] Reasons document p 003-387 paras 7.9 – 7.12 and pp 003-391 – 394 paras 7.34 – 7.45.

[146] *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC) para 50.

(e) The argument that ICASA did not have enough time to consider the representations it received

112. Finally, Telkom argues that the process is unfair because the *'truncated'* timelines did not give ICASA time to consider the submissions properly.[147]

113. Telkom is incorrect:

113.1. ICASA denies Telkom's allegation that it did not properly consider the representations due to time pressures.[148] Under *Plascon-Evans*, ICASA's version must be preferred.

113.2. ICASA's version is at least plausible:

113.2.1. First, ICASA put in place processes to ensure that it could consider the representations in the limited time permitted. For both rounds of written submissions, each member of the Spectrum Committee was tasked with analysing and summarising the representations received. Longer representations (like Telkom's) were split up and divided between more than one committee member.[149] This is permissible. A decisionmaker is permitted rely on summaries of representations if the nature of the decision demands it.[150]

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[147] Telkom HoA para 151.

[148] ICASA Part B AA p 004-914 para 137; denying Telkom Part B FA p004-36 para 30.

[149] Rule-53 record p 005-1118 and p 005-1131.

[150] *Esau* above n 133 para 105.

113.2.2. Second, the reasons document shows that ICASA considered the representations it received. The document deals with representations received thematically: in each section, ICASA first summarises the representations received, and then sets out its responses.[151]

IX. RELIEF

114. The 2021 ITA is not unlawful. The application falls to be dismissed with costs.

(a) Even if the ITA is unlawful, it should not be reviewed and set aside

115. But even if it is assumed that the 2021 ITA is somehow unlawful, it should not be reviewed and set aside. A court may decline to set aside an invalid administrative act if the interests of justice so demand.[152] Factors our courts have considered relevant include the interest in administrative finality, questions of fault and fairness, the undesirability of disrupting an important public service, and the effect that setting aside would have on the public purse.[153]

116. In this case:

116.1. It is common-cause that the permanent assignment of the subject spectrum is urgently needed and that it is long overdue.[154] Setting the

[151] See sections 3 – 19 of the reasons document pp 003-364 – 453.

[152] *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] ZASCA 90; 2008 (2) SA 638 (SCA) paras 28 – 30.

[153] See Hoexter & Penfold above n 35 pp 774 – 775 and the cases there cited.

[154] See paragraphs 22 and 23 above.

ITA aside would delay the assignment of the spectrum by months or years.

116.2. The 2022 auction raised R14.4 billion for the national fiscus.[155] If the auction is set aside, government would lose this money – and there is no guarantee that the next auction would raise the same amount.

116.3. Much of the subject spectrum is currently provisionally licensed to MNOs as part of the temporary COVID-19 disaster regime.[156] But this provisional regime is slated to end on the earlier of 30 June 2022 or three months after the end of the COVID-19 state of disaster. There is an urgent need for this to be permanently licensed to ensure download speeds and connection quality for millions of South Africans.[157]

116.4. If Telkom succeeds on lawfulness, it is likely to be on a technicality. ICASA has made a reasonable effort to balance the interests of different players in the industry and the public interest, and has run an auction which all MNOs (except Telkom) are willing to live with. No party is at fault.

116.5. Ultimately, no-one but Telkom wants the auction to be set aside. It is not in dispute that the industry desperately needs the spectrum to be permanently assigned.

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[155] Rain supplementary affidavit para 18.

[156] Rain Part A AA pp 003-1399 – 1401 paras 34 – 43.

[157] Rain Part B AA p 004-107 para 71.3.

(b) Telkom's structural relief is inappropriate

117. In addition to an order reviewing and setting aside the 2021 ITA and the 2022 auction, Telkom seeks an order in which this Court will supervise ICASA through a structural interdict.[158]

118. But there is no case for such an interdict. The Constitutional Court has held that a structural interdict is *'interventionist'* relief.[159] It is one that this Court should be cautious of granting.

119. Courts generally grant structural relief when government functionaries have repeatedly or wilfully failed to comply with their obligations.[160] But here, no court has definitively found that ICASA has acted unlawfully in the spectrum-licensing process. The Sutherland and Baqwa judgments concerned interim interdicts and did not pronounce finally on the lawfulness of the relevant ITA. The 2016 and 2020 ITAs were set aside by agreement, and ICASA did not concede that there was anything unlawful about either of them.[161]

120. In any event, much of the structural relief Telkom seeks would require ICASA to do things it has already done:

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[158] Notice of motion pp 003-874 – 876 prayers 2 – 2.5.4.

[159] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* [2016] ZACC 20; 2016 (10) BCLR 1308 (CC) para 27.

[160] See, for example, *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC) para 57, where —

> *'the problem to be addressed [was] the demonstrated inability of SASSA to get its own affairs in order, in relation to the performance of the contract, a competitive bidding process and becoming able to make payment of grants under its own steam'*.

[161] Rain Part B AA pp 004-107 – 108 paras 73 – 73.4.

120.1. Telkom seeks an order requiring ICASA to consult the public on options to assign spectrum other than by way of action.[162] ICASA has already done this. In the consultation process for the 2021 ITA, Telkom argued that an auction was not appropriate.[163] ICASA considered these submissions and rejected them.[164]

120.2. Telkom seeks an order requiring ICASA to publish a draft ITA and to invite comments thereon, prior to publishing a final ITA.[165] But the second IM contained a draft ITA, and ICASA invited comments on it.[166]

120.3. Telkom asks that this Court require ICASA to *'consider remedies to address the impact of the non-availability of sub-1GHz on competition'*.[167] But ICASA did exactly this by permitting successful bidders for sub-1GHz spectrum to pay auction and licence fees on a *pro rata* basis as that spectrum becomes available.

120.4. Finally, Telkom asks in its founding affidavit (but not in its notice of motion) that ICASA be required to consult with the Competition Commission.[168] But ICASA received submissions from the Competition Commission in setting up the 2021 ITA.[169]

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[162] Notice of motion p 003-875 prayer 2.1.

[163] Telkom submissions pp 005-359 – 379 paras 39 – 108.

[164] Reasons document p 003-383 paras 6.42 – 6.42.2.3.

[165] Notice of motion p 003-875 prayers 2.3 and 2.4.

[166] See paragraph 101.4 above.

[167] Notice of motion pp 003-875 – 876 prayers 2.5 – 2.5.4.

[168] Telkom FA pp 003-133 – 134 paras 319.2 – 319.4.

[169] The Competition Commission's submissions are at pp 005-703 – 709.

X. CONCLUSION AND COSTS

121. Telkom has attempted to delay the permanent assignment of IMT spectrum – something it admits is in the public interest – to protect its commercial interests. Its application should be dismissed.

122. Telkom claims the protection of the *Biowatch* rule[170] on the basis that it is attempting to vindicate its section-33 right to just administrative action (along with other rights).[171] But the *Biowatch* rule does not enable *'risk-free constitutional litigation'*. For the rule to apply, the case should raise *'genuine, substantive, constitutional considerations'*.[172] Telkom does not do so. Its case is a parade of misguided and technical arguments aimed at protecting its privileged commercial position at the public's expense.

123. Telkom claims that the respondents other than ICASA should bear their own costs regardless of the result, because *'Telkom sought no relief against any of them'*.[173] This is a preposterous argument. Telkom's relief directly affects the interests of the MNO respondents in respect of the spectrum they have won at the 2022 auction. It was entirely reasonable of them to oppose.

124. Costs should therefore follow the result. Rain is in this Court's hands as to whether, in the event that the application is dismissed, costs should be ordered against Telkom alone; or against Telkom and the two *'quasi-applicants'* (Mr Hjul

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[170] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC).

[171] Telkom HoA paras 260 – 267.

[172] See *Bo-Kaap Civic and Ratepayers Association v City of Cape Town* [2020] ZASCA 15; [2020] 2 All SA 330 (SCA) para 86.

[173] Telkom HoA para 267.

and the ICT SMME Chamber), given the latter's active participation in this litigation and their open support of Telkom's position.

125. Telkom claims the costs of three counsel.[174] We agree that a three-counsel costs order is appropriate, given the complexity of the matter, the length of the record, the public interest, and the urgency with which Part A was brought.

STEVEN BUDLENDER SC
PIET OLIVIER
LERATO MOLETE

Rain's counsel

Chambers, Sandton and Cape Town
Friday, 25 March 2022

[174] Telkom HoA para 269.

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1. Electronic Communications Act 36 of 2005
2. Independent Communications Authority of South Africa Act 13 of 2000
3. Promotion of Administrative Justice Act 3 of 2000
4. Radio Frequency Spectrum Regulations, 2015 GN 279 *GG* 38641 of 30 March 2015

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5. *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* [2014] ZACC 36; 2015 (3) BCLR 268 (CC)
6. *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC)
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11. *MEC for Environmental Affairs and Development Planning v Clairison's CC* [2013] ZASCA 82; 2013 (6) SA 235 (SCA)
12. *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC)
13. *Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa* [2016] ZAGPPHC 883
14. *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC)

15. *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* [2016] ZACC 20; 2016 (10) BCLR 1308 (CC)
16. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)
17. *Telkom SA SOC Ltd v Independent Communications Authority of South Africa* [2021] ZAGPPHC 120

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18. Hoexter & Penfold *Administrative Law in South Africa* 3 ed (2021)