IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No.: 166/2022

In the matter between:

TELKOM SA SOC LIMITED	Applicant
and	
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	First Respondent
CHAIRPERSON: INDEPENDENT COMMUNICATIONS 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 NETWORKS (PTY) LTD	Seventh Respondent
LIQUID TELECOMMUNICATIONS SA (PTY) LTD	Eighth Respondent
COMPETITION COMMISSION OF SOUTH AFRICA	Ninth Respondent
SOUTH AFRICAN COMMUNICATIONS FORUM	Tenth Respondent
SOUTH AFRICAN BROADCASTING CORPORATION LTD	Eleventh Respondent
NATIONAL ASSOCIATION OF BROADCASTERS	Twelfth Respondent
COMMUNITY INVESTMENT VENTURES HOLDINGS (PTY) LTD	Thirteenth Respondent

e.tv (PTY) LTD	Fourteenth Respondent
SOUTH AFRICAN RADIO ASTRONOMY OBSERVATORY	Fifteenth Respondent
PAUL HJUL	Sixteenth Respondent
ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS	Seventeenth Respondent
ICT SMME CHAMBER	Eighteenth Respondent
SONKE TELECOMMUNICATIONS (PTY) LTD	Nineteenth Respondent
INSTITUTE FOR TECHNOLOGY AND NETWORKS ECONOMICS	Twentieth Respondent
B-BBEE ICT SECTOR COUNCIL	Twenty-first Respondent

FILING NOTICE: VODACOM'S HEADS OF ARGUMENT

PRESENTED HEREWITH FOR FILING: Fourth Respondent's Heads of Argument

DATED at **Sandton** this the **28th** day of **March 2022**.

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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
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VODACOM'S HEADS OF ARGUMENT

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Introduction

1 Communications and economic activity are increasingly reliant on mobile data services. Since 2009, mobile data usage has increased more than 100 times (10,000%)[1] but the radio frequency spectrum ("spectrum") that has been permanently licensed to enable mobile network operators ("MNOs") to meet that demand has remained unchanged. The rest of the world has followed the International Telecommunications Union ("ITU") conventions and has licensed significantly more of the available spectrum than South Africa[2]. South Africa is now a decade behind where it should be and there is an urgent and critical need for the permanent licensing and assignment of spectrum which, undeniably, would operate in the public interest and for the benefit of all South Africans.

2 During the State of Disaster, ICASA was empowered to issue temporary spectrum licences in order to facilitate the deployment of additional spectrum.[3] The frequency bands that were licensed under this temporary arrangement are the same bands that are the subject of the 2021 Auction ITA and have been auctioned by ICASA during March 2022 for permanent licensing. The deployment of this spectrum during this temporary period showed the MNOs and ICASA the significant improvement that the additional spectrum can bring to the quality of electronic communication services delivered to the public. The temporary licensing arrangements will end on 30 June 2022 and if the permanent spectrum cannot be licensed, the public will suffer significant set-backs in the quality of electronic communications services they receive.

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1 Vodacom AA 004-674 para 24.

2 Vodacom AA 004-672 para 22.

3 Vodacom AA 004-675 para 27 – 28.

3 In Part A of the current application, Telkom sought to interdict the auction process which was initiated by the Invitation to Apply on 10 December 2022 (the "2021 Auction ITA"), but after it received the answering affidavits to Part A of its application, Telkom abandoned that relief. Instead, it elected to participate in the auction which was held by ICASA during March 2022 and to proceed with Part B - to review and set aside ICASA's decision to publish the 2021 Auction ITA.

4 Although the auction was completed after the affidavits in this matter were filed, there can be no objection to the Court's taking notice[4] of:

4.1 the fact that the auction took place;

4.2 the fact that Telkom participated in the auction and purchased spectrum lots in the auction up to the maximum amount that it could acquire;

4.3 Telkom acquired <1 GHz spectrum (in the 800 MHz band) at a price significantly below the price paid by Vodacom and MTN in the main auction for similar bands;

4.4 Over R14 Billion was raised in the auction, which far exceeded the initial estimates, providing the State (and therefore the public) with significant benefits.

5 Telkom seeks to set all of this aside. In doing so, it does not dispute that ICASA was empowered to have issued an invitation to apply ("ITA") and to have conducted an

[4] On 25 March 2022, Rain filed a supplementary affidavit setting out these matters. Although these are "post balance sheet events", in the sense that they post-date the decisions that are under review, they are nevertheless relevant as subsequent evidence that belies the speculative effect on bidding behaviour that Telkom contends some aspects of the auction entail for the bidders, including Telkom. Telkom has purchased the maximum spectrum that the auction rules allowed it to puchase – and so it certainly put its money where its mouth was not. These post balance sheet events are also potentially relevant for the issue of remedy – should the court reach that issue, as considered further below.

auction. Telkom's attack is instead focused on particular aspects of the 2021 Auction ITA design. Under the awkward banner of irrationality, Telkom contends that ICASA should have designed the auction in a manner that provided Telkom with greater preference or more asymmetric benefits than it did. Telkom's point of departure is to cast itself as the only potential competitor to Vodacom and MTN and to assert that ICASA's primary purpose in publishing the ITA was (or should have been) to assist Telkom in competing with Vodacom and MTN. The benefits it claims for itself are benefits which it says will "promote competition" in the manner contemplated in the ECA.

6 ICASA went to great lengths to design its auction in a way it felt "promoted competition". It took radical steps to assist Telkom and other MNOs (including through an opt-in round) and it imposed greater obligations on Vodacom and MTN than on other bidders (such as more extensive coverage and the "outside-in" obligations). The details of the steps ICASA has implemented, to give non-Tier 1 MNOs significant advantages over Vodacom and MTN, are set out in Vodacom's answering affidavit.[5] Telkom's complaint is based on its own highly contentious notions of what would *better* have promoted competition than the steps taken by ICASA. Telkom complains that ICASA did not go far enough in assisting Telkom and in hampering Vodacom and MTN. Telkom's whole case on ICASA's ostensible failure to "promote competition" is aimed either at: (i) providing Telkom with a preferential "leg up", which Vodacom and MTN does not receive; or (ii) hobbling Vodacom and MTN by imposing additional obligations on them or restricting them from opportunities Telkom might enjoy.

5 Vodacom AA 004-687 paras 56 and 57.

7 The most striking feature of this review is that Telkom elevates the "promotion of competition" into a position it simply does not occupy in the legislative framework governing ICASA's powers in the present context. As will be analysed below, the promotion of competition is but one of twenty-six at times heavily incommensurable objects ICASA must balance when it exercises its relevant powers, the main purposes of which do not even include the promotion of competition. There can never be one correct answer in how to achieve this balance. It is preposterous for Telkom to suggest, as it does, (a) promotion of competition trumps all else and (b) competition can be lawfully promoted only in the highly contested ways Telkom demands, and if this is not done, the exercise is subject to review for being irrational.

8 Vodacom, Rain, MTN, ICASA and the Minister have all in different ways proffered their own assessments, backed by professional and independent economists, of how ICASA could and should best have promoted competition. Vodacom's economic experts, Frontier Economics, have, for example, put forward a powerful case for saying that ICASA went well beyond what could reasonably have been required in seeking to make its auction "pro-competitive".[6] On the rules applicable in motion proceedings, this version must be accepted. Telkom has not even attempted to put forward a case that such version is so far-fetched as to be capable of being rejected on motion. But the court need not accept the version of Vodacom's expert economists to reject Telkom's case based on Telkom's own competition assessment. All the court needs to recognise is that the case does not come close to turning disagreement on the best ways to promote competition (and to integrate and balance this with the other competing imperatives in ICASA's function) into actionable grounds for review.

[6] Frontier Report "GH2" 004-763 particularly at 004-768, 004-770, 004-777, 004-779,004-792,004-795, 004-796

Telkom's self interest

9 Throughout its application, and again in its heads of argument (including when addressing the question of costs),[7] Telkom seeks to paint itself as a party acting in the public interest and as a small competitor in need of additional structural support and preference. As Vodacom sets out in its answering affidavit,[8] Telkom's analysis ignores a number of important facts which show that the above characterisation of Telkom's involvement is misleading.

9.1 First, it is clear that the entire focus of Telkom's application is directed at extracting greater benefits for Telkom. These benefits are intended to be extracted: i) in the short term, through delays, during which Telkom will retain its significant spectrum advantage as a result of its existing permanent spectrum holdings and its assignment of provisional spectrum under the State of Disaster Regulations;[9] ii) in the long term through greater preference in a future auction as, if it succeeds in this application, it will use the threat of additional court applications if it does not receive what it wants, to motivate for greater benefits. Although the public interest will suffer as a result of a delay occasioned by its review application, because the public will not receive the obvious benefits which arise from deployment of additional spectrum (which is undisputed), Telkom will be able to exploit its current privileged position.

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7 Telkom heads 004-1642 para 260.

8 Vodacom AA 004-685 para 52 – 55.

9 Vodacom AA 004-685 para 52.2 – 52.4.

9.2 During the past three years, Telkom has grown its data throughput volumes by approximately 400% resulting in significant increases in revenue and placing it in the position as the MNO carrying the largest volume of mobile data in the market.[10] It has been able to achieve this growth as a result of its own investment and because of the significant spectrum capacity constraints experienced by Vodacom and MTN during this period. Certainly, it would not have been able to achieve these outcomes if it was being in any way significantly hampered by "dominance" on the part of Vodacom and MTN.

10 In the circumstances, we submit that the Court should be slow to accept any of Telkom's arguments in which it suggests that it is acting in the public interest – either in respect of the merits or costs.

11 At paragraph 240 of its heads,[11] Telkom makes the exculpatory submission that even if it were found that Telkom was acting only to protect its pecuniary interests, "*the commercial interests are aligned with promoting competition and consumers will benefit from effective competition*". The fundamental flaw in this submission is that, as alluded to above, Telkom has focused on only one of the long list of factors recorded within section 2 of the ECA whereas ICASA is enjoined to consider and balance all of the factors. Where the results of Telkom's approach would undermine the other objects of the ECA such as: efficient use of spectrum; universal provision of electronic communications services and connectivity; investment and innovation in the sector; and

[10] Vodacom AA 004-686 para 54.

[11] Telkom heads 004-1632.

the improvement of service quality and data prices, there is no justification for entertaining Telkom's complaints.[12]

Expert evidence

12 As already noted, Vodacom (and other respondents) put up powerful expert evidence to set out their assessment of the competition dynamics and the extent to which ICASA can ever be said not to have gone far enough in assisting Telkom and hampering Vodacom and MTN, and these assessments must be accepted by the court on the rules applicable to motion proceedings.

13 In addition, Vodacom has challenged Telkom's entitlement to rely on the opinions expressed by BRG in the reports attached to the founding affidavit.[13] As set out by the SCA in *National Potato Co-op:*[14]

> *"The duties and responsibilities of expert witnesses in civil cases include the following:*
>
> *The expert evidence presented to the court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ...*
>
> *An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise ...*
>
> *An expert witness in the High Court should never assume the role of advocate.*
>
> *An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion ...*
>
> *An expert witness should make it clear when a particular question or issue falls outside of his expertise."*

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12 ICASA's mandate and the importance of these other factors are set out in Vodacom AA 0040-678 paras 37 – 49.

13 BRG reports at Telkom FA annexures "FA6" 003-458 and "FA7" 003-532.

14 *PriceWaterhouse Coopers Inc v National Potato Cooperative Ltd* 2015 JDR 3071 (SCA) at 98 with reference to the *Ikarian Reefer* [1993 2 Lloyds Rep 68 (QB) (ComCt)] at 81 – 82.

14 And with reference to *Stock v Stock*:[15]

> *"An expert ... must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he (or she), is partisan and consistently asserts the cause of the party who calls him..."*

15 The fundamental problem with the BRG reports is that they were not prepared for the Court. The two reports were prepared on 2 November 2021 and 30 November 2021 respectively, for purposes of submission to ICASA to motivate Telkom's position in response to the Information Memoranda issued by ICASA on 1 October 2021 and 16 November 2021 respectively. As these documents were prepared as "advocacy" documents and were not prepared as expert reports for purposes of submission to court, they do not meet the test for admissible expert evidence in the current court proceedings, because they were not prepared for purposes of assisting the Court in these proceedings but rather for purposes of motivating Telkom's position in its submissions to ICASA.

Legal principles on rationality and reasonableness

16 Before dealing with the individual grounds of review and the points on which Telkom focuses its attack, it is important to highlight the legal principles that apply to the main theme of Telkom's argument – namely irrationality. Telkom contends that the review application should be upheld because, it says, the ICASA decision is "irrational and arbitrary" in several respects.[16] Although Telkom also alleges a material error of law (in relation to the September 2021 Court Order) and that the consultation process was unfairly truncated, the vast majority of Telkom's arguments focus on allegations of irrationality.

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[15] *Stock v Stock* 1981 (3) SA 1280 (A) at 1296 E-G.

[16] Telkom heads 004-1555 para 5.3.

17 In assessing whether an administrator has acted irrationally, the Court does not approach the matter to decide whether the administrator was right or wrong, nor does it assess whether the administrator's decision was "the best decision". In upholding the separation of powers and recognising the expertise of a specialist decision-making body, like ICASA, a Court's role is not to intervene and to second-guess the expertise of those agencies authorised to conduct the business of the executive, particularly in decisions addressing policy-laden or polycentric issues.[17] The Court's review jurisdiction does not extend to overturning decisions, as if on appeal. The Court will intervene only where the decision is irrational or unreasonable, as those terms are defined and used in the Promotion of Administrative Justice Act, 2000 ("PAJA").[18] While Telkom has attempted to single out "promotion of competition" as the sole purpose of the 2021 Auction ITA and then set out to test the conduct of ICASA against that purpose, its approach is completely wrong. As set out below, the fundamental purpose of the Auction ITA is to assign the spectrum in the public interest. Section 2 of the ECA identifies 26 factors that may be taken into account in determining the public interest, approximately 14 of which may influence the polycentric, technical exercise required to be done by ICASA in relation to spectrum licensing and assignment. Only one of those factors is the promotion of competition. The Court cannot assess the rationality of ICASA's decision by merely focusing on one of the factors and ignoring the rest, which is precisely what Telkom has done. Furthermore, and fundamentally, the idea that competition can be promoted only in the way demanded by Telkom is in any event thoroughly refuted by the counter evidence of the economic experts, like Frontier economics.

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17 *Logbro Properties CC v Bedderson NO* 2003 (4) SA 460 (SCA) at para 21; see too *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) ("*Bato Star*") at para 46.

18 See sections 6(2)(f)(ii) and 6(2)(h) of PAJA.

18 In *Albutt*[19] the Constitutional Court noted:

> *"Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected ... The purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objectives sought to be achieved."*

19 This approach has been confirmed by the Full Bench in this Division[20] where the Court emphasised that rationality requires merely a rational link between the means and the ends and reiterated that the means selected, the most suitable or even the least restrictive, nor do they have to be backed to "infallible" evidence.

20 In approaching its determination in the current matter, we submit that the correct approach to be adopted by the Court when assessing "rationality" is to identify the purpose for which the 2021 Auction ITA was published and the factors which the legislation required ICASA to take into account. Having done so, the Court can assess whether there is a rational link between the means employed by ICASA through the 2021 ITA and the multi-faceted end which the legislation seeks to achieve. By adopting this approach and taking note of the extensive work that was done by ICASA in preparing for and managing the 2021 Auction ITA, the Court will recognise that the process followed and the decision made by ICASA were properly conducted by an expert regulator which should not be overturned on the basis of technical complaints or a difference of opinion by a disgruntled bidder seeking to use the court process to improve its commercial position.

21 Although Telkom has referred to and complained about the "reasonableness" of ICASA's decision, it appears to have employed that term as a synonym for "rationality".

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19 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 51.

20 *Fair-Trade Independent Tobacco Association v President, RSA* 2020 (6) SA 513 (GP) at paras 28 and 50.

"Reasonableness" in the context of PAJA section 6(2)(h) is evaluated in a "context specific" approach[21] and focuses on whether a decision, which might be rational in that it is linked to the relevant purpose, should still be set aside because the means employed by the decision-maker was "so unreasonable that no reasonable person could have exercised the power or perform the function".

22 Telkom justifiably does not pursue this line with any vigour. It is clear from an objective evaluation that, once the steps taken by ICASA are shown to be rationally connected to the purpose for which the decision was taken, the means used cannot be impugned as being "unreasonable". Whether it is the spectrum caps or the amount of spectrum allocated to the opt-in round or the exclusion of the spectrum arrangements, ICASA's answers cannot, even arguably, be considered so unreasonable that no reasonable regulator in ICASA's position could have adopted them.

23 In the circumstances, the threshold which Telkom has to meet in order to review and set aside ICASA's decision in the current circumstances is a significant one and, as set out below, Telkom's case comes well short of meeting this threshold.

September 2021 Court Order

24 Telkom's first ground of review relies on an assertion that "*ICASA's interpretation of the effect of the September 2021 Court Order is patently wrong*".[22] Telkom goes on to assert that: "*ICASA entirely misconceived the decision it had to take as a result of the September*

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21 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at 145.

22 Telkom FA 003-105 para 257.

2021 Court Order".[23] The essence of Telkom's complaint also appears in the replying affidavit[24] where Telkom states:

> *"It is farcical for any party to suggest when a decision has been set aside, that the administrator does not have to undertake the processes that would lead to a new decision. The setting aside is not limited to the outcome of an administrative process but the entire process."*[25]

25 Paragraph 2 of the Order which was granted by this Court on 15 September 2021 reads as follows:

> *"ICASA's decision to publish the invitation to apply for licensing process for International Mobile Telecommunications in respect of mobile broadband wireless access services for urban and rural areas using complementary bands IMT700, IMT800, IMT2600 and IMT3500 spectrum frequency through an auction published as Government Notice 535 of 2020 in Government Gazette No. 43768 of 2 October 2020 ('the Auction ITA') is reviewed and set aside and the matter is referred back to ICASA for reconsideration."*[26]

26 As set out by the Appellate Division in *Firestone:*[27]

> *"If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it."*

27 We submit that paragraph 2 of the Consent Order (quoted above) is clear and unambiguous. Only the decision to publish the Auction ITA was reviewed and set aside and the only "matter" that was "referred back" to ICASA for reconsideration was the decision to publish.

28 In the current proceedings, Telkom wants the Order to be read in a manner that cannot be justified by the text. Telkom's interpretation is also inconsistent with the Court's

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23 Telkom FA 003-107 para 261.

24 Telkom RA 004-1420 para 11; 004-1520 para 295 – 7.

25 Telkom RA 004-1520 para 296.

26 Telkom FA annexure FA8 003-575.

27 *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304 F.

purpose in making the order without hearing argument or deciding any of the issues giving rise to the relief claimed – that purpose being to bring an end to the litigation.

29 As pointed out in the affidavits,[28] the Court granting the Consent Order did not identify any part of the 2020 ITA document which was objectionable and did not hear argument or deliberate on the adequacy of the 2020 procedure or the 2020 ITA document. It certainly did not uphold any of Telkom's specific complaints or review grounds. As such, there is no basis for Telkom to imply that the Consent order imposed specific restraints on ICASA when preparing the 2021 document or that the content of the founding papers should be read to inform the content of the Order.

30 Therefore, when the text is considered in the context of the circumstances in which it was made,[29] there is no justification for finding that the content of the Order goes beyond reviewing and setting aside the decision to publish. Certainly it does not require ICASA to ignore or abandon what had been done prior to September 2021 or specifically impugn any of the steps taken before the decision to publish was taken. It would indeed have been irrational for ICASA to have done so.

31 If the Consent Order were interpreted to mean that ICASA accepted its decision to publish the 2020 Auction ITA might be found to be unlawful because, at the time the decision was taken, not all of the requirements had been met, this would not have the result asserted by Telkom. For example, if ICASA were for argument's sake required to have taken three steps before taking the 2019 decision to publish, and it took only two of those steps before doing so, the decision may be unlawful and liable to be set aside.

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28 Vodacom AA 004-703 para 98.

29 *Capitec Bank Holdings Limited and Ano v Coral Lagoon Investments (194) (Pty) Limited & Others* 2021 (JDR) 1484 (SCA).

However, ICASA's consent to the Order does not, as Telkom seeks to argue, render the first two steps void, unlawful or irrelevant or require ICASA to repeat the first two steps before taking a new decision to publish. Unless there is a good reason why ICASA is not entitled to rely on the first two steps when making its new decision, it should be entitled to rely on those steps, complete the third step and then publish a new decision.

32 Similarly, if there were specific parts of the text in the 2020 ITA document which were objectionable, giving rise to a review, ICASA was always entitled to amend the parts of the 2020 document that required amending, and leave unchanged the remainder of the text of the 2020 ITA document when it published the 2021 document.

33 In the circumstances, the content of the September 2021 Order, which did not identify any specific steps in the process, or parts of the 2020 ITA, that were unlawful, and heard no argument on any of this, did not preclude ICASA from relying on facts and processes which occurred prior to September 2021 when making the decision to publish the 2021 Auction ITA on 10 December 2021. Similarly, the Order did not preclude ICASA from preparing and publishing its 2021 ITA by amending its 2020 ITA document.

34 We respectfully submit that the September 2021 Order was not misinterpreted by ICASA and its terms did not preclude ICASA from proceeding with the 2021 Auction ITA in the manner in which it did.

The consultation process

35 Telkom complains that the process followed by ICASA was unreasonably truncated. It contends that the shortened time periods for consultation had the result that "*substantive and meaningful public participation process"* was not achieved.[30]

36 As confirmed by the SCA in *Esau,*[31] context is crucial in determining whether the time allowed for the making of representations is sufficient in the circumstances of any particular case. In that case, the SCA confirmed that the period of two days allowed for representations before Regulations were published was adequate. We submit that establishing the "context" in the current matter will include an assessment of, at the very least, facts in relation to (i) the history of the matter, including the information gathered and public participation previously held; (ii) the urgency with which the administrative action is required to be taken;[32] and (iii) the ability of the parties to make representations in the time allowed.[33]

37 Telkom's complaint and its argument around the timetable[34] do not address any of the above factors and Telkom has not introduced any facts which would give the necessary context to the court and enable the court to find that, in context, the time periods were inadequate. Instead, Telkom argues rhetorically and on a theoretical basis. We explain the context, with reference to the relevant facts, below.

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30 Telkom heads 140-145.

31 *Esau v Minister of Cooperative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA) para 96.

32 Compare *Esau* (supra) at para 97.

33 Compare *MEC, Department of Agriculture, Conservation and Environment and Another v HTF Developers* 2008 (2) SA 319 (CC) at para 49 where the respondent's ability to make representations within 48 hours confirmed the adequacy of the time allowed.

34 Telkom FA 003-122 para 289 – 301.

38 First, it is clear from a history of ICASA's various attempts to licence the IMT spectrum that extensive consultation has been held over a number of years on all of the relevant aspects which would inform the Auction ITA decision. In all of these processes, the interested parties were able to make representations. These include, but are not limited to, the following:

38.1 Consultation on the Minister's Draft Policy Directions regarding radio frequency spectrum in December 2011;[35]

38.2 Consultation on ICASA's Draft Spectrum Assignment Plan in December 2011;[36]

38.3 Public consultations during 2013 – 2016 in preparation of the integrated ICT Policy White Paper;[37]

38.4 Consultation on the 2015 Information Memorandum relating to prospective radio spectrum licensing process;[38]

38.5 Public consultation on the 2016 ITA;[39]

38.6 Public hearings into ICASA's market enquiry in relation to competition;[40]

38.7 Comments on the Minister's Draft Policy Directions in November 2018;[41]

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35 Telkom FA 003-70 para 147.

36 Telkom FA 003-71 para 151 and 158.

37 Telkom FA 003-74 para 162.

38 Telkom FA 003-80 para 181.

39 Telkom FA 003-83 para 193.

40 Telkom FA 003-89 para 210.3.

41 Telkom FA 003-90 para 214.

38.8 The Competition Commission's report on competition in the data services market published in December 2019;[42]

38.9 Representations made in relation to the 2020 Auction ITA which included commentary by interested parties on the 2019 Information Memorandum on the licensing process proposed by ICASA;[43]

38.10 The Court papers exchanged by the parties in Telkom's review application challenging the 2020 Auction ITA. Papers were delivered by *inter alia*, Telkom, MTN and Vodacom.

39 ICASA addressed Telkom's complaint in relation to the timetable in its Reasons document.[44] As pointed out by ICASA, there had already been a consultation process during 2019 and 2020 and the subject matter of the consultation for the 2021 Auction ITA covered very similar ground to the earlier process. This also adds to the context which justifies the timetable set by ICASA.

40 In the circumstances, Telkom and all other interested persons have had multiple opportunities to comment on how they suggest ICASA should license IMT spectrum prior to ICASA's commencing its process after the September 2021 Court Order. All of this prior interaction forms part of the relevant context in assessing the reasonableness of the time periods imposed by ICASA for the 2021 process.

41 Second, all parties agree that the licensing and assignment of IMT spectrum are long overdue and that the delays in deploying the spectrum have been detrimental to the public

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42 Telkom FA 003-93 para 225.

43 Telkom FA 003-94 para 226 – 231.

44 Telkom FA 003-81 para 6.33 – 6.41.

and to the economy. There was therefore a real need to ensure that the ITA, the auction and the licensing process were fast-tracked to reduce the prejudice caused by delays.

42 Third, Telkom does not dispute that it was able to produce the necessary comments within the period allowed by ICASA. Similarly, Vodacom (and the other MNOs) were able to submit detailed submissions.[45] The evidence on the affidavits and in ICASA's record shows that all of the parties were able to put together adequate submissions during the time allowed and no party has identified any particular issue that it would have addressed if it had been allowed more time, but didn't. In the circumstances, the time periods allowed by ICASA have proved to be adequate to meet any procedural fairness standards required by PAJA.[46]

43 Having regard to all of these factors, it cannot be said that, in setting its procedural timetable in the manner in which it did, ICASA acted in a procedurally unfair or unreasonable manner.

Availability of IMT700 and IMT800

44 Telkom's case in relation to the IMT700/800 suffers from a grotesque contradiction.

45 As explained in Vodacom's affidavit,[47] a series of transmitters are required to be installed to cover a wide geographical area as the strength of the transmission can carry the signal only so far. Consequently, the fact that there is a broadcast signal transmitted on a particular frequency in one town or province does not mean that the frequency band is unusable in other areas. Interference on that frequency band will be experienced only in

[45] Vodacom AA 004-721 para 162 – 163; undisputed in reply.

[46] Compare *Esau* (supra) at para 99, *HTF Developers* (supra) at para 49.

[47] Vodacom AA 004-669 para 13.

the geographic areas within the transmitter's range. Consequently, the continued existence of the TV broadcast transmitters in some areas does not preclude the use of the same spectrum bands used for IMT in other areas - different arrangements are possible in different geographical locations. Further, not all frequencies in the IMT700/800 range are occupied by broadcast signals. Consequently, even in provinces where the broadcast transmitters have not been switched off, IMT transmission is possible on those frequencies unused by broadcasters.

46 In the five provinces where the broadcast transmitters have now been switched off, it is possible to provide mobile services without interference. In the other four provinces where the transmitters have not been switched off, it is still possible to provide mobile services in some frequency bands in the IMT700/800 range, which are unaffected by the broadcast signals. It is indisputable that, in those areas where the new spectrum can be deployed, it will improve the services received by the residents who live there.

47 The thrust of the argument made in Telkom's heads[48] is that ICASA ought not to have published the Auction ITA and proceeded with the auction at all where even a portion of the IMT700/800 spectrum being auctioned may be interfered with by television broadcast transmitters. Telkom does not focus its relief solely on the inclusion of the IMT700/800 but seeks to set aside the entire Auction ITA including the auction of the spectrum which is unaffected by television broadcasts (specifically the IMT2600 and IMT3500).

48 This whole case stands in stark contrast to Telkom's submissions to ICASA's first Information Memorandum dated 2 November 2021.[49] There, Telkom sets out a series of submissions under the following heading:

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48 Telkom heads 004-1602 para 154 – 175.

49 Telkom submission to first IM 005-459 para 355 – 360.

"7.8 ***The importance of the <1 GHz spectrum to achieving roll-out targets and why it should be included in the auction*** *" (emphasis added)*

49 In paragraph 360, Telkom states:

> *"360 Utilising the partially temporary spectrum in the 700 MHz and 800 MHz bands, Telkom has been able to extend coverage somewhat during the Covid-19 lockdown period, however not to the extent desired. Due to the use of the bands for broadcasting systems, mobile systems can be deployed in some areas but is totally unusable in others. On balance, having partial access to the <1 GHz spectrum is better than having no access.*
>
> *361. Going forward the equation remains unchanged for Telkom, where partial access is problematic, especially in terms of the conditions attached in the auction. However, in serving customers and competing in the market, having partial <1 GHz spectrum access is better than none whatsoever.*
>
> *362. Consequently, Telkom's first wish is that until there is clarity on the digital migration process, the temporary assignments in <1 GHz should continue. Nevertheless, Telkom still maintains that the spectrum should be included in the auction for the simple reason that only auctioning mid-band spectrum strengthens the competitive positions of Vodacom and MTN, who by their own admissions are capacity spectrum constrained, whereas Telkom is coverage-spectrum constrained." (emphasis added)*

50 Having set this out, Telkom recommends that ICASA adopt an approach where the IMT700 and IMT800 are included in the auction and successful bidders pay the auction fee for this spectrum only once it is fully cleared and available nationally.[50] As noted above, all parties were consulted on ICASA's proposal (and later decision) to auction the spectrum and to apply a proportional payment mechanism as the broadcast transmitters were switched off around the country, which is a sensible solution to what is a temporary problem, and in line with Telkom's recommendation.

51 Telkom's review case advanced to this court flatly contradicts the submissions it made to encourage ICASA to include the IMT700/800 spectrum in the auction. This is a cynical and opportunistic approach which should not be countenanced. Telkom cannot, on the

[50] Telkom response to first IM 005-462 para 363 – 368.

one hand, make submissions to ICASA that the best approach involves auctioning the IMT700/800 spectrum and then, when ICASA does so, turn around and contend to this court that doing so is "manifestly irrational".[51]

52 The reliance on the judgments of Sutherland J and Baqwa J are equally misplaced because there are significant differences in the circumstances and issues that applied in those cases which render them wholly distinguishable from the current circumstances.

53 First, both cases involved interim relief where the Court was assessing the existence of a *prima facie* right at a preliminary stage of the proceedings. As such, the legal tests employed were different from the test which is applied in deciding final relief in a review. The words employed by these Courts, quoted by Telkom[52] - that ICASA's conduct in 2016 and 2019 "*has the look of a reckless decision"* is consistent with the *prima facie* nature of the inquiry and, in any event, was focussed on the particular facts which existed at that time in 2016 and 2020 respectively.

54 Second, in each case, the factual position on the ground and the issues facing the court were significantly different from the factual position today (and at the time that the 2021 Auction ITA decision was taken):

54.1 In both 2016 and 2020, none of the broadcast transmitters had been switched off and there was no firm plan to switch off the broadcast transmitters.

54.2 Currently it is common cause that the broadcast transmitters have been switched off in Free State, Limpopo, Northern Cape, Mpumalanga and North

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51 See Telkom's heads 004-1455 para 88.

52 Telkom heads 004-1588 para 111 and 116

West.[53] This means that, in these provinces, rollout of mobile services using the IMT700/800 bands will be possible with very little, if any, interference, which was not the case in 2016 or 2020.

54.3 In addition, the Minister has committed to completing the digital migration process by the end of March 2022.[54] Consequently, if the Minister's plan is successfully implemented, all nine provinces will be free of analogue broadcast transmitters by the end of March 2022.

54.4 Even if the Minister is unable to switch off on 31 March and is able finally to do so a few months (or even a year) later, it remains completely rational for ICASA to license the IMT700/800 now. Doing so will enable the successful bidders to rollout IMT700/800 in the five provinces where the broadcast transmitters have been switched off and incrementally in other provinces while the migration occurs, so that by the time that the IMT installation work has been done in the five provinces, the remaining four provinces will have been cleared and installation could take place there.

54.5 It is wholly irrational and self-serving for Telkom to argue for a delay in the entire process where it is clear that –

54.5.1 There are large areas of the country where installation and deployment of the IMT700/800 is possible without interference;

54.5.2 The roll-out and installation of IMT infrastructure will not happen overnight and will involve a phased approach; and

53 Telkom RA 004-1454 para 86.1.

54 Minister's AA 004-259 para 80.

54.5.3 Where Telkom has itself recognised and confirmed that significant public benefit has been achieved through the rollout of IMT700/800 during the national state of disaster.[55]

55 Third, the temporary licensing of IMT700 /800 during the national state of disaster has shown practically that it is possible to transmit and provide mobile services on the auctioned IMT700/800 frequency bands despite the presence of broadcast signals in some areas. As Telkom itself argued in its submission to ICASA (quoted above) *"having partial access to the <1 GHz spectrum is better than having no access"*. In fact, Telkom itself has confirmed that it has been able to use those bands in over 60% of the locations where it has deployed its temporary spectrum[56] which is an indication of the extent to which the spectrum might be usefully employed.

56 At the time of those proceedings in 2016, the Minister was the applicant seeking an interdict, and the Minister was in control of determining the date for digital migration and analogue switch off. The Minister and ICASA were at loggerheads on the desirability of auctioning the IMT700/800 bands, and this while the Minister held the switch. In addition, there was significant uncertainty over the future date on which the broadcast signal switch off would take place. The additional facts and subsequent developments which are now available would clearly have made a difference to the reasoning employed by Sutherland J in 2016.[57] Similarly, in 2020, before Baqwa J, the Minister had not progressed the broadcast switch-off. More fundamentally, the focus of the argument before and the judgment of Baqwa J in relation to the IMT700/800 spectrum related to

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55 Telkom Submission IM 005-412 para 204.

56 Telkom Submission IM 005-461 para 360.

57 See 2016 decision paras 57 – 59.

the change in stance which had been adopted by ICASA without the necessary consultation. ICASA had at that stage adopted the attitude, first that the relevant bands were unavailable, and then that they were available. For this it was heavily criticised.[58] There is no similar complaint in the current matter.

57 In the circumstances, the fact that the spectrum in the IMT700/800 bands has not been fully cleared nationally does not mean that MNOs are unable to use those bands. Given that the spectrum can be deployed in a large part of the country, the switch-off process is well underway, and bidders that have won the spectrum will only pay auction fees proportionately for the areas that are available, ICASA acted rationally and lawfully in issuing the 2021 ITA and initiating the process of rolling out this much-needed spectrum to South Africans.

58 It is not rational or reasonable to insist that South Africans who desperately need access to the additional spectrum must wait until the entire country is fully cleared before the deployment can commence.

Assessment of competition

59 Telkom's argument on this ground of review focuses on two aspects, in the alternative. First, it contends that a "competition assessment" was required to be conducted by ICASA, that ICASA failed to do so, and that section 6(2)(f)(ii) of PAJA should apply to strike down the decision on this basis.[59] In making this argument, it asserts that the competition assessment published by ICASA in December 2020 must be ignored. Second, in the alternative and in the event that the December 2020 assessment is not

[58] *Telkom SA SOC Ltd v ICASA and others* [2021] JOL 49912 (GP) at paras 25 – 30.

[59] Telkom heads 004-1611 para 179.

ignored, it asserts that it was "irrational and unreasonable" for ICASA to rely on this document because it is outdated.[60]

60 Before setting out why these arguments have no merit, we first show that the entire ground of review departs from a false legal premise – being Telkom's bald assertion that a formal investigation and assessment (and report) on competition is required before ICASA can embark on a spectrum ITA. For this entire argument Telkom relies on section 2(f) of the ECA.[61]

61 As we show below, section 2(f) of the ECA is just one of a number of objects of the ECA sought to be achieved by regulation of electronic communications and, while it is one of the aspects that ICASA is required to consider, it is not the primary object of the ECA and does not form part of the primary obligations placed on ICASA when licensing and assigning the use of spectrum.

62 Section 30 of the ECA empowers ICASA to control, plan, administer and manage the use and licensing of spectrum. Section 30(2) and section 31(3)(a) set out the powers and obligations of ICASA when it does so.

> *"**30 Control of radio frequency spectrum***
>
> *(1) In carrying out its functions under this Act and the related legislation, the Authority controls, plans, administers and manages the use and licensing of the radio frequency spectrum except as provided for in section 34.*
>
> *(2) In controlling, planning, administering, managing, licensing and assigning the use of the radio frequency spectrum, the Authority must-*
>
> *(a) comply with the applicable standards and requirements of the ITU and its Radio Regulations, as agreed to or adopted by the Republic, as well as with the national radio frequency plan contemplated in section 34;*
>
> *(b) take into account modes of transmission and efficient utilisation of the radio frequency spectrum, including allowing shared use of radio frequency*

60 Telkom heads 004-1615 paras 191 and 192.

61 Telkom heads 004-1609 paras 176 and 178.

spectrum when interference can be eliminated or reduced to acceptable levels as determined by the Authority;

(c) give high priority to applications for radio frequency spectrum where the applicant proposes to utilise digital electronic communications facilities for the provision of broadcasting services, electronic communications services, electronic communications network services, and other services licensed in terms of this Act or provided in terms of a licence exemption;

(d) plan for the conversion of analogue uses of the radio frequency spectrum to digital, including the migration to digital broadcasting in the Authority's preparation and modification of the radio frequency spectrum plan; and

(e) give due regard to the radio frequency spectrum allocated to security services.

(3) 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.

31 Radio frequency spectrum licence

...

(3) 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; ...”

63 The Radio Frequency Spectrum Regulations are published pursuant to section 31(3)(a) and merely record the requirement that ICASA publish an ITA where the radio frequency spectrum licence will be awarded on a competitive basis and where it determines that there is insufficient spectrum available to accommodate demand.[62] As appears from these provisions, there is no obligation on ICASA to conduct a formal “competition assessment” and to publish any report before issuing an ITA.

64 Section 2(f), on which Telkom relies, appears in the following context within the Act:

*“**2 Object of Act***

[62] Radio Frequency Spectrum Regulations 2015 GEN N279 in GG38641 of 30 March 2015 (as amended).

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-

(a) promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in this Act;

(b) promote and facilitate the development of interoperable and interconnected electronic networks, the provision of the services contemplated in the Act and to create a technologically neutral licencing framework;

(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;

(h) promote broad-based black economic empowerment, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities;

(i) encourage research and development within the ICT sector;

(j) provide a clear allocation of roles and assignment of tasks between policy formulation and regulation within the ICT sector;

(k) ensure that broadcasting services and electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic;

(l) provide assistance and support towards human resource development within the ICT sector;

(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 services; .....

(y) refrain from undue interference in the commercial activities of licencees while taking into account the electronic communication needs of the public;

(z) promote stability in the ICT sector."

004-1897

65 In this context, it is also useful to consider the provisions of the ICASA Act[63] which include:

65.1 In section 2:

> *The object of this Act is to establish an independent authority which is to-*
>
> *...*
>
> *(b) regulate electronic communications in the public interest; …*
>
> *(c) achieve the objects contemplated in the underlying statutes.*

65.2 In section 4:

> *(1) The Authority-*
>
> *(a) must exercise the powers and perform the duties conferred and imposed upon it by this Act, the underlying statutes and any other applicable law;*
>
> *(3) Without derogating from the generality of subsections (1) and (2), the Authority-*
>
> *(c) 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;*

66 It is immediately apparent from merely reading these provisions that, while the sub-clauses of section 2 of the ECA are to be taken into account by ICASA in its decision-making process, its primary object is to ensure that its ITA and licensing processes are "in the public interest". The promotion of competition is just one of 26 sub-categories identified as being relevant to achieving this primary object. It does not have any priority over the other sub-categories and it is clear that tensions will exist between the achievement of one sub-category at the expense of another. Where the promotion of competition is merely one of many, often competing, factors to be considered in the polycentric decision-making process engaged in by ICASA as the appointed regulator,

[63] Independent Communications Authority of South Africa Act 13 of 2000

ICASA's decision will be the product of ICASA's expertise applied in weighing and balancing the different factors.

67 The legislation does not prescribe how competition should be assessed and certainly does not require a formal investigation and reporting procedure before a decision is made. In the circumstances, Telkom's fixation on this aspect without considering the competing considerations and its insistence on detailed updated reports is not justified by the legislation.

68 Telkom's reliance on section 6(2)(f)(ii) is equally misplaced. In its heads, Telkom has listed a series of legal propositions[64] related to this sub-section but has not linked any particular conduct by ICASA to those individual propositions. On a proper analysis, these legal propositions do not apply to the current matter and there is no basis to impugn ICASA's decision.

68.1 The "administrative action" which is the subject of attack by ICASA is the decision to publish the 2021 Auction ITA.[65]

68.2 There is a clear rational connection between this decision and the purpose of the decision – being to invite applications for radio frequency spectrum licences for the purposes of providing national broadband wireless access services.[66]

64 Telkom heads paras 180 – 184.

65 Telkom notice of motion 003-4 Part B para 1.

66 Telkom FA 003-140, annexure "FA1" para 1.

68.3 As noted above, the empowering provisions are ECA sections 30 and 31. Certainly, the decision to publish the ITA is directly connected to the purpose of these sections.

68.4 Telkom's attempt[67] to elevate the promotion of competition to being *"the purpose sought to be achieved through the auction process*" is a complete misnomer and misrepresentation. The purpose for which the ITA decision was taken was to license and assign radio frequency spectrum to enable its efficient use in the public interest. In doing so, ICASA exercised its power under section 31(3) to issue the ITA in which it prescribed procedures and criteria.

69 On a proper interpretation of the ECA, considering the text, the purpose and the context, Telkom's interpretation and application of subsection (2)(f) are wholly unsustainable.

Competition was taken into account

70 To the extent that the promotion of competition was required to be taken into account by ICASA when publishing the ITA,[68] it certainly was. This is apparent from at least the following:

70.1 The first Information Memorandum[69] where it is recorded:

> *"The Authority has assessed the state of the competition in the mobile sector, as contained in the published Reasons document,[70] with the information at its disposal in formulating the ITA."*

67 Telkom heads 004-1612 para 181.

68 Pursuant to section 31(3) of the ECA.

69 ICASA record 005-14 at 005-18 para 1.

70 Published under Notice 697 of 2020 GG43970 on 4 December 2020.

It then goes on to set out the steps which it has implemented in the ITA as well as other considerations relating to competition matters.

70.2 In its second IM of 16 November 2021,[71] ICASA identifies various objects of the ECA which were taken into account including the promotion of competition[72] and sets out, in summary, the "proposed method to achieve the objectives".

70.3 In the Reasons document provided with the second IM, ICASA dealt specifically with the individual issues raised by each of the parties in relation to competition matters,[73] it confirms that it had also taken into account the findings of the Mobile Broadband Services Inquiry report ("MBSI") which had also taken into account the findings of the Data Services Market Inquiry ("DSMI"). The MBSI was published on 26 March 2021.[74] As appears from these reasons, [75] the Authority has recognised its obligations to consider the multiple objects of its regulation under the Act, including the promotion of competition, in preparing the ITA.

70.4 Competition was addressed again in the Reasons document issued with the 2021 Auction ITA on 10 December 2021.[76]

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71 ICASA record 005-42 at 005-55.

72 ICASA record 005-56.

73 ICASA record 005-120 ff.

74 ICASA record 005-102 para 3.7 16 November 2021 Reasons document.

75 ICASA record 005-100 – 102.

76 Telkom FA Annex FA1 003-385 para 7

71 In the circumstances, it is clear that ICASA has complied with its obligations insofar as competition matters are concerned and none of the criticisms raised by Telkom in this regard is sustainable.

The competition assessment was not outdated

72 Insofar as Telkom complains that ICASA's assessment is outdated,[77] this can be given short shrift.

73 It appears manifestly from the competition inputs considered by ICASA, set out above, that it is a gross misrepresentation to suggest ICASA's consideration of competition matters started and ended with the 2020 "competition assessment" that was based on 2018 data. The assessment was one of several aspects of interaction with various role-players that ICASA considered right up to the publication of the 2021 ITA – including comments on the competition assessment after the September 2021 order, which, to the extent considered relevant by those making submissions, including Telkom, would have made whatever was to be made of any developments since the Acacia assessment to which ICASA had recourse.

74 Absent from Telkom's criticism is any fact which would indicate: (i) any material difference between the market structure in December 2021 and the market structure in March 2021 (when the MBSI was published) or December 2020 (when the initial ICASA Reasons document was published); (ii) why, when it is issuing licences which will be in place for 20 years, minor developments over a few months in existing markets would have a material (or any) effect on the relevant competition assessment, particularly when the market after the spectrum auction would operate with different spectrum conditions.

[77] Telkom heads 004-1615 para 191 and 192.

These are critical factors which would have to be impugned if Telkom's attack were to be sustainable.

75 In Annex A to its expert report,[78] Frontier Economics has set out an analysis of the market which shows that the noticeable developments in the market during the year between December 2020 and December 2021 involved Telkom and Rain's growth and expansion of operations. If anything, developments weakened the case for pro-competitive intervention; it did not strengthen it. These aspects certainly do not justify an intervention by ICASA in the manner argued for by Telkom but rather show that where Telkom and Rain have invested, they have not been prevented from growing.

76 In the circumstances, the complaint that the data on which ICASA relies was "outdated" and that the 2021 Auction ITA is unlawful as a result, is a complaint in the air. It has no substance and would not support any finding of irrationality or unreasonableness on the part of ICASA.

Spectrum arrangements

77 Telkom makes a number of arguments directed at the manner in which ICASA has addressed and dealt with its complaints and comments regarding the spectrum agreements concluded between Rain/Vodacom; Vodacom/Liquid; MTN/Liquid and MTN/Cell C. These complaints are situated within a general complaint around the adequacy of ICASA's interventions to give preference to Telkom and non-tier 1 MNOs. In its founding affidavit, Telkom relies on section 6(2)(e)(iii) of PAJA for its attack on the spectrum arrangements.[79] It states that:

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78 Frontier report 004-766 at 004-841

79 Telkom FA 003-111 para 271.

> *"ICASA's decision is unlawful because of ICASA's failure to consider and engage with the parties' submissions on the impact on competition and the effect of spectrum holdings of various operators. The reasons provided for not including or considering capacity or access to spectrum in determining spectrum caps are not rationally connected to the objective of setting of spectrum caps".*
>
> *"The spectrum arrangements are a relevant and material consideration for the purposes of ensuring that competition is not adversely impacted by the licensing of spectrum through the auction. ICASA should take this into account in the design of the auction. Since ICASA has failed to consider such a material consideration, the impugned decisions are reviewable in terms of section 6(2)(e)(iii) of PAJA."*

78 Section 6(2)(e)(iii) of PAJA provides:

> *"A court or tribunal has the power to judicially review an administrative decision if ...*
>
> *(e) the action was taken ...*
>
> > *(iii) because irrelevant considerations were taken into account or relevant considerations were not considered."*

79 In its heads of argument, Telkom does not maintain this ground of review or even mention the relevant provisions of PAJA on which it relies for this attack.[80] It seems that it has abandoned these arguments because there is no factual basis for the assertion that ICASA failed to consider and engage the Telkom submissions on the spectrum arrangements. The fact that ICASA did so (comprehensively) is apparent from a number of documents including:

79.1 The 2020 Reasons document referred to in the first IM.[81]

79.2 In the first IM of 1 October 2021;[82]

79.3 In the Reasons document published with the second IM.[83]

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80 Telkom heads 004-1616 para 193 – 004-1628 para 227.

81 ICASA record 005-18 para 1.

82 ICASA record 005-22 para 1.4.

83 ICASA record 005-117 para 5.16 and 005-121 para 5.24 – 27.

79.4 The Reasons document issued with the 2021 Auction ITA 10 December 2021.[84]

80 In the circumstances, it is clear that ICASA gave careful consideration to Telkom's submissions. Consequently, its decision cannot be impugned in terms of section 6(2)(e)(iii) of PAJA.

81 A careful assessment of the spectrum roaming agreements is set out in the expert report prepared by Frontier Economics,[85] where the experts point out that the roaming agreements were concluded as wholesale services agreements in order to enable Vodacom to mitigate the significant capacity constraints which it has experienced. If ICASA adopted the approach which Telkom promotes and had reflected the roaming agreements in the spectrum caps, it would be punishing operators for having tried to mitigate their capacity constraints. This would have the effect of distorting the operators' incentives in future. As noted above, the main objects of the ECA include ensuring the efficient use of spectrum and encouraging investment and innovation. Certainly, ICASA should not look to punish parties who concluded agreements which achieved these objectives. It can hardly be regarded as having done anything reviewable in declining to do so.

82 Both Frontier and Rain[86] have set out clearly why the roaming agreements do not give Vodacom control of Rain spectrum and why these agreements are not anti-competitive. Rain points out particularly how the existence of these agreements has in fact operated

84 ICASA record 005-175 para 7.9 – 7.12 and 005-179 para 7.34 – 7.45.

85 Vodacom AA annexure "GH2" 004-763 at 004-818.

86 Rain AA to Part A 003-1410 para 63 – 97.

pro-competitively and enabled Rain's rapid growth and its ability to exert competitive pressure on other players in the market.

83 The focus of Telkom's attack in its heads of argument in relation to this ground of review has now become its refrain of "irrationality".[87] Although Telkom dresses up its complaints in the language of review, the essence of its complaint is merely a disagreement with the conclusions reached by ICASA after considering all of the information provided by Telkom and other parties. As set out above, the fact that Telkom (or even the Court) might disagree with ICASA's conclusions does not render ICASA's conclusion judicially reviewable. Certainly, Telkom has not come close to the threshold required to show that the ICASA decisions are so unreasonable and unfair in the context, as to render them irrational.[88]

84 Vodacom submits that the conclusions reached by ICASA in relation to the spectrum arrangements are clearly reasonable, correct and inherently rational.

85 First, the determination of a spectrum cap for purposes of the Auction ITA was set out in clause 7:[89] the applicants were allowed to bid up to

> *"7.1.2 an overall spectrum cap of 187 MHz (including existing assigned spectrum holdings)".*

86 The meaning of this is clear and confirms that only the spectrum for which an MNO held a licence would be taken into account in the relevant calculation. As section 31(1) of the ECA precludes a party without a spectrum licence from transmitting or receiving signals using spectrum for which it does not hold a licence, this is a clear and rational basis on

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87 Telkom heads 004-1620 para 205 and 004-1624 para 217.

88 See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) ("*New Clicks*") at para 108 and 145 and *Bato Star* at para 48 and 49.

89 Telkom FA 003-163 annexure "FA1" para 7.

which to determine the existing spectrum holdings to be taken into account in determining the cap to apply. Telkom does not dispute that each MNO's spectrum holding should be taken into account in determining the spectrum cap. Rather, Telkom contends that the calculation applied for Vodacom should also include spectrum which is licensed and assigned to other parties and on which Vodacom is not entitled to transmit. ICASA declined to take this other spectrum into account when determining the spectrum cap to apply to Vodacom.

87 As set out in Vodacom's answering affidavit:[90]

> *"There is an obvious and significant difference between the benefits which a spectrum licensee receives on the one hand and those received by a party contracting to use the wholesale services of a licensee (in the form of roaming etc). At the simplest level, a spectrum licensee is able to determine how it deploys its spectrum, where it deploys that spectrum, the technology to be employed on that spectrum and it decides to whom it will sell its services using that spectrum. A roaming party must contract for the services which a licensee is prepared to provide, and it is wholly restricted in its access to the spectrum by the terms of its roaming agreement."*

88 In reply, Telkom has stated[91]

> *"The extent to which the spectrum arrangements provide the same access to spectrum as acquiring a licence outright depends on the facts of each arrangement – not just the technical facts, but the commercial and pricing terms that may provide incentives for one party to effectively reserve capacity for another. These facts deserve closer and more thorough investigation than ICASA has so far given them."*

89 Further, in dealing with Vodacom's evidence that there is no material difference between Vodacom's roaming arrangements with Rain and Telkom's roaming arrangements with Vodacom,[92] Telkom has no substantive reply. All that it is able to say in reply is that – there is a distinction between "roaming for capacity" and "roaming for coverage" and

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90 Vodacom AA 004-712 para 134.

91 Telkom RA 004-1523 para 305.

92 Vodacom AA 004-711.

that there is a *"major potential difference in the impact on market competition"* between circumstances in which a smaller operator roams on a larger operator's network versus a large operator roaming on a smaller operator's network.[93]

90 However, as set out in Vodacom's answering affidavit,[94] the operational arrangements in achieving such roaming are indistinguishable and so ICASA's decision to treat them as the same cannot, on any basis, be considered unreasonable or irrational. Where the purpose of ICASA's licensing process is to assign and license spectrum to individual MNOs and to give those MNOs the freedom to determine how that spectrum should be deployed, an important factor in assessing whether ICASA's determination of the spectrum arrangements was unreasonable or irrational will involve identifying the spectrum over which the MNOs have that power and control.

91 We submit that it is perfectly reasonable and rational for ICASA only to include in the spectrum cap calculations those spectrum holdings over which an MNO has full control as licensee – giving it the exclusive right to deploy etc. Having assessed the spectrum arrangements, ICASA correctly concluded that the arrangements between Vodacom and Rain were commercial agreements for wholesale roaming access and did not provide the roaming parties with the rights which are held exclusively by the spectrum licensee. This is the same conclusion reached by the Competition Commission when it assessed Telkom's allegations that Vodacom had taken control of Rain's spectrum.[95] As such, it was reasonable and rational for ICASA only to count Vodacom's existing licensed spectrum and not spectrum to which it had wholesale roaming access.

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93 Telkom RA 004-1522 para 304.

94 Vodacom AA 004-712 para 131.1.

95 See Telkom's RA 004-1441 para 59.

92 The real reason for Telkom's complaint in relation to the spectrum arrangements appears in Telkom's heads of argument[96] where it complains that because it already has a total holding of 142 MHz and the cap is 187Mhz, it can only acquire up to 45 MHz of additional spectrum in the auction; however, MTN and Vodacom whose existing holdings of 76 MHz permit them each to buy up to 111 MHz at the auction. Telkom complains that "*Telkom is at an obvious disadvantage*".

93 Telkom asserts that, in addition to its own 76MHz, Vodacom "actually has access" to an additional spectrum capacity of 100 MHz through its agreements with Liquid and Rain; and MTN actually has access to an additional 100 MHz through its agreements with Liquid and Cell C. On the back of these assertions, Telkom complains that it is unfair and irrational for ICASA to set its cap at 187MHz. The self-serving irony in the argument however is exposed by Telkom's assertion that, at the same time as its cap is increased, Vodacom and MTN's caps should be decreased or remain at 187MHz (allowing each of them to acquire only 11MHz in the auction – 187MHz less (100 + 76MHz). One needs only set this out to see that there is no public interest or objectivity behind Telkom's arguments, but only an unbridled attempt at secure whatever preference it can for itself.

94 If an objective view is taken of all the relevant facts, there are a number of fundamental omissions in these Telkom submissions, including:

94.1 Telkom does have access to <1 GHz spectrum through its roaming agreement with Vodacom. It has the same type of access to Vodacom's <1 GHz spectrum as Vodacom has to Rain's 1800 MHz spectrum through its wholesale roaming agreement.

[96] Telkom heads 004-1621 para 208 – 213 particularly 210.

94.2 Telkom refuses to acknowledge the significant spectrum advantage which it has enjoyed for the past 10 years in having almost double the spectrum holdings of Vodacom and MTN – 142 MHz compared to 76 MHz held by Vodacom and MTN. In fact, the real motive for Telkom's complaint is that it started the auction with a significant spectrum advantage.

94.3 Both Rain and Vodacom[97] highlight the inconsistency in Telkom's approach. Although it insists that ICASA should add the spectrum on which Vodacom and Rain roams to their respective holdings, Telkom does not propose to add to its holdings the spectrum of Vodacom and Rain on which it roams. The arguments raised by Telkom in order to justify its distinction are *non sequiturs*[98] and do not withstand scrutiny.

94.4 Telkom has failed to acknowledge the similarities between the wholesale roaming arrangements it has in place with Vodacom, in terms of which it has access to roam on Vodacom's spectrum, and those in place between Vodacom and Rain, in terms of which Vodacom has access to roam on Rain's spectrum. Telkom's attempt to distinguish these arrangements amounts to no more than sophistry. First, it seeks to distinguish them by purpose – that its agreement with Vodacom is "roaming for coverage" while Vodacom's agreement with Rain is "roaming for capacity". Second, it seeks to distinguish them by size of firm – that its agreement is allowable because it is a smaller market player roaming on a bigger player (Vodacom); whereas Vodacom is a bigger player roaming on a smaller player (Rain). Neither of these grounds explains why

97 Vodacom AA 004-712.

98 Vodacom AA 004-712 para 131.3.

Rain's spectrum should be classified as belonging to Vodacom, while Vodacom's spectrum should not be classified as belonging to Telkom.

94.5 As Frontier points out, the approach adopted by ICASA is in line with international precedent,[99] and Telkom's proposed approach is not - which is yet another reason for the Court to endorse ICASA's approach as a reasonable one.

95 It is reasonable and rational for ICASA to impose the same spectrum cap of 187 MHz on each MNO, as this creates parity between all of the MNOs after the auction and does not subject any party (including Telkom) to a "disadvantage". It is also reasonable for ICASA to classify all of the spectrum agreements as commercial agreements in terms of which one MNO sells wholesale access to another, irrespective of whether the roaming party is a bigger or smaller firm or seeks to roam to improve its services to its customers through better coverage or through better uplink/downlink capacity.

96 We also point out that Telkom's approach has a fundamental logical flaw in that, when it asserts that spectrum should be allocated to increase Vodacom's holdings, it does not reduce the holdings of the MNO to whom the spectrum is licensed. Using, as an example, the Vodacom/Rain spectrum arrangement: Telkom seeks to count the Rain spectrum holdings twice – once towards the Rain spectrum cap and again towards the Vodacom spectrum cap. Where Telkom accepts that Rain has full access to its own spectrum and the power to deploy it as licensee (where Vodacom does not have similar access and rights) it is completely reasonable for ICASA to recognise that spectrum as Rain spectrum, not Vodacom spectrum, for purposes of calculating spectrum caps. It would

99 Frontier report 004-827 para 6.6.

be illogical and irrational for ICASA to follow Telkom's proposal and allocate Rain's spectrum to both Rain and Vodacom. As Frontier also points out, there are real impracticalities (if not impossibilities) if ICASA adopted Telkom's proposed approach.[100]

97 Telkom's reliance on *Airports Company*[101] does not support its argument. In the current matter, ICASA has not committed an error as to the material facts. ICASA has considered the spectrum agreements that are the subject of debate and it disagrees with Telkom's assessment of those facts. Telkom's attack is focused on ICASA's consideration of those facts and its assessment of the terms of those facts in the context of the ITA process. The determination of how these facts should be considered and weighed lies solely within ICASA's judgment and, as such, is not a matter with which the Court should interfere, even if the Court reached a different view, because ICASA is vested with the "original competence" to conduct the assessment.

Deferral of the WOAN

98 There appear to be two components to Telkom's complaint in relation to the WOAN. The first forms the basis for the relief claimed in the notice of motion (paragraph 1.2)[102] where Telkom seeks an Order declaring that the decision to defer the licensing of the WOAN to a later undisclosed date was unlawful. The second constitutes a further ground relied on to challenge the Auction ITA (which is a different decision from that in para 1.2 of the NoM), where Telkom complains that the uncertainty associated with when and

100 Frontier report 004-823 para 6.3.

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

102 Telkom NOM 003-4.

how the spectrum reserved for the WOAN might become available, casts a shadow over the Auction ITA.

99 Telkom does not appear to press the first component of its complaint in its heads of argument. The only mention appears in paragraph 238[103] where Telkom complains that ICASA did not consult the affected parties on its decision to defer the licensing of the WOAN. However, the failure to consult on the deferral of the WOAN was not a ground relied upon in its founding affidavit[104] and it is not mentioned in the supplementary affidavit. It is not open to Telkom to introduce new grounds of review in argument.[105]

100 If Telkom attempts to revive the arguments set out in its founding affidavit, we respectfully refer the Court to Vodacom's answering affidavit[106] where Vodacom highlights the inconsistencies in Telkom's arguments. Each of Telkom's arguments pointed to a conclusion that the WOAN was not ripe for publication. Having argued that the WOAN was not ripe for publication, it is completely unsustainable for Telkom (in the same breath) to argue that the decision on the WOAN ought not to have been deferred. We note that the same reasoning must apply to the arguments raised by the "quasi-applicants", particularly the ICT Chamber.

101 In the circumstances, the relief claimed by Telkom in paragraph 1.2 of the notice of motion can be summarily dismissed.

102 The second component of Telkom's complaint that is related to the WOAN departs from the premise that the Auction ITA is not ripe unless the WOAN is ripe. The essence of

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103 Telkom heads 004-1631.

104 Telkom FA 003-110 para 268.

105 *Director of Hospital Services v Mistry* 1979 (1) SA (AD) 626 at 635A-636F

106 Vodacom AA 004-704 para 107 – 127.

Telkom's attack on this ground (relying on the WOAN deferral) is that the deferral of the WOAN creates added uncertainty for participants in the auction. Telkom argues that the introduction of this uncertainty renders the Auction ITA unlawful.

103 Notably, none of the other applicants (or the Minister) shares Telkom's concerns. We submit there is no substance to this complaint and, in particular, whether or not a WOAN is pursued in parallel with the auction process makes no difference to the lawfulness of the 2021 Auction ITA and the auction process.

104 The Auction ITA is aimed at auctioning off, to interested MNOs, the identified spectrum lots which ICASA has identified for this round of spectrum allocation. It does not constitute the sole opportunity for MNOs to obtain IMT spectrum, nor the sole opportunity for ICASA to assign IMT spectrum. In deciding whether to apply to participate, each applicant was fully aware of the spectrum that was on offer in the auction and the fact that approximately 80 MHz of the currently licensable spectrum was withheld[107]. Each applicant was also aware that some spectrum might remain unsold and that additional IMT spectrum was likely to become available in the future.[108] But the details of that future availability and allocation are also unknown. The mere fact that there is uncertainty around what might happen in the future (which is a constant impediment to perfect planning) can never be a reason not to conduct the auction on the spectrum that was identified.

105 There will always be significant pricing uncertainty involved in a competitive auction process because the price ultimately paid is determined by factors outside of each

[107] The fact that it was intended to be deployed in due course, through the WOAN, does not detract from the fact that it was not available in the auction and there was no certainty on how or when (if at all) it might be deployed and accessed by MNOs.

[108] Vodacom AA 004-709 para 121 and 122.

individual bidder's control. While each individual bidder may estimate what it considers to be the value of any spectrum lot prior to the auction, the price ultimately paid for the spectrum lot, if desired by multiple bidders, may not bear any resemblance to the estimated value. Similarly, significant uncertainty will exist in any valuation methodology because the licences are to be used for 20 years and the benefits to be derived (and costs incurred) are subject to all of the vagaries of unknown future conditions and technology.

106 It is neither unreasonable nor irrational for ICASA, in light of the underlying purpose behind the ITA and the critical need for the IMT spectrum to be licensed and assigned, to proceed with the Auction ITA in circumstances where the details of the WOAN have not yet been determined. All of the applicants have been furnished with the same information and are able to make their own independent decisions based on that information. Vodacom submits that ICASA would be failing in its obligation to license and assign spectrum, to ensure the efficient use of spectrum and to facilitate the improvement of service quality and price if it were to further delay the licensing of the Auction ITA spectrum until further details of other spectrum became available.

107 In the circumstances, Vodacom submits that there is no merit to this ground of complaint at all.

Remedy

108 For the reasons set out above, Vodacom submits that the ITA decision is a lawful decision and is not liable to be reviewed and set aside. Once the Court arrives at this conclusion, the correct and necessary Order is for the entire application to be dismissed.

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109 The debate on an "appropriate remedy" arises only if the Court upholds a ground of review and holds that ICASA's conduct renders the decision unlawful. The submissions made below are made in the event that this be the finding and should not detract at all from Vodacom's fundamental submission that the review should be dismissed.

110 Telkom has identified the relevant authorities which address the broad power which the Court has to make an Order that is just and equitable.[109] However, Telkom has ignored those authorities and particularly *Millennium Waste Management*[110] and has formulated its relief solely in its own interests, without considering all the other parties and the public interest that would be affected by such an Order.

111 Further, Telkom has not attempted to justify why all of this structural relief would be required or even why the decision would need to be set aside, if only one or two grounds of review were upheld. If, for example, the Court found that the timetable was unreasonably truncated (which it was not) but the rest of the review grounds were rejected:

111.1 There is a strong argument that the Court should not set aside the decision at all. Telkom has not pointed to any factor that would have changed the structure of the auction if more time had been allowed.

111.2 The auction has been held and Telkom (and all other interested parties) obtained a fair opportunity to acquire spectrum and did acquire spectrum. There is a desperate need for that spectrum now to be assigned and rolled out.

[109] Telkom heads 004-1633 para 245 – 253.

[110] *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board, Limpopo Province* 2008 (2) SA 481 (SCA) para 22.

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111.3 Given the overarching object of ECA regulation – being the public interest, setting aside the award would further delay the assignment of spectrum and would be contrary to the public interest and would not be just and equitable.

112 Vodacom respectfully submits that, should the court find the impugned decision to be affected by unlawfulness, the question of the appropriate remedy ought not to be finally determined at this stage. Since the main papers in this application were filed, the auction was finalised. Rain has filed a short supplementary affidavit setting out the results of the auction. But, should this court actually be minded to consider setting aside the whole auction, it would need to do so possessed of all the facts relating to the position current at the time it makes such decision. In such a case, Vodacom submits that the Court should call for parties to furnish such facts and brief submissions and should convene a further hearing to address the remedy, for the following reasons:

112.1 The remedy will be shaped by the ground upheld and the reasons relied upon by the Court.

112.2 The facts that might inform the best remedy are not all before the Court, including: the conduct of the auction; how the R14,4 billion paid to the National Treasury may have been allocated; developments in digital migration, the precise benefits and conduct of the relevant parties flowing from and since the auction.

112.3 That hearing can be convened expeditiously and will focus solely on what would be just and equitable in light of the Court's findings and the relevant facts.

113 Vodacom submits that the Order formulated by Telkom[111] is far too broad and invasive. In formulating the relief which it seeks, Telkom is attempting, through the Court process, to usurp ICASA's powers. Effectively, in prayers 2.5.1 – 2.5.4,[112] Telkom seeks to impose its own wish list of interventions, which is wholly inappropriate and constitutes an unnecessary and illegitimate transgression of the separation of powers doctrine.

114 Vodacom submits that, given the significant public interest in and public benefit that will be derived from the licensing and assignment of spectrum following the auction as well as the significant public benefit which will have been gained from the auction revenue generated by Government, there are a number of strong reasons why the 2021 Auction ITA (and the subsequent auction) should not be set aside even if the court found that the procedure followed did not meet the required standard. Given that the full auction has been successfully completed and various other Policy amendments are contemplated by the Minister, the Court would be in a far better position to determine a just and equitable remedy if further facts were placed before the Court before it did so.

Relief and costs

115 As set out above, Vodacom submits that Telkom's application should be dismissed with costs, including the costs of three counsel and the costs of its experts Frontier Economists. If the review relief is dismissed, all of the additional relief set out in paragraph 2 of the notice of motion falls away.

116 If the Court finds that ICASA's conduct was unlawful and that such conduct impugns the decision to publish the Auction ITA, Vodacom submits that the appropriate approach

111 Telkom heads 004-1638 para 254.

112 Telkom NOM 003-6.

would be to limit the decision of the Court to a declaration of unlawfulness. If the Court considers that additional relief may be justified, we submit that the Court should not set aside the decision but rather call for focused affidavits and submissions on an appropriate remedy in light of the findings of the Court and the various events which have occurred since this application was launched.

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27 March 2022

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List of Authorities

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

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

3. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC).

4. *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments (194) (Pty) Limited & Others* 2021 (JDR) 1484 (SCA).

5. *Director of Hospital Services v Mistry* 1979 (1) SA (AD) 626.

6. *Esau v Minister of Cooperative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA).

7. *Fair-Trade Independent Tobacco Association v President, RSA* 2020 (6) SA 513 (GP).

8. *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

9. *Logbro Properties CC v Bedderson NO* 2003 (4) SA 460 (SCA).

10. *MEC, Department of Agriculture, Conservation and Environment and Another v HTF Developers* 2008 (2) SA 319 (CC).

11. *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board, Limpopo Province* 2008 (2) SA 481 (SCA).

12. *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC).

13. *PriceWaterhouse Coopers Inc v National Potato Cooperative Ltd* 2015 JDR 3071 (SCA).

14. *Stock v Stock* 1981 (3) SA 1280 (A).

15. *Telkom SA SOC Ltd v ICASA and others* [2021] JOL 49912 (GP).

Legislation

1. Electronic Communications Act 36 of 2005

2. Independent Communications Authority of South Africa Act 13 of 2000

3. Promotion of Administrative Justice Act 3 of 2000