IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 116/2022

In the matter between:

TELKOM SA SOC LIMITED	Applicant
and	
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	First Respondent
CHAIRPERSON: INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Second Respondent
MINISTER OF 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 AFRICA BROADCASTING CORPORATION	

LIMITED	Eleventh Respondent
NATIONAL ASSOCIATION OF BROADCASTERS	Twelfth Respondent
COMMUNITY INVESTMENT VENTURES HOLDINGS (PTY) LTD	Thirteenth Respondent
e.tv (PTY) LIMITED	Fourteenth Respondent
SOUTH AFRICAN RADIO ASTRONOMY OBSERVATORY	Fifteenth Respondent
PAUL HJUL	Sixteenth Respondent
ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS	Seventeenth Respondent
ICT SMME 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

TELKOM'S HEADS OF ARGUMENT

TABLE OF CONTENTS

THE ESSENCE OF THIS APPLICATION

1 On 10 December 2021, the first respondent ("**ICASA**") issued the invitation to apply ("**ITA**") inviting applications for radio frequency spectrum licences for International Mobile Telecommunications ("**IMT**") Spectrum bands in the ranges of 703 – 709 MHz ("**IMT700**"), 790 – 862 MHz ("**IMT800**"), 2500 – 2690 MHz ("**IMT2600**") and 3400 – 3600 MHz ("**IMT3500**") for purposes of providing national broadband wireless access services in terms of regulations 6 and 7 of the Radio Frequency Spectrum Regulations 2015, read with section 31(3) of the Electronic Communications Act 36 of 2005 ("**ECA**").[1] We will refer to this ITA as the "**2021 Auction ITA**". IMT700 and IMT800 will jointly be referred to as "**sub 1GHz spectrum**".

2 Telkom contends that the 2021 Auction ITA is unlawful and irregular. Consequently, Telkom seeks an order reviewing and setting aside the 2021 Auction ITA.[2]

3 ICASA also decided to defer the licensing process for Individual Electronic Communications Network Services and Radio Frequency Spectrum Licences for the Wireless Open Access Network ("**WOAN**") to an undisclosed later date. For convenience, we refer to this second decision as the decision to defer the licensing for the WOAN.

---

1 CaseLines 003-140, para 1.

2 Telkom' NOM CaseLines 003-878, prayer 1.1.

4 Telkom contends that the decision to defer licensing of the WOAN is also unlawful and irregular and seeks an order reviewing and setting aside this decision.[3]

5 In sum, Telkom's grounds of review are:

5.1 ICASA was influenced by a material error of law in that it misunderstood the effect of the order that this Court granted on 15 September 2021 ("**September 2021 Court Order**"), reviewing and setting aside the invitation to apply and participate in the licensing process for IMT radio frequency spectrum in respect of the provision of mobile broadband wireless access services for urban and rural areas using the complimentary bands IMT700, IMT800, IMT2600, and IMT3500 in December 2020 ("**2020 Auction ITA**").

5.2 ICASA engaged in an unfair process thereby rendering the 2021 Auction ITA unlawful and reviewable.

5.3 The 2021 Auction ITA is in several material respects reviewable for being irrational or arbitrary, including for the following reasons:

5.3.1 designing the 2021 Auction ITA in a manner that fails to promote competition, but instead entrenches the anti-competitive market structure in the mobile market;

5.3.2 the failure to appreciate the impact of the non-availability of sub 1GHz spectrum included in the auction, and proceeding with

[3] Telkom' NOM CaseLines 003-878, prayer 1.2.

the auction process when the sub 1GHz spectrum is not yet fully available for use by the party who may be successful in the auction;

5.3.3 an irrational division of spectrum between that reserved for the WOAN and that which is earmarked for the auction; and

5.3.4 The decision to defer the licensing of the WOAN and the assignment of spectrum to the WOAN is not rationally connected to the purpose of the 2021 Auction ITA and undermines the objects of the 2021 Auction ITA as currently designed.

6 In what follows, we expand on each of Telkom's grounds for review and demonstrate that ICASA's decisions were unlawful and should be set aside. Telkom will also demonstrate that a supervisory order is justified in the circumstances of this case. ICASA has demonstrated an inability or unwillingness to comply with its constitutional obligations. ICASA's failure to act lawfully is prejudicial to the mobile network operators, the consumers of mobile broadband services and the South African economy.

7 The structure of these heads of argument will follow the scheme of the table of contents.

WHAT IS SPECTRUM?

8 Wireless signals, including those used in mobile networks for the provision of voice or data services, travel over spectrum; it is a medium through which electronic communications signals are transported wirelessly – through the air without a physical medium.[4] The radio frequency spectrum consists of a range of radio frequencies which are assigned to the mobile industry and various other sectors and, amongst a myriad of things, enable the making of calls and use of the internet on mobile devices.

9 Spectrum is an essential input for providing mobile voice and data services. It is internationally recognised that spectrum is a scarce and valuable national resource.[5] There is only a finite portion available for use at one time.[6] The ECA defines "radio frequency spectrum" as "the portion of electromagnetic spectrum used as a transmission medium for electronic communications".

10 Spectrum is allocated to and shared between various wireless services, including mobile and broadcasting services. Different portions of the spectrum are called "frequency bands".[7] These frequency bands are allocated to different services such as mobile and broadcasting services.[8] The assignment of additional blocks of frequencies means mobile operators can connect more people and offer faster download and/or upload speeds.

---

4 Telkom's FA Annexure "FA2" CaseLines 003-233, para 7.

5 Telkom's FA Annexure "FA2" CaseLines 003-243, para 37.

6 Telkom's FA Annexure "FA2" CaseLines 003-232, paras 4 to 7.

7 Telkom's FA Annexure "FA2" CaseLines 003-233, para 8.

8 Telkom's FA Annexure "FA2" CaseLines 003-233, para 8.

11 The effective management of spectrum is pivotal for allowing mobile operators to provide quality services. Spectrum also allows operators to expand their networks, or provide new and additional services, without having to invest as extensively in infrastructure.[9] Spectrum impacts on the quality of service and throughput speeds that a mobile operator can provide to its customers. The best throughput speeds and quality of service attract the most customers. Thus, access to additional spectrum impacts on the ability of mobile operators to compete against each other. Also, access to sub 1 GHz impacts on network coverage and in-building penetration and access to such spectrum is essential for effective competition.

12 International Mobile Telecommunications, which we have defined as "IMT", are mobile systems that provide access to a wide range of telecommunication services, such as advanced mobile services, supported by mobile and fixed networks.[10] Suitable frequency bands are assigned to the mobile service and identified for IMT.

13 Only a limited number of frequency bands that are allocated to mobile services are also identified for IMT. ICASA captured the allocations and IMT identifications in the National Radio Frequency Plan. The typical frequency bands identified for IMT in South Africa are IMT700, IMT800, IMT2100, IMT2300, IMT2600 and IMT3500.[11]

---

9 Telkom's FA Annexure "FA2" CaseLines 003-252, para 68.

10 Telkom's FA Annexure "FA2" CaseLines 003-233, para 9.

11 Telkom's FA Annexure "FA2" CaseLines 003-238, para 25.

14 The 700 MHz, 800 MHz, 2600 MHz and 3500 MHz bands are internationally regarded as critical for deploying mobile technologies for providing broadband services, amongst other services.[12] The 2021 Auction ITA, which Telkom seeks to be review and set aside in this application, includes the IMT700, IMT800, IMT2600 and IMT3500 bands.

15 The IMT700 and IMT800 bands are generally used to achieve better network coverage and in-building penetration. Radio transmissions on these bands generally travel further and tend to penetrate buildings and other obstacles better than transmissions on other frequencies above 1 GHz.[13] Fewer base stations are required to cover a particular geographical area with IMT700 and IMT800 spectrum compared to IMT2600 spectrum.[14] This has a substantial impact on an operator's capital requirements of building a network.

16 The 700 MHz and 800 MHz bands are well-suited for rolling out wireless networks in rural areas and for indoor signal penetration (including urban areas), whereas the 2600 MHz band is better suited for urban environments where capacity, rather than coverage, is more of a priority.[15]

17 ICASA grants licences for using the frequency bands. A spectrum licence enables a licensee to emit spectrum, which is necessary to build a mobile voice and data network i.e. provide a service. A substantial amount of capital,

---

12 Telkom's FA Annexure "FA2" CaseLines 003-247, para 51.

13 Telkom's FA Annexure "FA2" CaseLines 003-257, para 84.

14 Telkom's FA Annexure "FA2" CaseLines 003-258, para 88.

15 Telkom's FA Annexure "FA2" CaseLines 003-258, para 91.

access to sites for deployment of base stations and deployment of associated network equipment is required in addition to the spectrum.[16]

18 When different operators use the same frequency at the same time and place, interference occurs. In its Radio Regulations (edition of 2020), the ITU defines "interference" in the context of frequency sharing between radiocommunication services (e.g. sharing between broadcasting and mobile services) as follows:

> *"1.166 interference: The effect of unwanted energy due to one or a combination of emissions, radiations, or inductions upon reception in a radiocommunication system, manifested by any performance degradation, misinterpretation, or loss of information which could be extracted in the absence of such unwanted energy."*

19 ICASA adopted the same definition in the National Table of Frequency Allocations, 2018.

20 The level (or quantity) of interference between transmitting and receiving radiocommunication systems is carefully managed through proper radio frequency planning through a process known as frequency coordination. The International Telecommunication Union (ITU), a United Nations specialised agency for information and communication technologies, therefore also describe definitions such as "permissible" interference, "accepted" interference and "harmful" interference.

[16] Telkom's FA Annexure "FA2" CaseLines 003-253, para 71.

> *"1.169 harmful interference: Interference which endangers the functioning of a radio navigation service or of other safety services or seriously degrades, obstructs, or repeatedly interrupts a radiocommunication service operating in accordance with Radio Regulations."*

21 "Radio Interference" is when a radio signal other than that from the intended source, interferes with the reception of the wanted service. Interference occurs when unwanted radio frequency signals disrupt the use of, for example, a television, radio or mobile phone service. Interference may prevent reception altogether, may cause only a temporary loss of a signal, or may affect the quality of the service.

22 As a result of the risk of interference, frequency bands cannot be arbitrarily shared amongst several operators. Before frequency bands can be licensed in South Africa for mobile/IMT use, the bands must be available. So, when frequency bands are licensed to certain operators, those operators have to be migrated out of that frequency band before the bands can be meaningfully licensed to other operators.

23 Once a frequency band is identified for IMT and where applicable the necessary migration is completed, the frequency band is then available to be licensed for IMT services. The licensing may, and in certain instances must, be done through an invitation to apply (an ITA). The ITA process could include an auction, a beauty contest (also known as a comparative tender) or any other suitable licensing method that ICASA deems appropriate.

How is spectrum regulated?

24 Internationally, the use of the radio frequency spectrum is regulated by the ITU. The allocation of frequency bands to different services such as mobile (including IMT) is done by the ITU through a World Radiocommunication Conference ("**WRC**"). WRCs are held every four years. Frequency allocations are contained in the ITU Radio Regulations, which is an intergovernmental treaty. The Radio Regulations are ratified by South Africa.

25 IMT spectrum harmonisation starts with the ITU identifying a specific frequency band for mobile/IMT, which signals to regulators and operators around the globe that the frequency band has been earmarked for IMT.

26 Only a limited number of frequency bands that are allocated to the mobile services are also identified (by the ITU) for IMT. These mobile allocations and IMT identifications are captured by ICASA in the National Radio Frequency Plan. The latest Radio Frequency Plan was prescribed on 25 May 2018 (Government Gazette 41650).

27 The Global System for Mobile ("**GSM**") standard was developed by European Telecommunication Standards Institute and is known as second-generation ("**2G**") digital cellular network for mobile phones. GSM replaced first-generation (1G) analogue cellular networks introduced in the 1980's. A C-450 (1G) network (operating in the 450 MHz band) was also deployed in South Africa and was an analogue voice system.

28 The primary global technology used today for the provision of voice and data services is based on the 3rd Generation Partnership Project ("**3GPP**") family suite of standards (apart from GSM that remains the key global voice system). The 3GPP technologies form part of the IMT standards adopted by the ITU and include, amongst others, UMTS (3G), LTE Advance (4G) and IMT-2020 (5G).

Types of spectrum

29 Whereas the spectrum up to 3000 MHz is regulated (and could be licensed) by ICASA for various wireless services, in South Africa the usable spectrum is limited to the bands below approximately 90 MHz for communication purposes or planned for such use. This limit is mainly due to the poor propagation characteristics of high frequency spectrum and technology constraints. Only some of this frequency range is currently available for mobile/IMT, as indicated above.

30 Spectrum used for mobile/IMT services can be broadly divided between "coverage" and "capacity" spectrum. The ideal use of IMT frequency bands is impacted by the propagation of signals with lower frequencies propagating further and deeper into buildings compared to higher frequencies.

31 Coverage spectrum is generally considered as bands below 1 GHz whereas those above 1 GHz are considered as capacity spectrum. In the lower frequency bands, there are less bandwidth available whereas higher frequencies allow for large bandwidths but over smaller areas. The 1800 MHz

band, traditionally considered to be “capacity” band is now considered by some as a coverage layer, including by Telkom which does not have access to any band below 1800 MHz. The use of the 1800 MHz as coverage layer however does not replace the need for access to sub 1 GHz spectrum.

32 Less base stations are required to cover a certain area with, for example, 700 MHz compared with 2100 MHz, which has a substantial impact on the capital requirements of building a network, as illustrated by Telkom.[17]

LEGAL FRAMEWORK

33 ICASA was established under chapter 9 of the Constitution of the Republic of South Africa. Section 192 of the Constitution mandates Parliament to establish an independent regulatory institution which is required to provide for the regulation of broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society. Two statutes regulate the usage of radio frequency: the Independent Communications Authority Act 13 of 2000 (“**ICASA Act**”) and the ECA.

ICASA Act

34 Section 2 provides that duties imposed on ICASA include to regulate electronic communications in the public interest.

[17] Telkom’s FA Annexure “FA2” CaseLines 003-257, paragraph 81

35 In terms of section 4(3)(c), ICASA "must control, plan, administer and manage the use and licensing of the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic".

Electronic Communications Act 2005

36 ICASA's mandate, in relation to competition in the market, is stipulated in section 2 of the ECA. In relevant part, section 2 provides:

> "*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—*
>
> *. . .*
>
> *(c) promote the universal provision of electronic communications networks and electronic communications services and connectivity for all;*
>
> *(d) encourage investment, including strategic infrastructure investment, and innovation in the communications sector;*
>
> *(e) ensure efficient use of the radio frequency spectrum;*
>
> *(f) promote competition within the ICT sector;*
>
> *(g) promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services;*
>
> *. . .*
>
> *(m) ensure the provision of a variety of quality electronic communications services at reasonable prices;*
>
> *(n) promote the interests of consumers with regard to the price, quality and the variety of electronic communications services*;
>
> *. . .*"

37 Section 30(1) of the ECA provides that ICASA "controls, plans, administers and manages the use and licensing of the radio frequency spectrum except as provided for in section 34".

38 Section 31(3) of the ECA states:

> "*The Authority may, taking into account the objects of the Act, prescribe procedures and criteria for—*
>
> *(a) radio frequency spectrum licences in instances where there is insufficient spectrum available to accommodate demand;*
>
> *(b) the amendment, transfer, transfer of control, renewal, suspension, cancellation and withdrawal of radio frequency spectrum licences; and*
>
> *(c) permission to assign, cede, share or in any way transfer a radio frequency spectrum licence, or assign, cede or transfer control of a radio frequency spectrum licence as contemplated in subsection (2A).*"

39 In terms of section 34(3) of the ECA,

> *"The Authority must assign radio frequencies consistent with the national radio frequency plan for the use of radio frequency spectrum by license holders and other services that may be provided pursuant to a license exemption.*"

40 ICASA plays a complementary or concurrent function with the Competition Commission in respect of competition matters within the electronic communication industry (Chapter 10).

41 Section 67(4) of the ECA specifically provides that ICASA "must" prescribe regulations with a view of defining the relevant markets and market segments, as applicable, and with a view to imposing pro-competitive conditions upon licensees having significant market power.

42 In terms of section 67(11), ICASA may consult with the Competition Commission on any issue.

2015 Spectrum Regulations

43 ICASA's general regulation-making power is contained in section 4(1) of the ECA.

44 ICASA promulgated the Radio Frequency Spectrum Regulations, 2015 (2015 Spectrum Regulations) by General Notice 279 published in the Government Gazette of 30 March 2015. Regulation 2(1)(a) states that the first purpose of the 2015 Spectrum Regulations is to establish the framework through which ICASA may allocate and assign radio frequency spectrum.

45 In terms of regulation 7(1), ICASA "will at all times publish an ITA (invitation to apply) where a radio frequency spectrum license will be awarded/granted on a competitive basis and where it determines that there is insufficient spectrum available to accommodate demand in terms of section 31(3)(a) of the [ECA]".

46 Although the high-demand spectrum licensing process commenced in 2006, the relevant period for purposes hereof commenced in 2010.

The 2010 Frequency Spectrum Policy

47 In April 2010, the then Minister of Communications published a national frequency spectrum policy[18] ("**2010 Policy**") in terms of section 3(1) of the ECA.

48 The 2010 Policy stipulated, among other things, that:

48.1 management of the radio frequency spectrum is subject to Government authority and spectrum must be managed efficiently so as to be of greatest benefit to the entire population; (Clause 2.1.2)

48.2 spectrum management takes place within a regulatory framework comprised of policies, legislation, regulations and procedures; (Clause 2.1.7)

48.3 it is not in the public interest for South Africa to adopt the international trend towards economic based spectrum management in all cases as this will adversely affect Small, Medium and Micro-sized Enterprise (SMMEs) and prospective new entrants to the information and communication technology sector (ICT); (Clause 8.3)

48.4 the policy will be implemented through the development of a radio frequency spectrum strategy; (Clause 12.1)

[18] Policies and Policy Directions Drafted in terms of section 3(1) of the Electronic Communications Act 36 of 2005 (Government Notice No. 306 published in Government Gazette No. 33116 dated 16 April 2010).

48.5 the principles in the policy will be supplemented by policy directions issued by the Minister on specific issues from time to time. (Clause 12.2)

The National Broadband Policy

49 On 13 July 2010, the then Minister of Communications issued a National Broadband Policy[19] ("**Broadband Policy**") focussing on increasing the accessibility, availability, affordability and usage of broadband services throughout South Africa. The Broadband Policy recognises that radio frequency spectrum is a scarce national resource and that the assignment of same shall be guided by the developmental objectives in the public interest. It further records that a broadband inter-governmental implementation committee incorporating all spheres of government will be established which, in facilitating the implementation of the Broadband Policy, through an implementation plan, will ensure that short and long term targets are achieved. Amongst the short-term targets stated in the Broadband Policy are the following:

49.1 the Broadband Inter-Governmental Implementation Committee will be tasked to conduct a survey on the current status of Broadband in South Africa as well as the relevant market players in the industry; and

[19] Policies and Policy Directions Drafted in terms of section 3(1) of the Electronic Communications Act 36 of 2005 (Government Notice No. 617 published in Government Gazette No. 33363 dated 13 July 2010).

49.2 the Broadband Policy shall be reviewed from time to time as determined by the Minister of Communications.

50 On 14 December 2011, the erstwhile Minister published a statutory notice of her intention to issue policy directions to ICASA in terms of section 3(2) of the ECA for the exploitation of the 2600 MHz radio frequency spectrum and the 800 MHz Digital Dividend Spectrum. In that notice, the Minister invited interested parties to make representations on the contents of draft policy directions ("**draft Policy Directions**") which accompanied the statutory notice. Amongst the draft Policy Directions was a direction to consider that the 800 MHz as allocated by the WRC 2007 (WRC-07) for Mobile except aeronautical mobile including IMT applications, is declared as the first phase of the digital dividend.

51 Although the draft Policy Directions were never finalised into binding policy directions, the draft demonstrates an intention to give effect to the 2010 Policy or, at least, to supplement its implementation through relevant policy directions issued in terms of the ECA. The stated objective of the draft Policy Directions was, amongst others, to '[f]acilitate the introduction of new national and rural providers of electronic communications, including broadband'.[20]

52 Furthermore, the Minister directed ICASA, amongst other things, to -[21]

[20] Draft Policy Directions, para 1.1.1.

[21] Draft Policy Directions, para 2.

52.1 Facilitate the licensing of spectrum in 800 MHz on a wholesale open access network, due to limited bandwidth in this band;

52.2 Facilitate the licensing in 2.6 GHz to multiple operators, due to the amount of bandwidth available in this band. In this regard, ICASA should ensure that a portion of this frequency band is set aside for new licensees; and

52.3 Ensure that auction would be considered only as a last resort, where necessary, in circumstances where there are competing applications who meet the stated policy objects.

53 What may be gleaned from the draft Policy Directions is that the promotion of competition in the form of the introduction of new entrants and the setting aside for a WOAN was part of the central considerations in the policy that was proposed to underpin the licensing of spectrum at the time.

54 On 15 December 2011, ICASA published the Draft Spectrum Assignment Plan for the combined licensing of the 800 MHz and the 2.6 GHz bands ("**2011 Draft Assignment Plan**") and a draft ITA for frequency spectrum licences for the designated bands ("**2011 Draft ITA**"). In these two draft regulatory instruments, ICASA considered and sought to give effect to the draft Policy Directions. The 2010 Policy provided the foundation for ICASA's approach to the licensing of spectrum in the affected bands.[22]

[22] Draft Assignment Plan, para 4.1.

55 At the time, the 2011 Draft Assignment Plan observed that:

> "*the [2010] policy strives to facilitate affordable, accessible and universal access to infrastructure to citizens, Businesses, communities and the three spheres of government and to stimulate the usage of broadband services to promote economic development and growth acting as an enabler for further social benefit.*"[23]

56 The 2011 Draft Assignment Plan recorded that "the mobile penetration [was] expected to be more than 104% in 2011" and that it could be concluded from this that "broadband services for all citizens" in South Africa could be achieved mainly through mobile telecommunications technologies.[24]

57 ICASA proposed to introduce the WOAN and a so-called "managed spectrum park" to encourage the sharing of spectrum.[25] The 2011 Draft Assignment Plan defined a WOAN as a sharing model where a licensed entity allows other entities to offer services on its network.[26] The WOAN would not offer retail services. A managed spectrum park refers to a 'a sharing model where a number of entities apply to participate in sharing a block of common spectrum on a self-managed basis and according to some regulations of agreed procedures'.[27]

---

[23] Draft Assignment Plan, para 4.1.

[24] Draft Assignment Plan, para 4.5.

[25] Draft Assignment Plan, para 5.1.

[26] Draft Assignment Plan, para 5.3.

[27] Draft Assignment Plan, para 5.8.

58 ICASA also proposed that any entity that is licensed for both 800 MHz and 2.6GHz had to build an open access network.[28] It also proposed to reserve some of the unassigned spectrum for licensees who had no access to spectrum at all.[29] It is on this basis that ICASA proposed the 2011 Draft ITA for public comment.

59 In a nutshell, the 2011 Draft ITA proposed three packages combining 800MHz and 2.6GHz.[30] The first package was earmarked for a licensed entity that wished to operate a WOAN. The second and third packages were reserved for licensees who did not have high demand spectrum in any of the designated bands. The designated bands were 900 MHz, 1800 MHz, 2100 MHz, and 2600 MHz. ICASA proposed to follow a comparative evaluation process to adjudicate the bids instead of an auction.

60 The 2011 Draft ITA was intended to promote the sharing of spectrum and the enablement of entities that did not have spectrum in any of the designated bands. If the unassigned HDS was licensed in the manner proposed in the 2011 Draft ITA and the 2011 Draft Assignment Plan, it is not inconceivable that it may have had an impact on the structure of the mobile market and its development.

61 ICASA invited interested parties to comment on the terms of the draft application for spectrum licences. The invitation was not finalised, and ICASA

---

28 Draft Assignment Plan, para 5.7.

29 Draft Assignment Plan, para 5.9.

30 2011 Draft ITA, para 1.26.

granted no spectrum licences in the designated frequency bands in terms of that draft.

62 Without any explanation, ICASA withdrew the 2011 draft ITA through a withdrawal notice published in Government Notice No. 894, Government Gazette 39179 of 8 September 2015.

63 During 2012, ICASA commenced a process in terms of which it sought to review and update the National Radio Frequency Plan ("**Frequency Plan**") to align it with the developments on spectrum frequency assignments internationally and domestically. The Frequency Plan sought to assign the 700 MHz and 800 MHz frequency bands to broadcasting and mobile services on a co-primary basis, and this has not yet been amended in accordance with the mandatory procedure prescribed in section 34 of the ECA.

64 Following a review process, ICASA sent the finalised Frequency Plan to the Minister of Communications for the Minister's approval. The Minister approved the Frequency Plan in terms of section 34(10) of the ECA ("**the 2018 Frequency Plan**"). The 2018 Frequency Plan also assigns the 700 MHz and 800 MHz frequency bands to broadcasting and mobile services on a co-primary basis.

65 On 27 October 2013, the then Director-General of the Department advised the chief executive officer of ICASA of a comprehensive review of the ICT policy initiated by the Minister pursuant to the National Development Plan ("**NDP**"). The Director-General's letter followed an injunction in the NDP that because a

comprehensive review had not been done in 1996, there was need for a new policy framework to realise the vision of a connected society.[31] This led to a lengthy review of policies that govern the ICT sector and public consultations with interested parties and led to the promulgation of the Integrated ICT Policy White Paper of 2016 ("**2016 Policy**").

66 Notably, insofar as the licensing of the unassigned radio frequency spectrum is concerned, the NDP observes "[s]pectrum policy should favour competition, but incumbents should not be excluded from gaining access to bands needed for expansion or to apply new technologies".[32] Furthermore, the NDP states that spectrum licences should be technology neutral so that they can be adapted to meet rapidly changing technological developments without high regulatory costs.[33]

67 The NDP is an overarching policy direction of government. It defines a desired destination and identifies the role different sectors of society must play in reaching that goal.

The SA Connect Policy

68 On 6 December 2013, the then Minister of Communications published the national broadband policy and associated strategy officially known as "South Africa Connect: Creating Opportunities, Ensuring Inclusion: South Africa

31 National Development Plan, at 191.

32 National Development Plan, at 193.

33 National Development Plan, at 193

Broadband Policy" ("**SA Connect**") in Government Notice No. 953, Government Gazette No. 37119 of 6 December 2013.

69 The SA Connect policy identifies constraints in the broadband market, including the lack of effective competition, which must be removed. The SA Connect policy proposes to restructure the market, where necessary, and create an environment that is conducive to private and public investment and also improves the level of service-based competition.

70 The SA Connect policy was published to give expression to the national vision in the NDP. The primary feature of that vision is to create a widespread information communication system which will be broadly accessible, at affordable costs and quality that meet the expectations of citizens, to businesses in the private and public sector and institutions of government that provide public services.

The Green Paper

71 In January 2014, as part of the consultation process giving effect to the NDP, the then Minister of Communications published a Green Paper on an Integrated ICT Policy for the Republic of South Africa. The Green Paper was published as a comprehensive public consultative document on several national policy proposals described therein.

72 Interested parties made representations and comments on the Green Paper to the Minister. The Minister also conducted a consultation process for further discussion of and comments on the Green Paper.

73 The Green Paper, observed that in many parts of the world, operators were being licensed with spectrum to enable them to deliver LTE.[34] However, that:

> "*[t]o use new spectrum in a way that is technically efficient, competitive, and of maximum consumer benefit, especially when it comes to LTE on the sought-after 800 and 700 MHz bands, no more than three operators tend to be granted the rights to use new bands to offer competitive services. This leaves some without the possibility of differentiating themselves with new services. Those who are excluded from the market in these situations are then forced to launch new technologies through shared networks.*"[35]

74 By 2013, mobile telephony had achieved 136% penetration.[36] This evidence put beyond doubt that the majority of South Africans were dependent on the mobile sector for access to broadband services,[37] but it also showed that prices for mobile services were significantly higher in South Africa than in other markets.

75 The Green Paper canvassed open access regimes that emphasise efficient use of infrastructure by promoting sharing models. It observed that:

---

[34] Green Paper at 38.

[35] Green Paper at 38.

[36] Green Paper at 39.

[37] Green Paper at 39.

> "*[t]here is evidence that indicates that a predictable and technology neutral competitive environment premised on open access principles can deliver better results. Broadband Policy, advances arguments for open access principles that will enable competition at infrastructure and service levels while reducing infrastructure duplication and restrictive access to networks by competitors.*"[38]

76 This laid the basis for the concept of the WOAN in the 2016 ICT Policy.

77 One of the critical findings in the Green Paper that is relevant to this application is that:

> *'[n]otwithstanding attempts to improve competition, the South African communications market is one of the most concentrated in the world taking fourth position after Mexico, Norway and New Zealand'.*[39] *Insofar as the mobile sector is concerned, the Green Paper notes that '[w]hile the introduction of Cell C in 2002 was aimed at opening the mobile market, the operators who were established at the inception of the mobile market still dominate with significant market power'.*"[40]

78 Whilst the policy review was ongoing, ICASA published Radio Frequency Spectrum Regulations in March 2015. The purpose of the 2015 Radio Frequency Spectrum Regulations was, among others, to provide for procedures and criteria for awarding radio frequency spectrum licences for competing applications or instances where there is insufficient spectrum available to accommodate demand.[41]

---

38 Green Paper at 42.

39 Green Paper at 40-41.

40 Green Paper at 40-41.

41 Government Gazette 38641, 30 March 2015.

79 Regulation 7 provides that ICASA will publish an invitation to apply where a radio frequency spectrum licence will be granted on a competitive basis and where it determines that there is insufficient spectrum available to accommodate demand in terms of section 31(3)(a) of the ECA.

80 Regulation 7 provides an overview of the expected content of an invitation to apply such as the application fee, qualification criteria, conditions for the disqualification of an applicant from the application process, the selection process and the evaluation criteria. It also provides that an invitation to apply ought to provide the licensing method that ICASA will use.

81 Regulation 7 also provides a general framework for the future licensing of high demand spectrum without specifying the actual procedures and criteria as required.

FACTUAL SYNOPSIS

82 The following facts are largely common cause.

The history of spectrum licensing in South Africa

83 ICASA has attempted the licensing of additional IMT spectrum on several occasions.

84 ICASA initiated the licensing of additional IMT spectrum in 2006 through a process of soliciting comments pertaining to the procedures and criteria for

licensing the 2600 MHz and 3500 MHz bands. Following consultation, ICASA published its decisions on this process on 17 June 2008 (Government Gazette 31150, Notice 748 of 2008).

85 ICASA decided that a two-step licensing process is most appropriate; pre-qualification followed by an auction to address both social and economic objectives. ICASA would use the licensing of these bands to promote competition and the empowerment of historically disadvantaged groups. These decisions will form the basis of the regulations to be developed in accordance with section 31(3) of the ECA.

86 Following further consultation on the reasons document, ICASA published its rationale for the licensing of high demand spectrum on 22 July 2009 (Government Gazette 32436). The promotion of effective competition and historically disadvantaged individuals were key considerations for ICASA.

87 ICASA prescribed regulations on procedures and criteria for the licensing of high demand spectrum (following further consultation) on 28 May 2010. On the same day, ICASA published two ITAs, namely for the 2600 MHz and 3500 MHz band. The available 3500 MHz spectrum were to be licenced (two licences) on district or metropolitan municipality level to provide regional competing broadband wireless access services. Four national licences were made available in the 2600 MHz band. These ITA's were withdrawn on 29 July 2009.

88 On 15 December 2011, ICASA published draft spectrum assignment plans and ITAs for the 2600 MHz and 800 MHz frequency bands. It is unknown why the 3500 MHz was removed from this process. In line with policy objectives, ICASA introduced wholesale open access and a managed spectrum park model. The managed spectrum park model is a sharing model where several entities share spectrum on a self-managed basis. Spectrum in these bands were offered as packages.

89 Only one package of 800 MHz/2600 MHz was available for existing IMT spectrum holders (i.e. those with access to 800 MHz, 900 MHz, 1800 MHz, 2100 MHz and 2600 MHz bands); the winner of this package had to provide services on a wholesale open access basis, which would promote retail competition. Two packages were set aside for licensees without access to IMT spectrum thereby introducing new players into the market. Set asides for Neotel, WBS and Sentech were also proposed to strengthen their participation in the market. These measures were aimed at introducing competition through the licencing of IMT spectrum. ICASA withdrew the ITAs previously issued for the 800MHz and 2.6 GHz on 10 September 2015 (Government Gazette 39192).

The 2016 ITA

90 On 13 September 2015, ICASA issued an Information Memorandum for comments related to the future licensing process for the IMT700, IMT800 and IMT2600. The submission date for comments was 16 October 2015. ICASA

subsequently extended the deadline for comments on the Information Memorandum to 30 October 2015.

91 On 15 July 2016, ICASA published an ITA for providing mobile broadband and wireless access services for urban and rural areas using the complimentary bands, IMT700, IMT800 and IMT2600. The 2016 ITA auction process was deferred on 12 February 2017.

92 On 2 September 2017, ICASA published the Second Draft Radio Frequency Spectrum Assignment Plan: Rules for Services operating the Frequency Band from 825 to 830 MHz and 870 to 875 MHz, for comment.

93 ICASA published the National Radio Frequency Plan for the 8.3 KHz to 3000 GHz bands on 25 May 2018.

94 On 18 August 2018, ICASA announced that public hearings about its Draft Radio Frequency Spectrum Assignment Plan would be held on 6 and 7 September 2018.

95 ICASA withdrew the 2016 ITA on 8 October 2018.

The 2020 ITAs

96 On 2 August 2019, ICASA issued a tender for the appointment of consultants to provide consultancy services to assist ICASA with the determination of fair

economic value of the IMT700, IMT800, IMT2300, IMT2600 and IMT3500 radio frequency spectrum and the drafting of the invitation to apply.

97 ICASA published the Information Memorandum setting out its plan for the upcoming process to licence the WOAN and assign high demand spectrum to industry on 1 November 2019.

98 On 2 October 2020, ICASA published the 2020 Auction ITA and the ITA for an individual electronic communication network service licence and radio frequency spectrum licence for the WOAN (the "WOAN ITA"). We refer to these as the "**2020 ITAs**". The Reasons Document setting out ICASA's motivations for the structure and content of the 2020 ITAs was published on 4 December 2020.

The 2020 judicial review application

99 Telkom launched an urgent application seeking to interdict the implementation of the 2020 ITAs and a simultaneous application to review and set aside the 2020 ITAs. e.tv (Pty) Ltd ("**e.tv**") applied to join Telkom's application as a second applicant. Then, on 27 January 2021, MTN launched a separate review application also seeking to review and set aside the 2020 Auction ITA.

100 Telkom's application, which e.tv joined as the second applicant, first sought an order interdicting ICASA from implementing the 2020 ITAs, pending the finalisation of the application to review and set aside the decisions to publish the 2020 ITAs.

101 The Telkom and MTN review applications, although not formally consolidated, were agreed to be heard together. But, before the applications were heard, ICASA consented to an order reviewing and setting aside the 2020 ITAs.

The 2021 Auction ITA

102 On 1 October 2021, ICASA published the notice regarding the Information Memorandum to advise the public on the process that ICASA intended to follow and consultation to be conducted in respect of the licensing for IMT spectrum for the provision of mobile broadband wireless access services for urban and rural areas using the complimentary bands IMT700, IMT800, IMT2600 and IMT3600, and I-ECNS and radio frequency spectrum licence for the purpose of operating a WOAN ("**First 2021 Information Memorandum**").[42]

103 ICASA received ten written representations on 2 November 2021.

104 On 16 November 2021, ICASA published the second Information Memorandum on the licensing process for IMT in respect of the provision of mobile broadband wireless access services for urban and rural areas using the complimentary bands IMT700, IMT800, IMT2600 and IMT3600, for public consultation ("**Second 2021 Information Memorandum**").[43]

105 ICASA received 17 written representations on 30 November 2021.

---

[42] CaseLines 005-14 to 005-31

[43] CaseLines 005-42 to 005-91.

106 On 10 December 2021, ICASA issued the 2021 Auction ITA.[44] On 31 January 2022, six applicants filed applications in response to the 2021 Auction ITA and all six qualified to proceed to the auction stage of the licensing process. The auction started on 8 March 2022.

THE LITIGATION HISTORY

107 This application should be determined in the context of preceding litigation about ICASA's previous attempts to license high demand spectrum through the different ITAs it has published since 2016. The history and context vividly demonstrate that ICASA's attempts to license the long awaited and much needed high demand spectrum have been plagued by various legal shortcomings. ICASA has repeatedly been found to have failed to act in terms of the applicable legal framework.

The Sutherland J judgment

108 The then Minister of Telecommunications and Postal Services ("**Minister of Telecommunications**") launched an application to review the 2016 Auction ITA. Telkom supported the Minister of Telecommunications' application.

109 The primary grounds of review were that (1) ICASA may not lawfully issue the 2016 ITA until it has considered the Minister of Telecommunications' policy, which was before the Cabinet at the time; (2) the 2016 ITA contradicted the

[44] CaseLines 005-144

2013 radio frequency plan; (3) the ITA failed to meet statutory obligations to promote competition, and was anti-competitive; and (4) the decision to issue the ITA was irrational in certain respects.

110 This Court (per Sutherland J – as he was then) found that sections 2(f) and 67 of the ECA provide for ICASA's duty to promote competition in the Information and Communication Technology ("**ICT**") sector.[45]

111 In relation to the assignment of unavailable IMT700 and IMT800 bands of spectrum, Sutherland J held:

> "*59. . . .first, the assignment of spectrum already assigned to other operators is of questionable validity and secondly, to assign now and defer access to an unknown future date, which is dependent on a host of process-dependent happenings has the look of a reckless decision and for that reason an irrational decision.*"[46]

(Our emphasis)

112 In the light of the above, it cannot be disputed that ICASA has a statutory obligation to promote competition when taking decisions, including decisions to issue ITAs for the licensing of high demand spectrum. Further, ICASA has to ensure that the spectrum it intends to license in terms of a particular ITA is available. Including unavailable spectrum is a "reckless decision and for that

---

[45] **Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa; Cell C (Pty) Ltd v Acting Chair, Independent Communications Authority of South Africa** (2016/59722, 2016/68096) [2016] ZAGPPHC 883 (30 September 2016) ("**Sutherland judgment**"), para 34.

[46] Sutherland judgment, para 59.

reason an irrational decision". We will demonstrate that, as it did in 2016, ICASA has acted irrationally and recklessly by including the IMT700 and IMT800 frequency bands in the 2021 Auction ITA even though these bands are still not available.

The Baqwa J judgment

113 As we have explained above in providing the background to this application, Telkom challenged the legal validity of the 2020 Auction ITA. Amongst the grounds Telkom relied upon in the 2020 review was that it was irrational to include the sub 1GHz in the 2020 Auction ITA, that it was arbitrary and irrational to issue the ITA without completing a competition assessment and that ICASA adopted an unfair process in failing to appropriately consider what Telkom referred to as the "**spectrum arrangement transactions**".

114 e.tv joined Telkom's application as a second applicant. e.tv supported Telkom's grounds of review and, amongst other grounds of review, added that ICASA failed to consult the television broadcasters that occupied the sub 1 GHz before including the sub 1GHz in the 2020 Auction ITA.

115 ICASA attempted to refute the contention that the unavailability of sub 1 GHz made the inclusion of the sub 1GHz in the Auction ITA unlawful, by stating that bidders for the IMT700 and IMT800 spectrum bands would become entitled to enjoy the full commercial benefits of the spectrum immediately after the auction. Further that the IMT700 and IMT800 frequency bands were to be

auctioned at a discount because mobile operators would have to await the terrestrial television broadcasters' migration out of the frequencies.

116 In a judgment interdicting the licensing process pending the review of the 2020 Auction ITA,[47] this Court (per Baqwa J) held:

> "*[30] Given the large amounts of money that the bidders have to expend when participating in the ITA process, ICASA promises them 'full commercial benefits for the amounts paid [by] them'. What that means in real terms is not clear at all given that the successful bidders will get spectrum which they will largely be unable to utilise until completion of the digital migration process. A proper consultation process could possibly have avoided this potential impasse. The situation created by ICASA's decision was aptly described in Minister of Communications paragraph 59:*
>
> > *'In summary I conclude that, first, the assignment of spectrum already assigned to other operators is of questionable validity and secondly, to assign now and defer access to an unknown future date, which is dependent on a host of process dependent happenings has the look of a reckless decision and for that reason an irrational decision.'*"[48]

117 Baqwa J also held:

> "*[35]ICASA had a duty to apply the fundamental principles of hearing the other side (audi alteram partem) and ensure that all the affected parties were informed of the proposed change. One of those parties was e.tv which not only had a clear interest in the matter by was also possessed of significant expertise in*

[47] **Telkom SA SOC Limited v Independent Communication Authority of South Africa** [2021] JOL 49912 (GP) ("**Baqwa judgment**").

[48] Baqwa judgment, para 30.

the field. It is difficult to understand how ICASA came to ignore e.tv's letter on 29 September 2020 in which concerns were raised about the spectrum auction. When ICASA failed to respond, a follow up letter was addressed to ICASA and it also failed to elicit a response.

[36] ICASA failed to respond to e.tv's concerns even in the clarification document and the reasons document which were subsequently published by ICASA. This single failure by ICASA to address the concerns of a significant stakeholder in the industry does not speak well of ICASA's willingness to uphold is statutory duties such those prescribed in section 3(3) of the ICASA Act: 'The Authority is subject only to The Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice.'

[37] ICASA's actions in ignoring one of the key stakeholders was blatant and unfair. It falls to be strongly deprecated."

118 Baqwa J concluded that:

"*[45]The radio frequency spectrum in the bands IMT 700 and IMT 800 will only become available on completion of the digital migration process. Despite its unavailability ICASA has included the IMT 700 and IMT 800 bands of spectrum in the spectrum to be licensed in terms of the auction ITA. This is likely to result in successful bidders deriving no commercial benefits upon being awarded a licence. This (*sic*) bidders have invested huge sums of money. The decision of ICASA is intrinsically irrational.*

[46] Sections 30 and 31 of ECA empower ICASA to issue licences in respect of spectrum that is available. ICASA's actions are therefore in direct contravention of the quoted sections and are therefore unlawful.

[47] For the reasons stated above ICASA has acted unlawfully and irrationally and there are good prospects of success in the review application."[49] (Our emphasis)

119 The IMT700 and IMT800 frequency bands of spectrum are still not available on a national basis and were not available when ICASA took the decision to include the IMT700 and IMT800 frequency bands of spectrum in the 2021 Auction ITA. ICASA's decision to include the sub 1GHz was irrational in 2020 and is irrational in relation to the 2021 Auction ITA. ICASA has repeated this irrational act without taking the Baqwa judgment into account at all.

120 ICASA's conduct is indicative of bad faith and it is reasonable to infer that ICASA does not prioritise acting lawfully even when its conduct has been declared unlawful by this Court. In terms of section 1(d) of the Constitution, organs of state must at all times uphold the constitutional values of accountability, responsiveness and openness.

121 In terms of section 165(4) of the Constitution, organs of state must assist and protect the court to ensure the effectiveness of the courts. ICASA has however failed to act in accordance with its obligations. Despite this Court's clear finding that including spectrum that is not available because it is occupied by television broadcasters is irrational and unlawful, ICASA did the same thing for the 2021 Auction ITA.

[49] Baqwa judgment, paras 45 to 47.

122 The delay and obvious urgency in to license spectrum is not valid justification to excuse ICASA from its obligation to comply with its obligations in terms of the ECA and ICASA Act. As the Constitutional Court said in **Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another**, "the rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process".[50]

THE SEPTEMBER 2021 COURT ORDER

123 While the MTN and the Telkom review applications were pending in 2020, the parties started settlement negotiations. But the parties failed to agree on the terms of a settlement acceptable to all the interested parties.[51] Telkom and MTN did not withdraw the applications and wished to continue prosecuting the applications.

124 ICASA did not want the litigation to continue. So, ICASA agreed to an order under which the primary relief Telkom and MTN sought in the two applications was granted: the decisions to publish the 2020 ITAs were reviewed and set aside. On 15 September 2021, the parties delivered a draft order in terms of which the decisions to publish the 2020 ITAs were reviewed and set aside and

[50] 2014 (2) SA 228 (CC), para [86]

[51] CaseLines 004-1459, paras 100 to 102.

referred back to ICASA for reconsideration. This Court made that draft order an order of court.

125 There is a dispute about the effect of the September 2021 Court Order. ICASA maintains that the order only reviewed and set aside the publishing of the 2020 ITAs but not the actual ITAs.[52] Telkom submits that this is mistaken. Telkom's 2020 application was, like this application, brought to challenge the legality of the 2020 ITAs. Consequently, Telkom asked the Court for an order reviewing and setting aside the decision to publish the 2020 ITA. Of course, Telkom sought other relief, but the order reviewing and setting aside the decisions to publish the 2020 ITAs was the gravamen of the application and the relief sought in the notice of motion. That Telkom sought to review and set aside the substance of the 2020 ITAs and all actions leading up to the decisions to publish them is unambiguously explained in the supporting affidavits. Telkom's relief was not limited to the simple act of the communication or notification or publication of the ITAs.

126 The Court, in line with the primary relief Telkom sought, granted an order reviewing and setting aside the decisions to publish the 2020 ITAs. The consequence of the September 2021 Court Order is that the 2020 ITAs ceased to exist.

127 In a judicial review, the validity of an administrative decision is challenged. A court is asked to scrutinise the decision and review it. Once the decision has

[52] Reasons Document for the 2021 Auction ITA CaseLines 005-167, paras 6.22 to 6.24.

been reviewed, as a remedy, the court has a discretion whether to set aside the decision. When a court grants an order "reviewing and setting aside" the administrative decision, that decision no longer exists – it is quashed.[53] This means that a new administrative decision has to be taken (unless the Court grants the exceptional order of substitution). This is the obvious meaning and effect of a court order "reviewing and setting aside" an administrative act.

128 In **Simon No v Mitsui and Co Ltd**,[54] the court said:

> "*A court order defines what the court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it . . . The court's intention must be ascertained primarily from the language of the order as construed according to the usual rules for interpreting documents. It must be read as a whole by reference to its context and objects*."[55]

129 The meaning of the September 2021 Court Order should be determined with reference to Telkom's notice of motion, which sets out the relief Telkom asked for, and the supporting affidavit, which explained the basis for the relief Telkom sought. The order declaring that the 2020 ITAs are reviewed and set aside should not be removed from the context in which it was sought – as explained in Telkom's supporting affidavit. An interpretation of the order otherwise is not reasonable or sensible.

---

53 CaseLines 004-1420, para 9. See C Hoexter **Administrative Law in South Africa** (3 ed, 2021 Cape Town Juta) at 701-2,

54 **Simon No v Mitsui and Co Ltd** 1997 (2) SA 475 (W); [1996] 3 All SA 353 (W).

55 **Simon No v Mitsui and Co Ltd** [1996] 3 All SA 353 (W) at 373E-F.

130 The manifest object and effect of the September 2021 Court Order was that the 2020 ITAs no longer existed. Consequently, 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.

131 An interpretation that the order for reconsideration in the September 2021 Court Order means that the 2020 ITAs remained valid and enforceable administrative acts or decisions and the administrator (ICASA) could still amend the decisions that were reviewed and set aside is misplaced and ill-founded. Such an interpretation is not sensible and undermines the rule of law and effectiveness of court orders reviewing and setting aside administrative acts and decisions. Upholding ICASA's interpretation would render the declaration reviewing and setting aside the 2020 ITAs hollow.[56]

132 It was not legally competent for ICASA to simply amend the 2020 ITAs, as it appears to have done.

133 Section 6(2)(d) of PAJA permits administrative action to be reviewed and set aside where it is materially influenced by an error of law.

134 Telkom submits that ICASA made an error of law in its understanding of the effect of the September 2021 Court Order. ICASA's error is material and affects the validity of the 2021 Auction ITA. The error is material because relying upon its interpretation of the September 2021 Court Order, ICASA

[56] CaseLines 003-2942, para 10.

failed to undertake the necessary administrative process for taking the decision to publish the 2021 Auction ITA. The failure includes that not all the relevant committees applied their minds and considered the issues as they did for the 2020 ITAs, and therefore ICASA failed to fulfil the function imposed on it by the applicable statutes.[57]

135 The 2021 Auction ITA is assumed to be valid until it is set aside.[58] Telkom could not ignore the 2021 Auction ITA and not participate in the licensing process. Telkom did not acquiesce to the legal validity of the 2021 Auction ITA by participating in the licensing process.

136 Telkom is not constrained by the "doctrine of peremption" because Telkom has not adopted contradictory positions in relation to the 2021 Auction ITA. Telkom has at all times and in every part of the process of participating in the 2021 Auction ITA expressly reserved its rights to challenge the validity of the 2021 Auction ITA.

ICASA ENGAGED IN AN UNFAIR PROCESS

137 In terms of section 4 of PAJA, administrative action that affects parties' rights must be procedurally fair. Section 4 also prescribes mechanisms designed to ensure that parties that may be affected by the administrative decision are

[57] **Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg** 1985 (2) SA 790 (A) at 801G-I; **Hira v Booysen** 1992 (4) SA 69 (A) at 90 and 93G-I.

[58] **MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd** 2014 (3) SA 481 (CC); **Merafong City Local Municipality v AngloGold Ashanti Limited** 2017 (2) SA 211 (CC); and **Department of Transport v Tasima (Pty) Limited** 2017 (2) SA 622 (CC).

afforded a hearing before the administrative action is taken in the following terms:

> "*(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—*
>
> *(a) to hold a public inquiry in terms of subsection (2);*
>
> *(b) to follow a notice and comment procedure in terms of subsection (3);*
>
> *(c) to follow the procedures in both subsections (2) and (3);*
>
> *(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or*
>
> *(e) to follow another appropriate procedure which gives effect to section 3.*
>
> *. . .*
>
> *(3) If an administrator decides to follow a notice and comment procedure, the administrator must—*
>
> *(a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;*
>
> *(b) consider any comments received;*
>
> *(c) decide whether or not to take the administrative action, with or without changes; and*
>
> *(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.*"

138 ICASA adopted the "notice and comment procedure" contemplated in section 4(1)(b) and 4(3) of PAJA.

139 Section 3 of PAJA requires that a procedure chosen in taking administrative action must ensure that adequate notice of the intended administrative action is given to members of the public and that they are given adequate opportunity to be heard.

140 A failure to conduct a substantive and meaningful public participation process may also result in the process being impugned as being irrational in terms of the principle of legality.[59]

141 In relation to the rationality of timeframes for a public participation process in terms of the principle of legality, in **Esau**,[60] the High Court held that procedural fairness would ordinarily require a long public participation process if the exigencies did not require swift action.[61]

142 On appeal,[62] the SCA said "context is crucial to the resolution of this issue: while, in one case, it may be unfair to allow a person two weeks to make representations, in another, it may be fair. It will always depend on the circumstances".[63]

---

59 **Earthlife Africa Johannesburg v Minister of Energy** 2017 (5) SA 227 (WCC), para 50.

60 **Esau v Minister of Co-operative Governance and Traditional Affairs** 2020 (11) BCLR 1371 (WCC) ("**Esau High Court judgment**").

61 **Esau** High Court judgment, para 151.

62 **Esau v Minister of Co-Operative Governance and Traditional Affairs** 2021 (3) SA 593 (SCA) ("**Esau SCA judgment**").

63 **Esau SCA** judgment, para 96.

143 This Court should consider the time ICASA has taken when publishing previous ITAs for context and determining a timeline that would have been reasonable and fair.

143.1 For the 2016 ITA, ICASA published the Information Memorandum for that ITA on 13 September 2015. Comments were required to be made by 30 October 2015. This was approximately six weeks after the Information Memorandum was published. The 2016 ITA was published in July 2016. The 2016 ITA was published almost ten months from the 2015 Information Memorandum.

143.2 For the 2020 Auction ITA, the 2019 Information Memorandum was published on 1 November 2019. Interested parties had until 29 January 2020 to make their written submissions. That is approximately three months. On 30 September 2020, ICASA announced that it would publish the 2020 ITAs, together with a reasons document, following the assessment of the submissions made in January 2020.[64] The 2020 ITAs were published on 2 October 2020. The 2020 ITAs were published almost 12 months from the 2019 November Information Memorandum.[65]

144 In contrast, ICASA completed the entire process for the 2021 ITA within three months (this is from the date of publishing the First 2021 Information

[64] CaseLines 004-1457, para 95.

[65] CaseLines 004-1458, para 97.

Memorandum on 1 October 2021 to publishing the 2021 Auction ITA on 10 December 2021).[66]

145 ICASA has not provided a reasonable explanation for the truncated timelines it has prescribed for the decisions to publish the new ITAs. The completion of the licensing of the spectrum has been delayed for over a decade because of ICASA's failure, refusal or inability to comply with the regulatory framework. It is unreasonable to rely on the delay to justify the truncated timeframes for the public participation process.[67]

146 ICASA did not address some of the written representations and when it did, it did not do so substantively and comprehensively. For example, it failed to engage with Telkom's submissions about the effect of the aggregation of capacity as a result of the spectrum arrangements and how this undermines the purpose of spectrum caps.[68] This is unsurprising because ICASA did not afford itself sufficient time to consider the representations.

147 To determine what timeframes may be considered as reasonable for purposes of affording the public to make submissions we consider that section 4B(2) of the ICASA Act also provides some context. Section 4B(2)(a) provides as follows:

[66] CaseLines 004-1458, para 97.

[67] CaseLines 004-1458, para 98.

[68] Telkom's FA CaseLines 003 – 111, para 270

> *"The Authority must, in the Gazette, give notice of its intention to conduct an inquiry and such notice must indicate the purpose of the inquiry and invite interested persons to—*
>
> *(a) submit written representations on or before a date specified in the notice, which date may not be less than 45 days from the date of publication of the notice;"*
>
> (Our emphasis)

148 The ICASA Act does not expressly stipulate a minimum period within which comments may be submitted in a notice and comment procedure for licensing spectrum. But, we submit that the notice and comment process is analogous to an inquiry as contemplated in section 4B(2)(a). Accordingly, we submit that, in the context of section 4B and the timelines for the public consultation for the previous ITAs, the timeframes stipulated by ICASA for the submissions of representations and comments by interested parties were unreasonable and rendered the public consultation process unfair.

149 In **Democratic Alliance v President of South Africa**,[69] the Constitutional Court held that:

> "*If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.*"[70]

[69] **Democratic Alliance v President of South Africa** 2012 (12) BCLR 1297 (CC).

[70] **Democratic Alliance v President of South Africa**, para 39.

150 The inadequacy of the time for the public participation process through submissions is thus a factor in determining whether the process is irrational.

151 The shortened timelines within which interested parties were expected to comment made the process mechanical and formalistic. Interested parties and stakeholders were not afforded sufficient time to make substantive and meaningful comments and ICASA could not have properly considered the parties' submissions. ICASA's failure to properly consider the parties comments or submissions would be a violation of section 4(3)(b) of PAJA and renders the process procedurally irrational because the purpose sought to be achieved by a particular exercise of public power or process may not be achieved because relevant considerations are not taken into account.[71]

152 The 2021 Auction ITA includes IMT700 and IMT800 frequency bands. It is common cause that these bands are currently not available because television broadcasters hold the licenses for and occupy these bands. The Minister has declared that these bands will be available by the end of March 2022. In the light of this common cause fact, ICASA's rushed public participation process and issuing of the 2021 Auction ITA on December 2021 is irrational. Even if the Minister's undertaking to make the bands of spectrum available by the end of March 2022 is accepted for a moment, it was not reasonable for ICASA to rush the public participation process. Especially when this Court – in two judgments – has said that including unavailable bands of spectrum in the 2021 Auction ITA is "reckless" and irrational.

---

[71] **Law Society of South Africa v President of the Republic of South Africa** 2019 (3) SA 30 (CC), para 64

153 The fact that ICASA received written submissions does not cure the unfairness of the process ICASA undertook.[72] The public participation process is meant to be objectively fair. Accordingly, that certain parties complied with unreasonably short timeframes within which to make representations is not an answer to Telkom's ground for reviewing the decision to publish 2021 Auction ITA. The 2021 Auction ITA should be reviewed and set aside. ICASA should undertake a fresh process and comply with the orders of this Court under the supervision of this Court.

UNAVAILABILITY OF IMT700 AND IMT800

154 The 2021 Auction ITA includes licensing for the IMT700 and IMT800 frequency bands of high demand spectrum.

155 ICASA has issued licences to television broadcasters that authorise the broadcasters to transmit their analogue broadcast via analogue transmitter site frequencies.[73] Both the IMT700 and IMT800 frequency bands still contain analogue and television broadcasting transmitters, which provide broadcasting services (i.e. e.TV, SABC 1, 2 and 3) to viewers within the large geographical coverage areas of those transmitters.

156 Mobile services operating in the IMT700 and IMT800 frequency bands therefore cannot be deployed within these areas without causing harmful interference to television viewers and/or receiving harmful interference from

[72] CaseLines 004-1450, para74.

[73] e.tv's licences Caselines 004-1210. to 004-1228

the broadcasting transmitters into the mobile services. Operating on the same frequencies and within the same geographic area will therefore cause harmful interference between these services.

157 It is not possible for two different operators to broadcast on the same frequency, and only one service can utilise a specific spectrum at a time. Thus, it will not be possible for a telecommunications company which purchases the spectrum in the IMT700 and IMT800 bands to use these frequency bands, since the analogue broadcast signal would obliterate the weaker signal of the telecommunications company. In any event, broadcasters will enjoy preferential or primary rights of use as incumbents in the event of interference, with mobile operators as secondary users.

158 As a result, the spectrum in these bands is not available for assignment on an exclusive or national basis. Any successful bidders in the 2021 Auction ITA auction process in these bands will inevitably be secondary occupiers or users of the spectrum and may not use it in geographic locations where such use interferes with broadcast transmissions. The consequence is that successful bidders will not enjoy the full commercial benefit of their investment upon award of the spectrum.

159 Telkom and e.tv raised the issue about the unavailability of these bands of spectrum in the 2020 review application. ICASA accepted that television broadcasters hold the licences for these bands of spectrum. So, it is common cause the IMT700 and IMT800 bands of spectrum were not available for use by mobile operators when ICASA published the 2021 Auction ITA.

160 When reviewing an administrative act, a court has to consider information that was before the administrator when an impugned decision was taken to determine the rationality and lawfulness of the administrative act.

161 In this case, ICASA knew that the IMT700 and IMT800 bands were not available for licensing to the bidders in the auction process. ICASA also knew that the Sutherland judgment and the Baqwa judgment found that including the IMT700 and IMT800 bands when these bands were not available was irrational and a basis for reviewing the relevant ITA. However, despite knowing that the IMT700 and IMT800 bands were not available, ICASA nevertheless included the IMT700 and IMT800 bands in the 2021 Auction ITA.

162 Telkom notes that the Minister submits that the IMT700 and IMT800 bands will be available when the digital migration process is completed. According to the Minister, the digital migration process will be completed by the end of March 2022 – after the auction under the 2021 Auction ITA is completed. But this is not enough to cure the irrationality of ICASA's decision. The fact remains: ICASA seeks to license spectrum that is not available under the 2021 Auction ITA. This Court has unequivocally found the inclusion of these unavailable bands irrational. Telkom submits that this time too this Court should declare the inclusion of the IMT700 and IMT800 bands irrational.

163 There is no indication that the digital migration will be completed by the end of March 2022. Far from it. In February 2022, the Minister presented the following to Parliamentary Portfolio Committee on Communications:

163.1 The migration has to be completed in four provinces (Northern Cape, North West, Free State, Mpumalanga and Limpopo).[74]

163.2 The Western Cape was targeted for February 2020.[75] The Eastern Cape, Kwa-Zulu Natal and Gauteng analogue switch-off was targeted for March 2022.[76] There is no update from the Minister about whether this has been achieved.

163.3 As of 16 February 2022, there had been no installations in four provinces (Western Cape, Eastern Cape, Kwa-Zulu Natal and Gauteng).[77]

164 The four largest provinces in the country are yet to be migrated. These provinces have the most transmitters of the South African Broadcasting Corporation SOC Limited ("**SABC**") compared to the five provinces that have already been switched-off. According to the Minister, only four e.tv transmitters have been switched-off.[78] The digital multiplexers remain within the 700/800 MHz bands.

165 The Minister's objective is unlikely to be accomplished in the times indicated. The migration process will not be completed by the end of March 2022 and the IMT700 and IMT800 will still be unavailable even after the auction is completed.

---

74 CaseLines Annexure "RAX2" CaseLines 004- 255 & 004 - 1536.

75 CaseLines Annexure "RAX2" CaseLines 004-1536.

76 CaseLines Annexure "RAX2" CaseLines 004-1536.

77 CaseLines Annexure "RAX2" CaseLines 004-1537.

78 CaseLines XX

166 It is also common cause that the sale of the 700MHz and 800MHz frequency bands will give rise to an interference (or potential interference) in the television broadcaster's offerings. Section 30(3) of the ECA provides:

> *"The Authority must, in performing its functions in terms of subsection (1), ensure that in the use of the radio frequency spectrum harmful interference to authorised or licensed users of the radio frequency spectrum is eliminated or reduced to the extent reasonably possible."*

167 ICASA cannot act in a manner that will cause interference or potential interference. It is irrational for ICASA to initiate a process that will give rise to interference when it has a statutory obligation to eliminate or reduce interference to the extent reasonably possible.

168 There is a further impediment to the completion of the migration process to make the IMT700 and IMT800 bands available. e.tv launched an application against the Minister.[79] Amongst other relief, e.tv asked the Court to—

168.1 declare that the digital migration process may not be completed unless and until the Minister and ICASA have undertaken a process of engagement and ensured that those who are reliant on analogue television have been provided with the appropriate means to continue to access e.tv's services on a free-to-air basis;[80] and

[79] ICASA Part B AA Annexure "IC5" CaseLines 004-1331.

[80] ICASA Part B AA Annexure "IC5" CaseLines 004-1331, prayer 3.

168.2 if the Minister takes a decision about when the digital migration will be completed before and without consulting with e.tv, to declare the Minister's decision to do so invalid and set it aside.[81]

169 At the time of the filing of these heads of argument, the e.tv application is set down for hearing on 14 and 15 March 2022. If the relief e.tv seeks is granted, the digital migration process may not be completed and the IMT700 and IMT800 bands will not be available – even at the unrealistic deadline of end of March 2022.

170 The outcome of the e.tv litigation clearly has an effect on the completion of the migration process and ultimately the availability of IMT700 and IMT800 bands. It was accordingly irrational for ICASA to proceed with the licensing of the IMT700 and IMT800 bands while this litigation is pending. ICASA would not have suffered any conceivable prejudice if the licensing process had been delayed pending the final determination of e.tv's application. Proceeding with the licensing process when the outcome of the e.tv application may result in the IMT700 and IMT800 spectrum remaining unavailable is unreasonable, threatens to create further uncertainty and to further delay the goal of promoting mobile broadband services.

171 Telkom submits that the decision was irrational. As a result, the decision to publish the 2021 Auction ITA should be reviewed and set aside in terms of section 6(2)(f)(ii)(aa) to (cc) of PAJA.

[81] ICASA Part B AA Annexure "IC5" CaseLines 004-1332, prayer 4.

172 ICASA was also warned about the prejudice to the broadcasters resulting from interference caused by sharing. In the 2020 review application, e.tv said its ability to broadcast its analogue services during the dual illumination period will be compromised if the auction process goes ahead and is completed.[82]

173 In response to the November 2019 Information Memorandum, the SABC also stated that a licensee will have a minimum of three years from the date that the 700 MHz and 800 MHz bands become available which will indirectly mean additional pressures on the licensees to the extent that sharing principles of the spectrum can easily be compromised, which will lead to interference to the disadvantage and severe prejudice of broadcasters.

174 SABC further submitted that over the years when ICASA published the IMT Roadmap, the SABC submitted the same responses requesting the availability of the spectrum and contending that the usage of the spectrum in the 700 MHz and 800 MHZ frequency bands should only be after the SABC's television services have migrated out of the digital dividend bands.

175 During the public participation process for the 2020 ITAs, SABC cautioned ICASA that if the 700 MHz and 800 MHz bands are licensed to mobile operators and brought into use before the successful completion of the Broadcasting Digital Migration process, approximately 40% of the South African population will be deprived of their constitutional rights of access to be informed, entertained and educated. The interference with broadcasters' use

[82] e.tv's founding affidavit in the 2020 review application CaseLines 004-1207, para 139.

of the IMT 700 and IMT800 spectrum affects the broadcasters' ability to provide services to their viewers – the viewers' constitutional rights to freedom of expression (to receive information) is thus limited. The limitation is unnecessary, unjustified and unreasonable.

COMPETITION ASSESSMENT

176 The obligation to promote competition in the ICT sector is clearly set out in section 2(f) of the ECA.

177 This Court considered the nature and ambit of ICASA's obligation in **Telkom SA SOC v Mncube NO**,[83] where this Court said:

> "*[73]. . . The purpose of this Act is to promote and maintain competition 'in the Republic' in order to, inter alia, promote the efficiency, adaptability and development of the economy. The purpose of the EC Act is, on the other hand, much more defined and focused when it refers 'to promote competition within the ICT sector'. It therefore appears that the Competition Act does not deprive ICASA of jurisdiction over competition matters relevant to the communications sector or that ICASA is exempted from its duty to properly consider the competition issue.*
>
> *[74] Having regard to all these considerations. I have to conclude that competition within the ICT sector was a relevant consideration with regard to the Neotel/Vodacom application. Facts placed before ICASA also demonstrated that the Neotel/Vodacom application raised various competition*

[83] **Telkom SA Soc Limited v Mncube NO; Mobile Telephone Networks (Pty) Ltd v Pillay NO; Cell C (Pty) Limited v The Chairperson of ICASA; Dimension Data Middle East & Africa (Pty) Ltd t/a Internet Solutions v ICASA** (55311/2015; 77029/2015; 82287/2015) [2016] ZAGPPHC 93.

concerns. Furthermore, having regard to the statutory provisions referred to above, I am of the view that ICASA had a statutory duty to also consider the issue of competition in order to promote the objects of the EC Act before a decision was taken. Put differently, the statutory obligation to promote competition within the ICT sector implies an obligation to also consider and take into account competition which is part of the decision making process and cannot be delegated or deferred to another organ of state. ICASA's failure to do so and its decision to defer to the Competition Commission were both, in my view, wrong in law. I therefore find that ICASA's failure to also consider competition and to defer to the Competition Commission in this regard was materially influenced by an error of law within the meaning of section 6(2) of PAJA."[84]

(Our emphasis)

ICASA did not conduct a competition assessment

178 To comply with its obligation to promote competition under section 2(f) of the ECA and as confirmed by this Court in **Telkom SA SOC v Mncube NO**, ICASA must know the current market structure at the time of issuing an ITA for licensing spectrum. This would enable ICASA to design the ITA in a manner that does not worsen ineffective competition or entrench the dominance of certain operators. ICASA may only know the current market structure if it conducts an assessment of the current market structure. ICASA did not conduct such an assessment as part of the process of issuing the 2021 Auction ITA. Instead, it appropriated and relied on an assessment conducted

[84] **Telkom SA Soc Limited v Mncube NO**, paras 73 and 74.

by a third party consultant more than 18 months before ICASA issued the 2021 Auction ITA. This was an assessment conducted by these consultants for ICASA in relation to its decision to publish the 2020 ITAs.

179 Section 6(2)(f)(ii) of PAJA provides that administrative action will be reviewable if it is not rationally connected to—

> "*(aa) the purpose for which it was taken;*
>
> *(bb) the purpose of the empowering provision;*
>
> *(cc) the information before the administrator; or*
>
> *(dd) the reasons given for it by the administrator.*"

180 The principle of legality requires that:

180.1 There must be a rational connection between the decision taken and the purpose for which the decision was taken.[85]

180.2 A decision must be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken:

> "*The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise, a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a*

[85] **Pharmaceutical Manufacturers Association of SA: in re Ex parte President of the Republic of South Africa** 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC), para 85.

conclusion would place form above substance and undermine an important constitutional principle."[86]

180.3 A decision is rationally connected to the purpose for which it was taken if it is connected to that purpose by reason, as opposed to being arbitrary or capricious.[87]

180.4 Whether a decision is rationally connected to its purpose is a factual enquiry blended with a measure of judgment.[88]

180.5 In order to be rational, a decision must be based on accurate findings of fact and a correct application of law.[89]

181 We submit that the 2021 Auction ITA is irrational and not connected to the information before ICASA. The 2021 Auction ITA is procedurally irrational, in the sense that several steps taken by ICASA in the process resulting in the publishing of the 2021 Auction ITA are not rationally related to the purpose sought to be achieved through the auction process, namely to promote competition in the mobile communication sector.[90] The 2021 Auction ITA is not objectively connected to the purpose for which the power to assign spectrum has been conferred.

---

86 **Pharmaceutical Manufacturers Association of SA: in re ex parte President of the Republic of South Africa**, para 86; See, also, **Albutt v Centre for the Study of Violence and Reconciliation** 2010 (3) SA 293 (CC), para 51.

87 **Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry** 2010 (5) SA 457 (SCA), para 58.

88 **Minister of Home Affairs v Scalabrini Centre, Cape Town** 2013 (6) SA 421 (SCA), para 66.

89 **Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd** 2012 (2) SA 16 (SCA), para 40.

90 **Electronic Media Network Limited v e.tv (Pty) Limited** (9) BCLR 1108 (CC), para 149.

182 In terms of section 2(f) of the ECA, ICASA is required to promote competition in the mobile sector. ICASA's obligation to promote effective competition is buttressed by the obligations imposed upon, and powers afforded to, ICASA to remedy competition issues in terms of section 67, which provides that where there is inadequate competition in the market, ICASA must conduct an inquiry and may place various conditions on the licences awarded to the operators in the market.

183 In relation to the relevance of the process for the test of rationality, in **National Energy Regulator of South Africa v PG Group (Pty) Limited**,[91] the Constitutional Court held:

> "*The relevant question for rationality is whether the means (including the process of making a decision) are linked to the purpose or ends. To my mind, rationality necessarily, whether found in PAJA or anywhere else, must include some evaluation of process. If not, then we are simply asking whether a decision is right or wrong based on post hoc reasoning.*"[92]

184 The Constitutional Court also relied on the Supreme Court of Appeal's judgment in **Zuma v Democratic Alliance**[93] and added that the process leading to a decision "must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred".[94] And "Problems found in the process used to reach a decision can be very useful

---

91 **National Energy Regulator of South Africa v PG Group (Pty) Ltd** 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC).

92 **National Energy Regulator of South Africa v PG Group (Pty) Ltd**, para 48.

93 **Zuma v Democratic Alliance** 2018 (1) SA 2000 (SCA), para 82.

94 **National Energy Regulator of South Africa v PG Group (Pty) Ltd**, paras 48 and 49.

evidence or illustration of a faulty rational link".[95] There are many problems in the process leading to ICASA's decision to publish the 2021 Auction ITA.

185 ICASA's failure to conduct and complete a competition assessment in relation to the 2021 Auction ITA is sufficient evidence of a missing or faulty link between the means and the ends. ICASA has not undertaken a process that will achieve the goal of promoting competition and avoiding entrenching the ineffective market structure currently dominated by the two largest MNOs (MTN and Vodacom).

186 The 2021 Auction ITA is thus reviewable on the basis of procedural irrationality alone.

187 ICASA did not conduct a competition assessment but merely adopted Acacia's assessment. There is no evidence that ICASA did not "rubber stamp" Acacia's assessment. In fact, the evidence suggests that ICASA did just that.

188 In **Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd**,[96] SCA held:

> "*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 was simply to rely on the advice of another without knowing the*

[95] **National Energy Regulator of South Africa v PG Group (Pty) Ltd**, para 48.

[96] **Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd** [2005] 2 All SA 239 (SCA).

grounds on which that advice was given the decision would clearly not be his."[97]

189 It is not sufficient for ICASA to seek to rely on reports from its consultants. And yet, this is what ICASA has done with the competition assessment, *albeit* doing so selectively by ignoring the important advice and recommendations of the experts.

190 On this basis alone, ICASA's decision to publish the 2021 Auction ITAs without conducting a competition assessment is irrational and unreasonable.

In the alternative, ICASA's assessment is outdated

191 In the alternative, and only if this Court finds that ICASA's appropriated competition assessment from the 2020 Auction ITA process is sufficient for ICASA to comply with its obligation to conduct a competition assessment in relation to the 2021 Auction ITA, we submit that the assessment is unreliable because it is outdated. It is irrational and unreasonable for ICASA to make a decision with far-reaching consequences, as will arise from the 2021 Auction ITA, relying on outdated information.

192 In the Reasons Document for the 2021 Auction ITA, ICASA states that "the licensing process is responding to the current market structure".[98] However, the information upon which ICASA relied was not about the current market

[97] **Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd** at 251A-B (para 20).

[98] CaseLines 005-177, para 7.21.

structure – namely that which obtained in 2021 when the ITA was issued. Instead, it was based on the market structure in 2018 at the earliest when the submissions upon which the findings in the MBSI and the DSMI are based were made. ICASA issued the 2021 Auction ITA relying on the MBSI and the DSMI to ensure that the process was "responding to the current market structure". However, since ICASA did not obtain information about the current market structure (in 2021 when the 2021 Auction ITA was designed and issued) but relied on information about the market structure in 2019, the 2021 Auction ITA is not rationally connected to the purpose for which it was issued – being to respond to the current market structure. The 2021 Auction ITA is reviewable under section 6(2)(f)(ii)(aa) of PAJA.

SPECTRUM ARRANGEMENTS

193 Vodacom and MTN have concluded a series of transactions that resulted in the two largest operators gaining effective access to more spectrum than ICASA has licensed to these operators. As a result, Vodacom and MTN gained an advantage in the mobile broadband services market by increasing their network capacity and entrenching their respective dominance in the mobile data telecommunications market.

193.1 On 13 September 2016, Vodacom and Rain concluded a series of agreements in terms of which Vodacom acquired control of some of the spectrum assigned to Rain. The agreements had the effect that Vodacom has effective access to spectrum that is, in terms of the regulations, licenced to Rain.

193.2 Around February 2020, Vodacom and Rain concluded an additional series of agreements. These further agreements extended the scale and scope of Vodacom's access to and control over Rain's radio spectrum. This second series of related transactions has extended Vodacom's effective access to Rain's spectrum on a national scale.

194 Telkom referred these transactions to the competition authorities as a merger that should have been notified and has made submissions in that referral about the anti-competitive effects of this transaction.

195 In addition to the Vodacom transaction with Rain, the following further transactions exist in the mobile industry in terms of which Vodacom and MTN, the two dominant mobile operators, have gained effective access to spectrum licenced to other licensees:

195.1 Vodacom and MTN have each concluded arrangements with Liquid Telecom in terms of which they have effective access to Liquid Telecom's spectrum (56 MHz in the 3500 MHz band and 2x12 MHz in the 1800 MHz band with Vodacom and MTN, respectively) in circumstances where Liquid Telecom is not understood to conduct a traditional mobile business in South Africa; and

195.2 Cell C has effectively transferred its entire Radio Access Network operations to MTN, ostensibly including the spectrum licenced to Cell C (i.e. 900 MHz, 1800 MHz and 2100 MHz).

196 ICASA is aware of Telkom's concerns regarding the above transactions and has failed to address them, notwithstanding their relevance to competition in the mobile market.

197 Despite the obvious significance of the spectrum arrangements on competition and on the rationality of the spectrum caps in the 2021 Auction ITA, in the First 2021 Information Memorandum, ICASA stated that the spectrum caps would only consider existing "spectrum holdings" and IMT spectrum acquired through the 2021 Auction ITA.[99]

198 In their report for ICASA dated 4 May 2020, Acacia proposed a review of the roaming transactions (which Telkom refers to as "spectrum arrangements") to consider whether these are leasing arrangements or spectrum sharing arrangements.[100] According to the report, the competition assessment (done by Acacia for ICASA) advises that this could be material in finalising spectrum caps. But ICASA did not heed to this advice.

199 The professed purpose of spectrum caps sought to be introduced in the ITAs is to improve competition. A failure to consider the total spectrum holdings which a mobile operator can control or has access to undermines the purpose of spectrum caps in an auction.

200 The two dominant mobile operators (MTN and Vodacom) will end up with access to more spectrum than what the 2021 Auction ITA intends to restrict

[99] CaseLines 005-22, para 1.4.2.

[100] CaseLines 004-1012, item 10 of the table.

them to. This undermines the stated objective of the spectrum caps and indeed renders ICASA's decision irrational. It is important to consider relative spectrum assignments pre- and post-auction in the forthcoming auction process to ensure that ICASA complies with its statutory obligations to promote and enhance competition.

201 The access to additional spectrum assets and the need to assess this was acknowledged by ICASA (Acacia Economics' report):

> "*[ICASA] acknowledges that various announced commercial transactions between wholesale national operators and sub-national operators have enabled the former to have access to substantial additional spectrum assets"*[101]
>
> *"there is an argument for their scrutiny as they arguably more than double the access to spectrum enjoyed in much of the geography of South Africa by Vodacom and MTN*".[102]

202 ICASA's failure to assess the implications of the spectrum arrangements on the design of the 2021 Auction ITA is fatal to the validity of the 2021 Auction ITA.

203 In the MBSI findings document, ICASA acknowledges that "agreements signed between operators based on MOCN technology has meant that MTN and Vodacom are able to use the capacity of others where they are constrained" (paragraph 115 of the MBSI findings). Further that "the increase in capacity creates a measure of asymmetry between the larger two operators

[101] CaseLines 004-1039, para 128.

[102] CaseLines 004-1039 para 128.

and the smaller operators (particularly Telkom)" (paragraph 120 of MBSI findings document).

204 ICASA also states that "[t]he access to additional capacity in the context of a spectrum constrained market does confer some benefit to the large operators." In paragraph 124 of the MBSI findings, ICASA states that its "view is that these MOCN deals, while falling short of spectrum trading or sharing, likely confers some advantage to the largest operators in terms of capacity."

205 In the light of the conclusion of the effect of the spectrum agreements, I submit that it was irrational for ICASA to proceed with the auction process without providing for the asymmetry caused by these agreements, and it is unreasonable for ICASA to fail to address this asymmetry considering that the purpose of the spectrum licensing process through the ITAs is to ensure effective competition after licensing.

MNO's access to spectrum is relevant for determining spectrum caps in the 2021 Auction ITA

206 ICASA will license the following frequency bands, IMT700, IMT800, IMT 2600 and IMT3500.

207 Telkom currently holds a licence for and has access to a total spectrum capacity and quantity of 142 MHz (but does not have access to any sub 1 GHz spectrum).[103]

208 Vodacom is licenced in several bands and holds 76 MHz. However, as a result of the spectrum arrangements, Vodacom actually has access to an additional spectrum capacity of 100 MHz, consisting of 56 MHz of the 3.5 GHz band from the arrangement with Liquid and 20 MHz of the 2.6 GHz band and 24 MHz of the 1.8 GHz band from the arrangement with Rain.[104]

209 MTN also has licences in several bands and holds 76 MHz. But, as a result of the spectrum arrangements, it too actually has access to an additional spectrum capacity of 100 MHz, consisting of 24 MHz of the 1.8 GHz band from the arrangement with Liquid and 22 MHz of the 900 MHz band, 30 MHz of the 2.1 GHz band, and 24 MHz of the 1.8 GHz band from the arrangement with Cell C.[105]

210 The 2021 Auction ITA provides for a spectrum cap of 187 MHz for each applicant. Since Telkom already has a total of 142 MHz, it can only get up to 45 MHz of additional spectrum in the auction. This is including sub 1GHz which Telkom does not have any access to at all. Telkom is at an obvious disadvantage. The spectrum cap, in the light of the spectrum the MNOs have

[103] CaseLines 004-1466 (Graphs above para 124).

[104] CaseLines 004-1466 (Graphs above para 124).

[105] CaseLines 004-1466 (Graphs above para 124).

access to will lead to a further skewing of an already uncompetitive structure of the mobile services market.

211 Vodacom and MTN could possibly gain 110 MHz of additional spectrum under the 2021 Auction ITA, despite the advantage the two operators already have as a result of their increased spectrum capacity and quantity, including that of other operators to which they have access.[106] So, the result of not considering Vodacom and MTN's **actual effective spectrum capacity** in determining spectrum caps in the 2021 Auction ITA is that the largest operators may acquire more than double the spectrum that may be acquired by a smaller operator that is currently the only meaningful potential competitor to the two operators.[107]

212 Telkom made submissions to ICASA about the significance of the spectrum arrangement agreements between Rain and Vodacom and MTN and Liquid. In sum, Telkom demonstrated that these spectrum arrangements should be considered in determining the spectrum caps for Vodacom and MTN that is taking into account the spectrum the two operators have as a result of the arrangements.[108]

213 The spectrum arrangements have increased Vodacom and MTN's capacity and quantity of spectrum.[109] The failure to have regard to the spectrum

[106] Telkom's RA in Part B CaseLines 004-1432, para 35.

[107] Telkom's RA in Part B CaseLines 004-1432, para 36.

[108] Telkom's RA in Part B CaseLines 004-1433, para 36

[109] Telkom's RA in Part B CaseLines 004-1431, para 34.

arrangements means the current spectrum caps have an anti-competitive or negative effect on the market and renders the current spectrum caps artificial because Vodacom and MTN will, in the end, potentially have access to more spectrum than the other operators assigned spectrum.

214 ICASA refused to take the arrangements into account for purposes of determining the spectrum caps for the 2021 Auction ITA. ICASA considered that since Vodacom and MTN did not hold the licences for Rain and Liquid's spectrum, that spectrum could not be considered in determining Vodacom and MTN's spectrum caps.

215 Telkom submits that this is an error of fact and a failure to take into account a significantly material consideration in taking the decision to design the 2021 Auction ITA.

216 In **Airports Company South Africa v Tswelokgotso Trading Enterprises CC**,[110] the High Court held that:

> "*[12]a court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have*

[110] **Airports Company South Africa v Tswelokgotso Trading Enterprises CC** 2019 (1) SA 204 (GJ).

reached a different view on these matters were it vested with original competence to find the facts.

[13] This test fits tolerably well with the conception of rationality that has been laid down by the Constitutional Court in ***Democratic Alliance****. In that case, Yacoob ADCJ held that a failure to take into account relevant material is a failure constituting part of the means to achieve the purpose for which the power was conferred. Rationality is determined under a three part test.*

> *'The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.'*"[111]

217 It is uncontentious and objectively verifiable that the spectrum arrangements augment the spectrum used in Vodacom and MTN's networks and allow the two operators more capacity and quantity of spectrum. This is material in relation to the purpose of spectrum caps – which is to ensure symmetry in spectrum holdings post-auction.[112] But the asymmetry will remain and will afford the two largest operators an advantage over other national wholesale operators. This post-auction result will also undermine the objective of not worsening or maintaining an uncompetitive market as a result of the auction process on contemplated under the 2021 Auction ITA. The 2021 Auction ITA is accordingly reviewable on the basis of a material mistake of fact which in turn rendered the 2021 Auction being irrational.

---

[111] **Airports Company South Africa v Tswelokgotso Trading Enterprises CC**, paras 12 and 13.

[112] Telkom's RA in Part B CaseLines 004-1431, para 34.

Spectrum arrangements are not roaming agreements

218 The other respondents seek to muddle two different types of arrangements by claiming that Telkom also concluded a roaming agreement with Vodacom and MTN. But the agreements Telkom concluded are not comparable or similar to the spectrum arrangement agreements between Rain/Vodacom, Vodacom/Liquid, MTN/Liquid and MTN/Cell C.

219 National roaming occurs between operators within the same country code as they provide services within the same geographical region or within different geographic regions within a country. National roaming agreements are intended to be for coverage not capacity.[113] National roaming agreements are necessary to ensure that a new entrant or smaller operator's mobile services customers have network or connection even when they are in areas where the operator does not yet have a radio access network. Under standard national roaming agreements, the customer or user of the new entrant or smaller operator is allowed to roam on the host network if the new entrant's or smaller operator's network does not have coverage in the area. In general, smaller operators conclude these agreements for roaming on a larger operator's network.

220 Under national roaming agreements the smaller operator or operator whose customers are permitted to roam on another operator's network does not gain

[113] Telkom's RA in Part B CaseLines 004-1435, para 43.1.

access to the larger operator's spectrum. Neither of the operators gain access to the other's spectrum.

221 To reiterate, the primary rationale and purpose of national roaming agreements is for one operator (most typically a new entrant or smaller operator) to get network coverage in areas where that operator does not have network.

222 In contrast, the spectrum arrangements between Rain and Vodacom entails Vodacom, which is the largest mobile network provider in South Africa, roaming on Rain's LTE/4G network and providing Rain with access to Vodacom sites and facilities to deploy Rain's radio access network. Therefore, unlike the national roaming agreements, the owner and operator of the largest mobile network in South Africa roams on Rain's smaller network. Since Vodacom does not have any gaps in its network coverage, it roams on Rain's network to boost or augment its capacity – not coverage. The effect is that Vodacom has access to additional spectrum and precludes possible challenges from competing through using that spectrum. Under the arrangements Vodacom alleviates its network congestion, increases its network capacity and augments its network.[114]

223 Likewise, in the case of MTN and Liquid, MTN ostensibly roams on Liquid's network, but Liquid does not even have a true retail mobile service offering in South Africa. The implications of this arrangement are obvious – this is not

[114] CaseLines 005-180, para 7.35.

true national roaming but is instead nothing more than simple effective access to Liquid's spectrum.

224 Lastly, 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.

Telkom cannot conclude similar spectrum arrangement agreements

225 Section 31(1) of the ECA states that:

> "*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*."

226 Section 31(5) and (6) read as follow:

> "*(5) Subsection (1) does not apply to a person who utilises radio frequency spectrum—*
>
> *(a) in the course of making due and proper use, as a subscriber, of an electronic communications service or electronic communications network service, the provision of which is licensed in terms of Chapter 3 or as a recipient of a service subject to a licence exemption;*
>
> *(b) in the course of making due and proper use of an electronic communications service, the provision of which is licensed in terms of Chapter 3 as part of his or her duties in the service of the State or a local authority,*

including any military force, police service or traffic authority, in instances of force majeure; or

(c) in accordance with the regulations contemplated in subsection (6).

(6) The Authority may prescribe—

(a) types of radio apparatus the use or possession of which; or

(b) the circumstances in which the use or possession of radio apparatus,

does not require a radio frequency spectrum licence, including, but not limited to radio frequency spectrum allocated for use in respect of radio astronomy and other scientific uses of radio frequency spectrum that have been coordinated and agreed to by the Authority."

227 In the light of section 31, Telkom considers that spectrum arrangements where one licensee emits the spectrum that is assigned to another licensee are inconsistent with section 31 because the effect of the arrangements is that an operator transmits spectrum for which it does not hold a licence. Telkom has instituted litigation in the Competition Tribunal, where it is challenging the lawfulness of these arrangements. Telkom cannot therefore participate in the arrangements in circumstances where it holds the view that the conduct concerned would be unlawful.

OTHER RELEVANT CONSIDERATIONS

228 In the 2021 Auction ITA, ICASA states that the purpose and design of the ITA is to "ensure that South Africa is left with at least five (5) credible wholesale

national operators after the spectrum assignment process (including the WOAN."[115]

229 Cell C has indicated it will decommission its physical radio access network ("**RAN**") sites within the next three years and permanently roam on other networks through a so-called virtual radio network provisioned for Cell C on the RAN of another operator. Cell C has successfully decommissioned 34% of its RAN.

230 In light of Cell C's declared position and conduct, it is reasonable to infer that it will decommission all its RAN sites within the 20-year term of the spectrum licenses. An operator requires RAN sites to utilise their spectrum. As a result, in light of Cell C decommissioning its RAN sites, it is not rational to include Cell C as one of the operators in the "five-operator" market structure envisioned.

231 If ICASA took into account that Cell C is no longer a national wholesaler, it would have adjusted the current spectrum caps designed to accommodate its envisioned five operators (the spectrum caps are divided to accommodate five market operators). ICASA's failure to consider Cell C's status as a national wholesaler has a material impact on the design of the 2021 Auction ITA.

232 ICASA disregarded relevant considerations when it failed to consider the spectrum sharing arrangements before it issued the ITAs. The 2021 Auction ITA should be reviewed in terms of section 6(2)(e)(iii) of PAJA.

[115] CaseLines 005-267, para 6.5.

DECISION TO DEFER LICENSING FOR THE WOAN

233 In the First 2021 Information Memorandum, ICASA stated that it had asset aside an 80 MHz assignment for spectrum requirements for the WOAN.[116] ICASA explained that the importance of the spectrum set aside was to ensure that the WOAN is a credible national wholesale operator in the market.[117] Further, that the spectrum set aside for the WOAN is empirically supported by the spectrum that is assigned to Tier-1 operators that meet the credibility test.[118]

234 However, in the same Information Memorandum, ICASA stated that it was reconsidering the composite ITA for the licence for purposes of operating the WOAN.[119]

235 In the Reasons Document for the 2021 Auction ITA, ICASA stated that it will publish a notice advising on the process that will be undertaken for licensing for the WOAN.[120]

236 ICASA has always maintained that the WOAN was meant to be a national wholesale operator that would compete as the fifth national wholesale operator in the market. Additionally, the decision to defer licensing for the WOAN overlooks that the WOAN and IMT licensing processes in the 2021 Auction

[116] CaseLines 005-24, para 4.2.

[117] CaseLines 005-24, para 4.5.

[118] CaseLines 005-24, para 4.6.

[119] CaseLines 005-26 and 005-27.

[120] CaseLines 005-154, para 4.8.

ITA are inter-linked because spectrum set aside for the WOAN means spectrum taken away from the IMT process in the 2021 Auction ITA and because there are WOAN-related requirements (e.g. offtake requirements and even MVNO access requirements) that are proposed as conditions of IMT spectrum licenses pursuant to the auction.

237 The decision to defer the licensing for the WOAN undermines the stated purpose for the WOAN. As a result, the Auction ITA is reviewable under section 6(2)(f)(ii)(aa) of PAJA.

238 ICASA did not consult the affected parties on its decision to defer the licensing of the WOAN. The future existence or otherwise of the WOAN has a material bearing on the bidders' decisions in the auction. This renders ICASA's decision to defer the WOAN procedurally unfair and irrational.

MISCELLANEOUS ISSUES

239 The report from Telkom's economics advisers ("**BRG**") dated 1 November 2021[121] and Mr Masalesa's affidavit[122] are relevant and admissible. The experts are qualified and their respective curriculum vitae are attached to the report.[123] The other respondents have also submitted reports from their respective experts. We respectfully submit that it would be to the

[121] Telkom's FA Annexure "FA6" CaseLines 003-458.

[122] Telkom's FA Annexure "FA2" CaseLines 003-231 to 291.

[123] Telkom's RA in Part B CaseLines 004-1497, para 217.

benefit of the Court to consider BRG's expert's report in assessing the merits of Telkom's grounds for challenging the legality of the 2021 Auction ITA.

240 Telkom is accused of only acting to protect its pecuniary interests.[124] But this is incorrect. Even if that were so, the commercial interests are aligned with promoting competition and consumers will benefit from effective competition. ICASA's powers are not unfettered. The issuing of ITAs is an exercise of public power and as such is subject to constitutional control.

241 Telkom brought this application to uphold the rule of law and to hold ICASA accountable. Telkom is firmly committed to the rule of law and the values of the Constitution.

THE APPRIOPRIATE REMEDY

242 Under section 172(1)(a) of the Constitution, this Court is required to declare any and all conduct that it finds to be inconsistent with the Constitution invalid to the extent of its inconsistency. This application falls within the ambit of section 172 as a "constitutional matter" because "every improper performance of an administrative function [implicates] the Constitution."[125] Moreover, it involves the exercise of a public power by an agent of the Constitution – a chapter 9 institution.

[124] ICASA's AA in Part A CaseLines 003-1552, para 18

[125] **Steenkamp NO v Provincial Tender Board of the Eastern Cape** 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC), para 29.

243 Therefore, if this Court finds that the impugned decision is unlawful in terms of PAJA, this Court is required to make a declaration to that effect. Once a ground of review under PAJA or the principle of legality has been established, section 172(1)(a) of the Constitution requires the impugned decision to be declared unlawful.

244 That, however, is not the end of the matter. In terms of section 172(1)(b) of the Constitution, this Court "may make any order that is just and equitable". In **Corruption Watch NPC v President of the Republic of South Africa**,[126] the Constitutional Court explained that "[t]he operative word 'any' is as wide as it sounds. Wide though this jurisdiction may be, it Is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity."[127]

245 In **Economic Freedom Fighters v Speaker of the National Assembly**,[128] the Constitutional Court held:

> "*This Court's remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, section 172(1)(b) empowers courts to make any order that is just and equitable ...*
>
> *The power to grant a just and equitable order is so wide and flexible that it allows Courts to formulate an order that does not follows prayers in the notice of motion or some other pleading*."[129]

[126] **Corruption Watch NPC v President of the Republic of South Africa** 2018 (10) BCLR 1179 (CC).

[127] **Corruption Watch NPC v President of the Republic of South Africa**, para 68.

[128] **Economic Freedom Fighters v Speaker of the National Assembly** 2018 (3) BCLR 259 (CC).

[129] **Economic Freedom Fighters v Speaker of the National Assembly**, para 210.

246 Under PAJA, section 8 provides legislative content to the nature and ambit of just and equitable remedies once an administrative action has been reviewed. In **Bengwenyama Minerals (Pty) Ltd**,[130] the Constitutional Court held:

> *". . . when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding*."[131]

247 In **Millenium Waste Management**,[132] the Supreme Court of Appeal held that determining a just and equitable remedy in terms of section 8 of PAJA—

> "*involves a process of striking a balance between the applicant's interests on the one hand, and the interests of the respondents, on the other. It is impermissible for the court to confine itself . . . to the interests of the one side only*."[133]

248 The question of what is just and equitable is a question that will always be informed by the circumstances of each case.[134]

249 Supervisory relief can be granted as just and equitable relief in terms of section 172(1)(b) of the Constitution. In **Head of Department: Mpumalanga**

---

130 **Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd** 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC).

131 **Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd**, para 84

132 **Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province** 2008 (5) BCLR 508 (SCA); 2008 (2) SA 481 (SCA).

133 **Millennium Waste Management**, para 22.

134 **Millennium Waste Management**, para 22.

Department of Education and Another v Hoërskool Ermelo,[135] the Court also held:

> *"[97]It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution."*[136]
>
> (Our emphasis)

250 In **Mwelase v Director-General for the Department of Rural Development and Land Reform**,[137] the Constitutional Court held:

---

[135] **Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo** 2010 (2) SA 415 (CC).

[136] **Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo**, para 97.

[137] **Mwelase v Director-General for the Department of Rural Development and Land Reform** 2019 (6) SA 597 (CC).

"[46] . . . The courts and government are not at odds about fulfilling the aspirations of the Constitution. Nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution's vision of justice, dignity and equality. That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable.

. . .

[48] In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief. That was so in Black Sash I, and it is the case here. In both, the most vulnerable and most marginalised have suffered from the insufficiency of governmental delivery.

[49] The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do. In cases of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done."[138]

[138] **Mwelase**, paras 46, 48 and 49. See, also, Kent Roach and Geoff Budlender **Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable** (2005) 122 SALJ 325-351, at 333-334, 351, where the authors highlight that "[d]ifferent remedial routes may be appropriate in different circumstances, but the ultimate destination that the courts should insist upon is compliance with the

(Our emphasis)

251 The remedy sought in this case is within the powers of this Court. It is also just and equitable, and it will be effective. It will not intrude unduly into the terrain of the Executive.[139] Section 8(1)(c)(i) of PAJA expressly permits this Court to remit the matter to ICASA "with or without directions". Telkom asks that the Court remit the licensing process to ICASA as the specialist constitutional agent empowered to license spectrum with directions as contemplated in section 8(1)(c)(i) of PAJA.[140] So, Telkom is not asking the Court to assume ICASA's administrative role.

252 In **Meadow Glen**,[141] the SCA held:

> *"[35]Both this Court and the Constitutional Court have stressed the need for courts to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio-economic rights. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order and the myriad other issues that may arise with orders the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with*

constitution. In the final analysis, the test is one of effectiveness. Court orders that are not effective undermine respect for the courts, for the rule of law, and for the constitution itself."

139 Telkom's FA CasLines 003-132, para 319.

140 Telkom's FA CaseLines 003-131, para 316.

141 **Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality** 2015 (2) SA 413 (SCA).

these issues and courts should look to orders that secure on-going oversight of the implementation of the order."[142]

253 In **Port Elizabeth Municipality v Various Occupiers**,[143] Sachs J said:

> *"The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make."*[144]

254 Telkom proposes that the Court should grant the following orders:

254.1 The Court should direct ICASA to investigate, and undertake a public consultation process on, the options available to it to license affected spectrum in a manner that promotes competition in the mobile market, within a period directed by the court.

254.2 ICASA must be requested to consider the assistance and advice of the Competition Commission. The Competition Commission is a specialist state institution that has previously undertaken assessments and inquiries into the mobile data services market – and concluded that the competition was ineffective.

254.3 ICASA and the Competition Commission have concurrent jurisdiction in relation to competition in the ICT sector. Under section 67(11) and

---

[142] **Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality**, para 35.

[143] **Port Elizabeth Municipality v Various Occupiers** 2005 (1) SA 217 (CC).

[144] **Port Elizabeth Municipality v Various Occupiers**, para 36.

(12) of the ECA, ICASA and the Competition Commission may cooperate to assess and determine the effectiveness of competition and the necessary remedies. An order directing the cooperation would not be inconsistent with the ECA, nor with the ICASA Act.

254.4 The Competition Commission's expertise will also be relevant for purposes of defining the market in respect of which the competition assessment ought to be undertaken.[145]

254.5 The Court should direct ICASA to investigate and consult the public on the minimum requirements for the efficiency of the WOAN including the amount and type of radio frequency spectrum required to ensure that WOAN is able to meet the policy mandate set out in item 3(1) of the 2019 Policy Directive.[146]

254.6 The Court should stipulate a timeframe for ICASA to conduct the process. This should include addressing the timelines within which submissions should be made, and a competition assessment based on these submissions should be conducted.[147]

254.7 The Court should also direct ICASA to publish a draft invitation to apply as regulations and invite interested parties to make submissions on the draft invitation to apply. This would be just and equitable because it promotes a transparent and accountable licensing process. It would further assist in allowing ICASA and interested parties to consult on

[145] Telkom's FA CaseLines 003-134, para 319.4.

[146] Telkom's FA CaseLines 003-134, para 319.5.

[147] Telkom's FA CaseLines 003-134, para 319.6.

the substance of the draft invitation to apply before any expenditure is incurred by applicants intending to submit bids in response to an invitation to apply. ICASA undertook a similar process in 2016 when it published the 2016 invitation to apply as regulations in General Notice 912, Government Gazette No. 34872 of 15 December 2011 for comment.[148]

254.8 The Court should direct ICASA to only finalise and publish the ITA for the licensing of the high demand spectrum once it has had regard to the representations made by the interested parties, and thereafter embark on an auction process or other lawful process ICASA may determine.[149]

255 It is just and equitable for this Court to control compliance with its order and exercise some form of supervisory jurisdiction to ensure that the order is implemented.[150] It is necessary because the licensing of spectrum is long overdue. But, despite the urgency of the matter, ICASA has repeatedly demonstrated that it cannot comply with the regulatory framework that governs the licensing process.[151] Ultimately, the consumer is prejudiced by ICASA's failure to comply with its statutory obligations. The Court would be granting the structural order to vindicate the consumers' rights including the right to freedom of expression, amongst other rights enshrined in the Bill of Rights.

[148] Telkom's FA CaseLines 003-134, para 319.7.

[149] Telkom's FA CaseLines 003-135, para 319.8.

[150] Telkom's FA CaseLines 003-132, para 318.

[151] Telkom's FA CaseLines 004-1455, para 89.

256 This relief is justified by the peculiar harms that ICASA's conduct has caused to the economic development of the country and consumers having to endure high data prices because of the ineffective competition in the mobile broadband market.

257 ICASA's conduct also undermines the rule of law and the integrity of the courts. This is because, even when the Courts declare that the inclusion of 700 MHz and 800 MHz frequency bands of spectrum in an ITA for the licensing of high demand spectrum when these frequency bands are unavailable ICASA did so in the 2021 Auction ITA. There are obvious accountability concerns centred on ICASA's *modus operandi*.

258 The proposed order does not usurp ICASA's authority and does not result in the Court interfering with how ICASA complies with its statutory obligations. ICASA need only ensure that it complies and demonstrate its compliance to the Court.[152] This will avoid more litigation being bought if ICASA fails to comply. So, any claim that the order proposes a violation of the doctrine of powers or usurping of ICASA's administrative powers is ill-founded.

259 Although the auction will have taken place by the time this application is determined, the successful bidders would not have begun to commit to original equipment manufacturers and order equipment.[153] It would be possible for the Court to grant the order reviewing and setting aside the 2021 Auction ITA. In

[152] CaseLines 004-1456.

[153] CaseLines 004-1468, para 130.

addition, Telkom launched this application at the beginning of January 2022. The application was specially allocated and, at a meeting on 8 February 2022 the Deputy Judge President set the application down for hearing on the week of 11 April 2022. All the parties participating in the auction process and ICASA carried on while aware of the risk that this Court could find that the 2021 Auction ITA is invalid. The bidders, including Telkom knowingly assumed the risk setting aside the ITA after they participated in the auction. Therefore, it is not unreasonable for this Court to grant the relief Telkom seeks.

COSTS

260 Telkom asks for costs of this application, if successful. If not, this application is covered by **Barkhuizen v Napier**[154] and **Biowatch Trust v Registrar Genetic Resources**.[155]

261 In **Barkhuizen v Napier**, the Constitutional Court said:

> "*This is not a case where an order for costs should be made. The applicant has raised important constitutional issues relating to the proper approach to constitutional challenges to contractual terms. The determination of these issues is beneficial not only to the parties in this case but to all those who are involved in contractual relationships. In these circumstances, justice and fairness require that the applicant should not be burdened with an order for costs. To order costs in the circumstances of this case may have a chilling effect on litigants who might wish to raise constitutional issues. I*

[154] **Barkhuizen v Napier** 2007 (5) SA 323 (CC).

[155] **Biowatch Trust v Registrar Genetic Resources** 2009 (6) SA 232 (CC).

consider therefore that the parties should bear their own costs, both in this Court and in the courts below."[156]

262 Later, in **Biowatch**, the Constitution Court held that:

262.1 In litigation between the government and a private party seeking to assert a constitutional right, ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.[157]

262.2 The issues must be genuine and substantive and truly raise constitutional consideration relevant to the adjudication.[158]

262.3 Courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise unless the application is frivolous, vexatious or in any other way manifestly inappropriate.[159]

263 This case is concerned with the exercise of rights in the Bill of Rights (including section 33 right to fair administrative action, the rights to freedom of trade, education and the dissemination of information pursuant to freedom of expression) and the actions of a Chapter 9 institution and the public interest relating to a much needed resource.

---

[156] **Barkhuizen v Napier**, para 90.

[157] **Biowatch Trust**, para 22.

[158] **Biowatch Trust**, para 25.

[159] **Biowatch Trust**, para 24.

264 In **Minister of Telecommunications**,[160] this Court highlighted the importance of the licensing of spectrum to the South African public in general in the following terms:

> "*The radio frequency spectrum, like water and electricity is a crucial dimension of social life. Access to the utility of the frequency spectrum implicates the optimal achievement of several constitutional values and rights, including the freedom of trade, modem education and the dissemination of information pursuant to freedom of expression. Achieving effective access to its utility implicates equality too because of its role in facilitating these several rights. The regulatory regime owes, as alluded to earlier, in part, its lineage to the Constitution. Accordingly, radio frequency spectrum is a highly regulated affair because of its scarcity and critical role in the communications industry and the importance, in tum, of that industry to modem economic and social activity*."[161]

(Our emphasis)

265 The principle in **Barkhuzen** and **Biowatch** therefore applies *a fortoiri* in this litigation.

266 Telkom should not be ordered to pay the costs of the other respondents that oppose this application. Telkom only sought to impugn decisions taken by ICASA; Telkom did not seek any relief against the other respondents.[162] ICASA is very capable and well-resourced to defend the legality of the

---

[160] **Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa; Cell C (Pty) Ltd v Acting Chair, Independent Communications Authority of South Africa** (2016/59722, 2016/68096) [2016] ZAGPPHC 883 (30 September 2016)

[161] **Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa; Cell C (Pty) Ltd v Acting Chair, Independent Communications Authority of South Africa**, para 10.

[162] Telkom' FA CaseLines 003-21, para 11; CaseLines 003-29, para 34.

impugned decisions; ICASA filed substantive affidavits, which although mistaken about the legality of the impugned decisions, substantively provided a response to the basis upon which Telkom sought to rely to review and set aside the impugned decision.

267 The other respondents did not have to be involved because Telkom sought no relief against any of them.[163] The other respondents should accordingly bear their own costs in this litigation. It would be unjust for a party seeking to impugn a decision of an organ of state to have to pay the costs of parties that oppose the application when the organ of state is very capable and well-resourced to defend the decision.

CONCLUSION

268 For the reasons above, Telkom submits that it has demonstrated that the 2021 Auction ITA is unlawful and should be reviewed and set aside. The appropriate remedy is for ICASA to restart the licensing process and take a new decision remedying the legal shortcomings in the 2021 Auction ITA.

269 The opposing respondents should jointly and severally pay Telkom' costs,[164] including the costs of three counsel.

[163] Telkom' FA CaseLines 003-29, para 34.

[164] Telkom' FA CaseLines 003-29, para 34.

Werner Lüderitz SC
Sesi Baloyi SC
Mfundo Salukazana

Chambers, Sandton
14 March 2022

LIST OF AUTHORITIES

Cases

1. Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa; Cell C (Pty) Ltd v Acting Chair, Independent Communications Authority of South Africa (2016/59722, 2016/68096) [2016] ZAGPPHC 883 (30 September 2016)
2. Telkom SA SOC Limited v Independent Communication Authority of South Africa [2021] JOL 49912 (GP)
3. Simon No v Mitsui and Co Ltd 1997 (2) SA 475 (W); [1996] 3 All SA 353 (W).
4. Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg 1985 (2) SA 790 (A)
5. MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd 2014 (3) SA 481 (CC)
6. Merafong City Local Municipality v AngloGold Ashanti Limited 2017 (2) SA 211 (CC)
7. Department of Transport v Tasima (Pty) Limited 2017 (2) SA 622 (CC).
8. Earthlife Africa Johannesburg v Minister of Energy 2017 (5) SA 227 (WCC)
9. Esau v Minister of Co-operative Governance and Traditional Affairs 2020 (11) BCLR 1371 (WCC)
10. Esau v Minister of Co-Operative Governance and Traditional Affairs 2021 (3) SA 593 (SCA)
11. Democratic Alliance v President of South Africa 2012 (12) BCLR 1297 (CC).
12. Law Society of South Africa v President of the Republic of South Africa 2019 (3) SA 30 (CC)

13. Telkom SA Soc Limited v Mncube NO; Mobile Telephone Networks (Pty) Ltd v Pillay NO; Cell C (Pty) Limited v The Chairperson of ICASA; Dimension Data Middle East & Africa (Pty) Ltd t.a Internet Solutions v ICASA (55311/2015; 77029/2015; 82287/2015) [2016] ZAGPPHC 93

14. Pharmaceutical Manufacturers Association of SA: in re ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC),

15. Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC)

16. Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry 2010 (5) SA 457 (SCA)

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

18. Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd 2012 (2) SA 16 (SCA)

19. Electronic Media Network Limited v e.tv (Pty) Limited (9) BCLR 1108 (CC)

20. National Energy Regulator of South Africa v PG Group (Pty) Limited 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC)

21. Zuma v Democratic Alliance 2018 (1) SA 2000 (SCA)

22. Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd [2005] 2 All SA 239 (SCA)

23. Airports Company South Africa v Tswelokgotso Trading Enterprises CC 2019 (1) SA 204 (GJ)

24. Steenkamp NO v Provincial Tender Board of the Eastern Cape 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC)

25. Corruption Watch NPC v President of the Republic of South Africa 2018 (10) BCLR 1179 (CC)

26. Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC)

27. Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province 2008 (5) BCLR 508 (SCA); 2008 (2) SA 481 (SCA)

28. Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC)

29. Mwelase v Director-General for the Department of Rural Development and Land Reform 2019 (6) SA 597 (CC)

30. Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality 2015 (2) SA 413 (SCA)

31. Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC

32. Barkhuizen v Napier 2007 (5) SA 323 (CC)

33. Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC)

Legislation

34. Electronic Communications Act 36 of 2005

35. Independent Communications Authority Act 13 of 2000

36. Radio Frequency Spectrum Regulations, 2015

Textbook

37. C Hoexter and G Penfold *Administrative Law in South Africa* (3 ed, 2021 Cape Town Juta)

Journal articles

38. Kent Roach and Geoff Budlender *Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable* (2005) 122 SALJ 325-351