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	1ST Respondent
CHAIRPERSON: INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	2ND Respondent
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	3RD Respondent
VODACOM (PTY) LTD	4TH Respondent
MOBILE TELEPHONE NETWORKS (PTY) LTD	5TH Respondent
CELL C (PTY) LTD	6TH Respondent
RAIN NETWORKS (PTY) LTD	7TH Respondent
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LTD	8TH Respondent
COMPETITION COMMISSION OF SOUTH AFRICA	9TH Respondent
SOUTH AFRICAN COMMUNICATIONS FORUM	10TH Respondent
SOUTH AFRICAN BROADCASTING CORPORATION LIMITED	11TH Respondent
NATIONAL ASSOCIATION OF BROADCASTERS	12TH Respondent
COMMUNITY INVESTMENT VENTURES HOLDINGS (PTY) LTD	13TH Respondent
E.tv (PTY) LIMITED	14TH Respondent

SOUTH AFRICAN RADIO ASTRONOMY OBSERVATORY	15TH Respondent
PAUL HJUL	16TH Respondent
ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS	17TH Respondent
ICT SMME CHAMBER	18TH Respondent
SONKE TELECOMMUNICATIONS (PTY) LIMITED	19TH Respondent
INSTITUTE FOR TECHNOLOGY AND NETWORKS ECONOMICS	20TH Respondent
B-BBEE ICT SECTOR COUNCIL	21ST Respondent

ICASA'S HEADS OF ARGUMENT

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INTRODUCTION

1. These heads of argument are filed on behalf of the first and second respondent ("hereinafter referred to as ICASA collectively"). On 4 January 2022 Telkom launched the present application on an urgent basis. In part A it sought an interim interdict pending part B. Part A was set down for 25 January 2022. Telkom did not proceed with Part A. It abandoned it despite that Part A was directly related to the relief Telkom seeks in Part B.

2. The interdict sought in Part A was that ICASA should be restrained from accepting applications from prospective bidders of the 2021 auction ITA, and not to open the bids already received, and not to process them. The interdict was to halt the auction process and to stop the auction per se which was earmarked to start on 8 March 2022. Telkom's argument was that it will suffer irreparable harm if the auction is allowed to proceed on 8 March 2022, because it will be impossible to unscramble the egg after the auction has taken place. Telkom also averred that irreparable harm will be suffered if ICASA is permitted to receive and open the applications submitted or to be submitted by prospective bidders.

3. When the interdict application was opposed by the main respondents including ICASA, Telkom wrote to the parties intimating that it no longer wishes to proceed with the interdict, but it would ask for an expedited hearing of Part B from the Deputy Judge President and insisted that Part B review be heard before 8 March 2022, that is, before the actual auction takes place. It threatened

that should Telkom be not allocated a hearing date of before 8 March 2022, it would set down the interdict application and obtain an interdict. Telkom's threats were rebuffed by ICASA and other main respondents.

4. At a case management meeting held with the DJP on 8 February 2022, Telkom reiterated its stance that it seeks an allocation date of before 8 March 2022. At that stage, the date for the submission of the applications by prospective bidders had passed on 31 January 2022. All the six major mobile network operators ("MNOs"), including Telkom had submitted their applications to ICASA by the closing date of 31 January 2022. All the six MNOs had been shortlisted to participate and compete in the auction on 8 March 2022.

5. Telkom's request for the hearing date of part A to be allocated before 8 March 2022 was rebuffed by ICASA and other respondents. Telkom relented and opted for a later hearing date in April 2022, a date after the auction which Telkom in its papers said would cause irreparable harm and make it impossible to unscramble the egg.

6. It was on the basis aforesaid that Part B was set down for 11 to 14 April 2022. We submit that Telkom is correct that once the auction has taken place, and spectrum bands have been auctioned and purchased by successful bidders, it is almost impossible to unscramble the egg. We submit that Telkom's part B relief floundered the moment Telkom failed to obtain an interdict in Part A. Telkom cannot competently proceed with part B without amending the relief it seeks, which has been overtaken by the auction and the purchase of spectrum

by successful bidders.

7. Telkom would have to challenge the auction itself and not the process leading to the auction. Telkom itself participated in the auction and spent R1.5 billion in the purchase of the spectrum. Vodacom and MTN spent over R5 billion each and Rain and Liquid also purchased some spectrum and spent some considerable amount of money.

8. The auction which commenced on 8 March and ended on 17 March 2022 accumulated R14.4 billion into the national fiscus, which will go directly into the National Revenue Fund. This is the monumental success the auction has achieved on behalf of the people of South Africa and its fledgling economy. Indeed, it is so, that the egg has become impossible to unscramble. The relief sought by Telkom in part B is neither competent nor desirable in the circumstances of this case. It has to be dismissed. Below we demonstrate why the review application is ill conceived and meritless. We address the following topics in these heads of argument.

The relief sought in part B is legally unsustainable

9. Telkom seeks an order reviewing and setting aside two ICASA decisions. The relief is encapsulated in prayer 1 of the notice of motion. In prayer 1.1 it seeks an order reviewing the decision by ICASA to publish the 2021 auction ITA. The 2021 auction ITA was published on 10 December 2021. The second decision sought to be reviewed is the decision to defer the licensing of the wireless Open

Access Network ("WOAN"). The two decisions are not interlinked and are in fact separable. In any event, the first decision has already been implemented. The auction has taken place and the spectrum has been sold and purchased. Only the 20 MHz remains unsold and will be auctioned at a later date.

10. The second decision has already been affected by the steps taken by the Minister acting in terms of section 3 of the Electronic Communications Act ("ECA"). On 11 March 2022, the Minister published in the Government Gazette No. 1853 her intention to amend the 'policy on high demand spectrum and policy direction on the licensing of a wireless open access network ("WOAN") which was issued in Government Gazette No. 42597 on 26 July 2019 ("the policy").

11. In paragraph 2 of the notice, the Minister stated that:

"The available spectrum for licensing on the WOAN does not meet the viability threshold as determined in the study conducted by the CSIR on behalf of the Department of Communications and Digital Technologies. The policy objectives that were intended to be achieved by the WOAN, will be realised using the Next Generation Radio Frequency Spectrum policy that is currently being finalised for public consultations."

12. Interested persons are invited to provide written comments on the proposed amendments of the policy within 30 working days of the date of publication. Evidently the relief sought Telkom in prayer 1.2 relating to the deferral of the WOAN has become superfluous.

13. Prayer 2 of part B concerns itself with structural interdict. No factual basis has

been laid for such structural interdicts, and we elaborate on this later when we deal with appropriate remedy.

ICASA's regulatory regime

14. It is common knowledge that the assignment of high demand spectrum in South Africa is long overdue. South Africa is lagging behind its peers in this area. The situation is unacceptable as the President of the Republic of South Africa intimated in his State of the Nation Address ("SONA") in February 2022. Everybody, including the applicant, seems to agree that the assignment of high demand spectrum can no longer be delayed further. ICASA has a constitutional and statutory duty to ensure that high demand spectrum is assigned without further unnecessary delay.

15. ICASA is an independent statutory body established by section 3 of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("***the ICASA Act***"), endowed with the authority to control, plan, administer and manage the use and licensing of the radio frequency spectrum as contemplated by section 30 of the Electronic Communications Act No, 2005 (Act 36 of 2005) ("***the ECA***"). Section 31 of the ECA makes a prohibition for anyone to 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 ICASA.

16. Section 31(3) permits ICASA, in performing its functions in terms of the ECA,

to prescribe procedures and criteria for awarding radio frequency spectrum licences for competing applications in instances where there is insufficient spectrum available to accommodate demand. ICASA may opt for auction, beauty contest or any method that gives effect to the object of the Act. In this instance, ICASA has opted for an auction as the method to award radio frequency spectrum licences to qualifying bidders in order to meet demand. The invitation to apply ("***ITA***") issued on 10 December 2021 (a 91-page extensive document detailing the process) was a culmination of processes ICASA embarked upon, including extensive consultations with industry players.

17. In paragraph 6 at page 27 of the Reasons Document[1] for the 2021 ITA of 10 December 2021, ICASA elaborated on the choice of an auction as the preferred method to award the high demand spectrum, and fully set out the basis in sub paragraphs 6.42; 6.43 to 6.47 of the 10 December 2021 Reasons Document. A timetable leading to the auction was also set and communicated to the public. According to the timetable set by ICASA, the auction should take place on 8 March 2022, with mock rehearsals scheduled to start on 1 March 2022, leading to the eventual auction on 8 March 2022. Indeed, the auction has taken place as provided for in the 2021 auction ITA, and it was a resounding success with R14.4 billion into the national fiscus.

18. Legality dictates that all spheres of government must adhere to the law that empowers them to act and comply with the prescripts of the law which governs

[1] Case line page 005-170

their powers. This includes all forms of legislation, including the Constitution. This much was authoritatively espoused by Chaskalson P (as he then was), in *Fedsure Life Assurance v Greater Johannesburg TMC*.[2] Chaskalson P explained the principle as follows: -

"These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate were lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions."[3]

19. The above legal position was echoed by Navsa JA in *Gerber v MEC for Development Planning & Local Government, Gauteng*:[4] *Gerber* was a case dealing with rates and taxes and His Lordship Mr Justice Navsa expressed himself as follows: -

"The Republic of South Africa is a constitutional State. Local authorities and other State institutions may act only in accordance with powers conferred on them by law. This is the principle of legality, an incident of the rule of law… In my view, it is abundantly clear that the rates in question were not imposed as required by law. The classification of the land rate as a 'flat rate' is a misnomer especially when it is suggested, as the council does in the present appeal, that it is a uniform fair rate and consistent in its application. As demonstrated earlier the rates are unfair and discriminatory. It is clear that there is no constitutional or statutory warrant for the rates sought to be imposed. On the contrary, the rates have been imposed in conflict with statutory prescripts and have to be set aside."[5]

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2 1999 (1) SA 374 (CC).

3 See paragraph 56 at p 399C - E.

4 2003 (2) SA 344 (SCA).

5 See paragraphs [35] and [36] at p 357B - F.

20. The aforesaid principle was followed and applied in *Peri-Urban Areas Health Board v Administrator, Transvaal*.[6] In the latter case the court held as follows: -

"On general principles the Board, being a creature of statute, is limited in its functions to the exercise of those powers which are conferred upon it expressly or by implication in the creating statute."[7]

21. It is against this backdrop that this court will constrain itself from restricting ICASA to act within its statutory power and executing its statutory mandate which have been statutorily provided.

22. The legal position is summarised in Affordable Medicines Trust and others v The Minister of Health and others[8] as follows that:

"Our constitutional democracy is founded on… the supremacy of the constitution and the rule of law… the Constitution is the supreme law of the Republic; law of conduct inconsistent with it is invalid…this means that the exercise of all public power is subject to Constitutional control. The exercise of public power Must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality which is part of that law".

23. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional checks and balances, through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive are constrained by the principle that they may exercise no power and perform no function other than conferred upon them by law. In this sense, the Constitution entrenches the principle of legality and provide the foundation for

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6 1954 (3) SA 169 (T).

7 At 171H.

8 2006 (3)247 (CC)

control of public power. It is only the power lawfully conferred which can be exercised. In any event Telkom is not permitted to flip flop between PAJA and legality because its case is located right inside the PAJA review thus bound to the review grounds in section 6 of PAJA.

24. Telkom's case is that the impugned decisions are administrative decisions. Telkom's assertions that the decisions are irrational and unreasonable conflates the review under PAJA and legality. Whilst rationality is the species of legality and the rule of law concept founded on section 1(c) of the constitution, unreasonableness is a PAJA review ground.

25. We turn to the review grounds pleaded by Telkom in the founding and supplementary founding affidavit. It is trite that in motion proceedings affidavits serve as both pleadings and evidence. The applicant must make out a case in the founding papers and not in the replying affidavit and heads of argument or submissions from the bar.

26. In a review application, the evidence under oath must be buttressed by the rule 53 record. If the evidence under oath is not supported by the record, the evidence is irrelevant or inadmissible. Where the evidence tendered is one outside the record and the impugned decision, Plascon Evans rule applies to resolve disputes of fact. In this review application, Telkom relies largely on disputed facts which are not foreshadowed by the rule 53 record. The disputed facts in the affidavits must be resolved in favour of the respondents in the simple Plascon Evans rule. The respondents' version only falls to be rejected if it is far-

fetched and untenable. It can never be said that the version put up by the respondents, in particular ICASA in its answering affidavit is far-fetched and untenable. This is particularly so when considering most of the review grounds raised by Telkom.

27. In National Director of Public Prosecutions vs Zuma[9] the supreme Court of Appeal ("SCA"), per Harams DP, stated as follows:

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special and they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon Evans rule that where in motion proceedings dispute of fact arise on the affidavit, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers. The Court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

28. As we have already mentioned above, Telkom is correct that its review application is a PAJA review. It follows that as PAJA review Telkom is bound by the review grounds enumerated in section 6 of PAJA. It is not open to Telkom to flip flop between the PAJA review grounds and the legality review grounds. Telkom's review grounds are akin to appeal grounds because by and large Telkom's complaint is that ICASA took decisions that Telkom does not agree with. Telkom would have preferred a different decision other than one arrived

[9] 2009 (2) SA 277, para 26

at by ICASA. That is not the basis upon which an administrative decision is impugned.

29. Telkom accepts that ICASA is authorised by statute to take the decisions it took. What Telkom complains about is that the decisions are irrational for one or other reasons, but Telkom fails to motivate with reference to the record that the decisions are irrational. The rule 53 record evidently shows the diligent and meticulous manner by which ICASA executed its statutory duty.

30. Telkom's grounds of review are reflected under the heading 'grounds of review' from paragraph 252 of the founding affidavit[10]. The grounds alleged are the following inter alia: that ICASA misinterpreted the court order of 15 September 2021 and accordingly committed a material error of law; ICASA acted in contravention of the 2019 policy directive (paragraph 2.1.2) by failing to license spectrum to operators through the auction and to the WOAN simultaneously, and that it failed to consult on the impact of withdrawing the WOAN ITA; that ICASA did not consider the impact of spectrum arrangements on the auction; ICASA has not conducted a competition assessment; the unavailability of the IMT 700 and IMT 800 and that it is irrational for ICASA to auction these spectrum bands because they are unavailable for use by the mobile network operators; that the process undertaken by ICASA was procedurally unfair and irrational process. No additional grounds of review were added in Telkom's supplementary founding affidavit dated 28 January 2022.

[10] Case line page 003-104

31. The replying affidavit[11] attempt to introduce new grounds are expand Telkom's case beyond the one pleaded in the founding papers. We submit that Telkom is not permitted to do so. Any new case it seeks to argue in reply should be ignored. We do not in these heads deal with new matters not properly pleaded in the founding and supplementary founding affidavit.

32. Telkom's heads of argument [12]summarise what Telkom asserts is its grounds of review. We can only assume that only those grounds advanced in the heads of argument are those Telkom will rely on in this matter and at the hearing. In paragraph 5 of the heads of argument the following grounds of review are advance: material error of law in respect of the 15 September 2021 court order; procedural unfairness; 2021 auction ITA is irrational and arbitrary because it was designed in a manner that fails to promote competition; failure to appreciate the non-availability of the 1GHz spectrum which was included in the auction when it is not yet available; irrational division of spectrum between the spectrum reserved for the WOAN and that which is earmarked for the auction; and 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.

33. These are the grounds of review that Telkom wishes to argue to the court at the hearing.

[11] Case line page 003--2937
[12] Case line page 004-1550

34. We submit that there is no merit in any of these grounds of review. We deal with each of them in detail below.

GROUNDS OF REVIEW

The 15 September 2021 Court Order: Material errors of law

35. Telkom has made much of an issue about the 15 September 2021 consent order. It deals with that in paragraphs 256 to 262 of the founding affidavit and repeated in the supplementary founding affidavit at paragraphs 11 to 13[13]. In essence Telkom's contention is that ICASA has misconstrued the September 2021 court order because the court order required that ICASA should start the entire process de novo and reinvent the wheel even in respect of processes that have been concluded and never set aside. Telkom's interpretation of the September 2021 court order is preposterous. The court simply has to have a look at the prayers Telkom sought in its notice of motion in that litigation. It wanted both review and structural interdict orders. None of the structural interdict prayers found their way into the consent order of 15 September 2021.

36. The September Court order was a consent order agreed to by all the active parties to the litigation. It was an out of court settlement in which the court was not called upon to consider the merits. And the court did not consider the merits at all. ICASA had not put its version under oath as it did not file an answering affidavit in opposition thereof. ICASA did not consent that the 2020 auction ITA

[13] Case line page 004-1414

was unlawful.

37. When the parties consented to the September 2021 order, they were anxious to have the process underway without further delay. The parties agreed to a truncated timetable for the performance of certain tasks and indeed complied with the truncated timetable. The consent order was not prescriptive to ICASA as to how it should go about ensuring that the high demand spectrum is auctioned. It was left to ICASA as a specialist body to craft the way forward.

38. It is strange that of all the parties that participated in the consent order of September 2021 only Telkom understands the court order differently. We submit that Telkom's bizarre interpretation of the court order is opportunistic and at odds with the circumstances under which the consent order was made and the plain language of the order having regard to the prayers that Telkom sought in the notice of motion then.

39. In interpretation of statute the point of departure is that the words used in a statute or agreements are to be given their ordinary grammatical meaning unless they lead to absurdity.

40. Authorities stress the importance of context in the process of interpretation and concluded that:

"*A court must interpret the words in issue according to their ordinary meaning in the context of the Regulations as a whole, as well as background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the Rules.*"

41. Whilst this summary of the approach to interpretation was buttressed by reference to authority it suffers from an internal tension because it does not indicate what is meant by the 'ordinary meaning' of words, whether or not influenced by context, or why, once ascertained, this would coincide with the 'true' intention of the draftsman.

42. In *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.*[14] The present state of the law can be expressed as follows:

42.1 Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

42.2 Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.[15]

[14] Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School [2008] ZASCA 70; 2008 (5) SA 1 (SCA) paras 16 - 19. That there is little or no difference between contracts, statutes and other documents emerges from KPMG Chartered Accountants (SA) v Securefin Ltd & another 2009 (4) SA 399 (SCA) para 39.

[15] Described by Lord Neuberger MR in Re Sigma Finance Corp [2008] EWCA Citv 1303 (CA) para 98 The expression has been approved by Lord Mance SCJ in the appeal Re Sigma Finance Corp (in administrative receivership) Re the Insolvency Act 1986 [2010] 1 All ER 571 (SC) para 12 and by Lord Clarke SCJ in Rainy Sky SA and others v

42.3 The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

42.4 Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible, or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.

42.5 In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

43. All this is consistent with the 'emerging trend in statutory construction'.[16] It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO and another*,[17] namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the

Kookmin Bank [2011] UKSC 50; [2012] Lloyds Rep 34 (SC) para 28. See the article by Lord Grabiner QC 'The Iterative Process of Contractual Interpretation' (2012) 128 LQR 41.

[16] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others [2004] ZACC 15; 2004 (4) SA 490 (CC) para 90.

[17] Jaga v Dönges NO & another, Bhana v Dönges NO & another 1950 (4) SA 653 (A) at 662G-663A.

need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere.

44. Thus, Sir Anthony Mason CJ said:

'*Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise*.'[18]

45. Three Australian judges have sought to explain the use of the expression on other grounds. Gleeson CJ in *Singh v The Commonwealth*,[19] said:

'*…references to intention must not divert attention from the text, for it is through the meaning of the text, understood in the light of background, purpose and object, and surrounding circumstances, that the legislature expresses its intention, and it is from the text, read in that light, that intention is inferred. The words "intention", "contemplation", "purpose" and "design" are used routinely by courts in relation to the meaning of legislation. They are orthodox and legitimate terms of legal analysis, provided their objectivity is not overlooked.*'

46. French J described the intention of the legislature as 'an attributed intention based on inferences drawn from the statute itself' and added that it is 'a legitimising and normative term' that 'directs courts to objective criteria of construction which are recognised as legitimate'.[20]

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[18] K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd [1985] HCA 48; (1985) 157 CLR 309 at 315.
[19] Singh v The Commonwealth [2004] HCA 43 para 19.
[20] NAAV v Minister for Immigration and Multicultural Affairs [2002] FCAFC 228; [2002] 193 ALR 449 (FCA) paras 430 - 433.

47. In a broad ranging discussion of the concept, Spigelman CJ concludes that it is acceptable because the interpreter is concerned to ascertain the 'objective' will of the legislature or the contracting parties.[21]

48. However, in each instance the expression is being used either as a shorthand reference to something else or to convey a restricted and unrealistic meaning. If interpretation is, as all agree it is, an exercise in ascertaining the meaning of the words used in the statute and is objective in form, it is unrelated to whatever intention those responsible for the words may have had at the time they selected them. Their purpose is something different from their intention, as is their contemplation of the problem to which the words were addressed.

49. The sole benefit of expressions such as 'the intention of the legislature' or 'the intention of the parties' is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say.

50. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation.

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[21] 'The Principle of Legality and the Clear Statement Principle' opening address by the Honourable J J Spigelman AC, Chief Justice of New South Wales, to the New South Wales Bar Association Conference 'Working with Statutes' Sydney, 18 March 2005.

51. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.

52. The position in our law as expressed by Wallis JA in Educated Risk Investments 165 (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Others [2016] 3 All SA 18 (SCA) at para 19 is that '*the words must be taken as the starting point and construed in the light of their context and purpose and where applicable the dictates of the Constitution*'.

53. Based on the above, Telkom's ground of review that ICASA committed an error of law by misinterpreting the September consent order falls to be rejected.

Procedural unfairness

54. The next ground of review by Telkom is procedural unfairness. The allegations relied upon by Telkom in support of this ground of review is found at paragraphs 289 to 301 of the founding affidavit[22] and repeated in the supplementary founding affidavit at paragraphs 26 to 32[23]. Intertwined with this ground of review is the allegation by Telkom that the consultation process was flawed. This is repeated in the supplementary founding affidavit at paragraphs 33 to 35[24].

[22] Case line page 003-122 - 003-126
[23] Case line page 004-1426-1431
[24] Case line page 004-1431-1432

55. What Telkom assert in its founding affidavit in respect of this ground of review is that the truncated timelines were unfair, and that adequate time was not given to interested parties to comment. What Telkom however acknowledges is that ICASA did follow section 4 of PAJA and it did invite interested parties to comment on the 2021 auction ITA and that all interested parties did comment. Telkom also did comment and submitted extensive representation on the proposed deadline and so are the other interested parties. Telkom also acknowledges that the notice and comment procedure followed is provided for in section 4(1)(b) and 4(3) of PAJA.

56. What Telkom complains about is that the time given by ICASA to the parties to comment was not adequate. But Telkom does not say what would have been adequate time to submit comments or representations. What constitutes adequate time depends on the facts and circumstances of the case. In this case the time given was more than adequate given the circumstances of the matter. The parties were familiar with the process and all of them had already participated in the 2020 auction ITA which was set aside by agreement between the parties.

57. ICASA gave interested parties 30 days in respect of the first information memorandum and two weeks in respect of the second information memorandum. ICASA has given reasonable opportunity to interested parties and indeed interested parties submitted their comments. ICASA followed a process of public consultation before it published the 2021 auction ITA.

58. The first information memorandum ("IM") was published on 1 October 2021. Stake holders or interested parties were afforded 30 days to submit their comments. ICASA held public hearings on 15 October 2021 on the spectrum licensing process. The second IM was published on 16 November 2021 and interested parties were afforded two weeks to submit their representation and they did submit their representations on time. The closing date for the representations or comments was 30 November 2021.

59. Telkom, like other stake holders submitted extensive comments to ICASA in respect of both IMs. For instance, on 2 November 2021, Telkom submitted representations consisting of 130 pages accompanied by an expert report from BRG (a consultancy company that was employed by Telkom to provide expert report). This was in response to the first IM. On 30 November 2021, being the closing date for the submission of comments or representations in respect of the second IM, Telkom yet again respondent by submitting 73 pages of its representations accompanied by the second expert report from BRG.

60. Certainly Telkom, and all other interested parties were not prejudiced at all. They all submitted detailed and well-crafted submissions for consideration by ICASA. Indeed, ICASA considered the submissions as evidenced by its extensive reasons document which captured the submissions and the reasons for rejecting or accepting the submissions. ICASA also explained in the reasons document why the truncated period was adopted, and we should add, which was agreed upon by all parties participating in the process and all interested parties.

61. The supreme Court of Appeal in the *Democratic Alliance V eThekwini Municipality*[25] confirmed what Ngcobo J in *Doctors for Life International* par 145 stated that:

"The duty to facilitate public involvement must be construed in the context of our Constitutional democracy, which embraces the principle of participation and consultation. Parliament and Provincial Legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislative…"

62. The test for rationality in public participation stated that rationality is whether the exercise of public power is linked to a legitimate governmental purpose.[26] It was held that the Gauteng provincial legislature's conduct was linked to a legitimate purpose of eliminating cross boundary municipalities and the creation of a viable economically sustainable municipalities and therefore rational. The court also noted that in keeping with the separation of powers doctrine, the judiciary should not substitute the legislature's opinion which it disagrees with and impose its own opinion.

63. It is trite that rationality standard in public consultation does not have a high threshold. All it requires is that the impugned decision must be aimed at the achievement of a legitimate government purpose and the chosen method to achieve that object.[27]

[25] (887/2010) [2011] ZASCA 221(30 November 2011)
[26] Merafong demarcation forum and others v President of Republic of South Africa and others (CCT 41/07) [2008] ZACC10:2008(5) SA 171 (CC);2008(10) BCLR (CC) (13 June 2008)
[27] footnote 19

(see Prinsloo v van der Linde 1997(3) SA 1012(cc)par 36; Pharmaceutical Manufactures supra par 90, Law Society of South Africa v Minister of Transport 2011 (1) SA 400 cc Par 32-36)

64. We submit that there was no unfairness in the time period provided by ICASA to the interested parties. All parties were in agreement that the truncated timelines were dictated by the urgent need to have high demand spectrum released to the benefit of the country and in the public interest. Telkom also does not suggest otherwise. It agrees that the high demand spectrum in long overdue and should be released without any further delay. What Telkom however assert is that the urgent need for the release of the high demand spectrum should be conducted in a lawful manner. ICASA also does not suggest otherwise.

65. It is for this reason that ICASA ensured that the high demand spectrum is release as a matter of priority and in accordance with the applicable legal prescripts. This is exactly what ICASA did. It is not surprising that only one entity stands in silos opposing the urgent release of the high demand spectrum. We can think of no other reasons for Telkom to do so other than a pursuance of commercial interest.

66. Intertwined with this ground of review is Telkom's assertion that the public consultation was not adequate. Telkom at least acknowledge that public consultation was undertaken by ICASA. Telkom does not say what would have constituted meaningful consultation when none of the interested parties and the public complained about inadequate public consultation.

67. Telkom then suggest without evidence that the shortened timelines have deprived ICASA the opportunity to properly apply its mind to the submissions made by the parties. There is no merit in this suggestion. ICASA considered all the submissions and applied its mind to each of the submissions. This is evidently borne out by the rule 53 record.

68. There is no merit in the contention by Telkom that ICASA's decision was taken in violation of section 4(3)(b) of PAJA. All relevant considerations were taken into account by ICASA in arriving at the 2021 auction ITA. It is not surprising that the 2021 auction ITA was a resounding success which put into the national fiscus R14.4 billion.

69. This ground of review has no merit and should be rejected.

70. In *Democratic Alliance v the President of South Africa and Others*,[28] the Constitutional Court said the following:

> *"[39] ... 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. There is therefore a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. 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*

[28] 2013 (1) SA 248 (CC) at para [39]. Also see Gordhan v Public Protector and Others Unreported Judgment 7 December 2020

with irrationality and thus renders the final decision irrational.

71. In *SA Predator Breeders Association v Minister of Environmental Affairs*,[29] the SCA said the following:

> *"[28] ... Rationality, as a necessary element of lawful conduct by a functionary, serves two purposes: to avoid capricious or arbitrary action by ensuring that there is a rational relationship between the scheme which is adopted and the achievement of a legitimate government purpose or that a decision is rationally related to the purpose for which the power was given and to ensure the action of the functionary bears a rational connection to the facts and information available to him and on which he purports to base such action. ..."*

The 2021 auction ITA failed to promote competition

72. The third ground of review as pleaded by Telkom in its founding and supplementary founding affidavit is that the 2021 auction ITA failed to promote competition. This assertion by Telkom is directed at the historical dominance of the market by MTN and Vodacom due to their first entry into the market as compared to the late entry into mobile telephony by the other role players such as Telkom and the remaining others. The dominance of the mobile telephony market by MTN and Vodacom is sometimes colloquially referred to as the duopoly.

73. Telkom alleges that the 2021 ITA entrenches MTN and Vodacom market dominance and that is anti-competitive. It alleges that ICASA has failed to take into account the competition aspect of the 2021 ITA. It seeks to buttress this

[29] 2011 (2) All SA 529 (SCA) at para [28]

contention my incorrectly suggesting without evidence that ICASA has not conducted a competition assessment.

74. Telkom deals with this ground of review at paragraphs 272 to 279 of the founding affidavit[30] and repeated in the supplementary founding affidavit at paragraphs 20 to 25. Intertwined with this ground of review is an allegation that ICASA has failed to take into account spectrum arrangements entered into by Vodacom and Rain on the one hand and MTN and Liquid on the other. According to Telkom these types of arrangements are inherently anti-competitive. ICASA has demonstrated in its answering affidavit that there is no merit in this allegation. This issue was also comprehensively dealt with by MTN, Vodacom and Rain in their answering affidavit. But the obvious fallacy in this ground of review is an allegation that ICASA did not consider competition and spectrum arrangements. This is not true. We demonstrate why we say so below.

75. ICASA as a statutory body derives its powers from the ECA. Section 2 of ECA is of significance for this purpose. One of the objects is to promote competition. ICASA was alive to that fact and that is why is pertinently stated it in its 2021 ITA, a fact that is acknowledged by Telkom in paragraph 272 of the founding affidavit. What Telkom however states in the same paragraph 272 is that despite ICASA having stated that in the second IM that the 2021 ITA has as its stated objective to enhance competition in the mobile operator market as its

[30] Case line page 004-1424-1426

primary consideration, it however failed to conduct a competition assessment or engage with the industry to determine the state of competition in the market. Telkom alleges in paragraph 274 of the founding affidavit[31] that ICASA has failed to conduct a competition assessment to determine the implications of the proposed licensing process in terms of the 2021 auction ITA.

76. Firstly, the allegation that ICASA did not conduct a competition assessment is false. ICASA conducted a formal competition assessment leading to the 2020 ITA. This fact is not disputed by Telkom. What Telkom seeks to do, albeit unsuccessfully in paragraph 276 is to discredit the competition assessment done by ICASA on the basis that the 2020 ITA was set aside. This assertion is without merit. The September consent order did not set aside the competition assessment done by ICASA, nor did it set aside the assessment done by Acacia, a consultancy firm engaged by ICASA to provide technical and advisory services.

77. Telkom criticises ICASA and alleges that ICASA did not in itself conduct the competition assessment, instead it impermissibly copied an assessment conducted by a third-party service provider, Acacia Economics. There is no merit in this criticism. ICASA stated in its answering affidavit that the work done by Acacia was a joint effort in which ICASA itself made inputs. The report produced by Acacia is ICASA report. In any event there is nothing wrong in law when the decision maker adopts the report of the advisory committee or

[31] Case line page 003-113

independent advisor as long as the decision maker has applied his mind to it. In this instance ICASA was party to the formulation of the report and made inputs to it. ICASA applied its mind to the report.

78. It was recorded in ***Albutt***:[42]

"The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government.

...

Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. The same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.

...

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... What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved."

79. All that Telkom seeks to do is to impose prescribed procedures on the exercise of what are plainly (and admittedly) Executive functions – effectively prescribing the means to be used and usurping ICASA's sole power to determine those means. This falls foul of the above warnings and the clear constitutional imperative to maintain the separation of powers in Government.

80. ICASA conducted a formal competition assessment although it was not obliged by section 2 of ECA to conduct a formal competition assessment. All what section 2 of ECA requires of ICASA is that ICASA should take into account the competition aspects. This ICASA did and went beyond.

81. Telkom then turns in paragraph 276.3 of the founding affidavit and contradicts its earlier assertion that ICASA did not conduct a competition assessment. In this paragraph Telkom admits that ICASA did conduct a competition assessment but alleges that the competition assessment conducted in 2020 is outdated. It alleges that ICASA has failed to explain why it relies on an outdated assessment. Telkom cannot have its case and eat it. Either there was a competition assessment or that there was none. We submit that there was nothing wrong in ICASA taking into account the competition assessment it conducted in 2020 when there was no material change which affected its conclusion. Telkom does not aver what materially changed from 2020 when the competition assessment was conducted and when the 2021 ITA was published.

82. What Telkom can however not dispute is that ICASA did take into account competition aspect when publishing the 2021 ITA.

83. In paragraphs 276.4 to 276.6[32] Telkom makes allegations which cannot be substantiated. ICASA has denied these allegations. In this regard, Plascon Evans rule operates against Telkom. ICASA's version should prevail. There will

[32] Case line page 003-114

be no reason to reject it.

84. In the reasons document, ICASA specifically dealt with the competition aspect of the 2021 ITA. For instance, it categorised Telkom as a Tier-2 operator. This meant that Telkom would be able to participate in the opt-in round and not compete with Vodacom and MTN which were classified as Tier-1. Telkom despite its market share in the fixed line telecommunication and having the largest spectrum holdings will be competing in the opt-in round with smaller players such as Cell-C; Rain and Liquid.

85. The other criticism by Telkom is that there are inconsistencies in the conclusion arrived at in the Mobile Broadband Services Inquiry ("MBSI") conducted by ICASA and the competition assessment upon which ICASA seeks to rely on and the MBSI. Telkom contend further in paragraph 276.6 of the founding affidavit that 'the MBSI deliberately excluded the spectrum licensing from the competition analysis and the remedies that would have to be implemented. It alleges that in the MBSI, ICASA assumed that the 2020 ITA would preclude the need for regulations emanating from the MBSI to introduce new measures to some of the competition issues in the mobile broadband services market. It then unceremoniously concludes in paragraph 277[33] without facts that 'ICASA's failure to conduct a competition assessment is unreasonable and irrational.

86. Telkom's assertions in support of this ground of review is incomprehensible and

[33] Case line page 003-115

at best muddled. This is evidenced by the case sought to be made out in Telkom's heads of argument when it now says that the 2021 ITA relied on the findings of ICASA's MBSI and the competition commission's data services market inquiry ("DSMI"). The assertion is that these are outdated as they date back to 2018.

86.1 But Telkom is clearly wrong factually. In the supplementary founding affidavit Telkom alleges that ICASA has relied on the findings in the MBSI, which were said to be based on information from 2017 to 2019. This is factually incorrect. The MBSI findings were published in March 2021. ICASA states that it relied on these findings when it published the 2021 ITA. The record shows that the findings of the MBSI were a product of a lengthy investigation and involvement with role players. There was nothing irrational on ICASA taking those findings into account as the competition considerations under section 2 of the ECA.

86.2 Accordingly, there is no merit in this ground of review. As we said earlier, linked to this ground of review about ICASA's failure to consider competition, is Telkom's allegation about spectrum arrangement. We turn to this topic next.

87. The Constitutional Court held in *Bapedi* Ba Marota:[34]

"[N]either [section 33 of the Constitution nor PAJA] asks courts to substitute their opinions for those of administrative bodies. It is not required that a decision

[34] Bapedi ba Marota Mamone V Commision on Traditional leadership dispute and claims 2014 ZACC 2015 (3) (BCLR 268(CC)

of an administrative body be perfect or, in the court's estimation, the best decision on the facts. And this is particularly so for rationality review under PAJA. Hoexter notes that:

> *"[a] crucial feature [of rationality review under PAJA] is that it demands merely a rational connection – not perfect or ideal rationality. In a different context Davis J has described a rational connection test of this sort as 'relatively deferential' because it calls for 'rationality and justification rather than the substitution of the Court's opinion for that of the tribunal on the basis that it finds the decision . . . substantively incorrect'." (Footnotes omitted.)*

A level of deference is necessary – and this is especially the case where matters fall within the special expertise of a particular decision-making body. We should, as this Court counselled in Bato Star, treat the decisions of administrative bodies with "appropriate respect" and "give due weight to findings of fact . . . made by those with special expertise and experience".'[39]

Spectrum arrangement

88. Telkom dealt with the allegation about spectrum arrangement in paragraphs 269 to 271.3 of the founding affidavit[35]. It repeated the same allegations in the supplementary founding affidavit at paragraphs 14 to 19.3.[36] In essence the nub of the complaint is that despite ICASA having recognised in the 2021 ITA that ICASA should promote competition within the ICT sector and that the method for achieving this object of the ECA is to design an auction licensing process "which includes spectrum floors, spectrum caps, opt-in round, discounted reserve prices and spectrum sharing provisions", ICASA failed to do so, contrary to what it stipulated in the 2021 ITA.

[35] Case line page 003-110-003-111
[36] Case line page 004-1422-004-1424

89. We submit that for the reasons that follow hereunder there is no merit in this contention. ICASA did consider the spectrum arrangements, and this is evident from the rule 53 record. Telkom makes factually incorrect statements in paragraphs 269 and 270 of the founding affidavit[37]. It alleges without any factual basis that 'ICASA has discounted the impact of spectrum arrangements on the auction in terms of which the two largest operators gain access to and have use of more spectrum than they own. This is factually incorrect. It is however true that the spectrum arrangements are not exclusive and are not permanent and do not amount to acquisition of the spectrum through a licensing process.

90. It is not true that ICASA failed to engage with the substance of the various submissions filed in response to the first and second IMs on the issue.

91. The factual allegations made by Telkom with regard to spectrum arrangement is disputed. There is thus a material dispute of fact. As such, Plascon Evans rule applies in favour of the respondents version. There is no factual or legal basis to reject the respondents version on this issue. Besides, Telkom seeks to make a new case on this ground of review in the heads of argument. On a factual level Telkom is wrong. ICASA considered the spectrum arrangement in the 2021 ITA.

92. The reasons document says it much. It is clear from the reasons document that

[37] Case line page 003-110-003-111

Telkom raised the same issues which were responded to in the reasons document. What is evident is that spectrum arrangement does not permit or give rise to the dominant operator to have more spectrum capacity that it has or to augment its spectrum allocation through the spectrum arrangement. This issue was comprehensively dealt with by the other respondents such as Rain, MTN and Vodacom which are accused by Telkom for the abuse of spectrum arrangement in order to perpetuate MTN and Vodacom's dominance. As we have submitted, Telkom's version cannot on the simple application of Plascon Evans rule on this issue.

93. Accordingly, this ground of review falls to be rejected.

94. In National Treasury v Opposition to Urban Tolling Alliance [38] the constitutional court held that:

"Id para 31: 'Having granted leave to appeal, we must now decide the merits of the appeal. To do that, I need not determine the cogency of the review grounds. It would not be appropriate to usurp the pending function of the review court and thereby anticipate its decision. I have kept in mind that the rule 53 procedure 20 might result in the lodging of a supplemented case record which would not be before an appellate court and which may entail new matters or disputes of fact which will best be dealt with by the review court itself."

The 700 MHz and the 800 MHz spectrum bands are unavailable

95. We turn to this ground of review that ICASA is auctioning the 700 MHz and the

[38] [2012] ZACC 18;2012 (6) SA 223 (CC) ('OUTA')

800 MHz spectrum which is unavailable for use by MNOs. According to Telkom, these spectrum bands are still available for use by terrestrial broadcasters such as e.tv. Telcom avers that until digital migration is completed and the analogue transmitters switched off by the Minister, the sub-1 GHz spectrum will remain unavailable for use by the MNOs. There is no merit in this contention as we demonstrate below.

96. Telkom deals with this unmeritorious contention in paragraphs 280 to 288 of its founding affidavit[39] but not repeated in its supplementary founding affidavit. In paragraph 282 of the founding affidavit Telkom makes a patently false statement that 'it is common cause that the 700 MHz and 800 MHz frequency bands are not yet available for use nationally by any party who may successfully bid for any of these frequencies. It alleges that 'these frequencies are currently occupied by television broadcasters and are used for providing broadcasting services.'

97. The statement made in paragraph 281 of the founding affidavit [40]is not sustained by the facts. The 700 MHz and the 800 MHz frequency bands are available in full in provinces where the digital migration has already been completed. For instance, it is common cause that digital migration has been completed in five provinces of the Free State, North West, Limpopo and Mpumalanga. In these provinces, where the switch off of the analogue transmitters has already taken place, these frequency bands are fully available

[39] Case line page 003-116-003-122
[40] Case line page 003-116

for use by the mobile network operators. Digital migration is still to be completed in the remaining four provinces of Gauteng, Kwazulu-Natal, Western Cape and Eastern Cape. In these remaining provinces, the Minister has been systematically switching off the analogue transmitters and has now gazetted a date of 31 March 2022 as the switch off date of all analogue transmitters.

98. Telkom has been riding on the pending litigation between e.tv and the Minister of communications and digital technologies in which e.tv seeks an order delaying the switch off date of the analogue transmitters until all its viewers of the free to air television have been provided with the set top boxes. Judgment has been reserved in that litigation and may be delivered soon. In any event, even if the switch off does not happen on 31 March 2022 and it is postponed, this does not affect the auctioning of these frequency bands in full. The 2021 ITA has made provision for that. It expressly states that the purchaser of the spectrum in the sub-1 GHz will pay pro rata fees, with the deferral of the payment of fees for the portion of the spectrum that is still in use by the terrestrial television broadcasters. This is a permissible way of auctioning spectrum and there is nothing unlawful about it. It is an international best practice that has been used internationally by other countries.

99. Telkom has purchased 20 MHz of the sub-1 GHz spectrum at the auction. It never said that it cannot purchase it because it is unavailable. It understood that it will suffer no prejudice because it will be able to roll out its infrastructure in areas where the spectrum is fully available and only pay pro rata fees. It will roll out infrastructure in the remaining areas where the spectrum is still in use by

terrestrial broadcasters once the switch off has occurred and the remaining portion of this spectrum migrated to the mobile network operators.

100. There is no merit in what Telkom alleges in paragraph 283 of the founding affidavit[41]. There is no obligation to pay license fees in respect of that portion of the spectrum that is still unavailable. The litigation between e.tv and the Minister has been concluded and judgment is awaited. In fact, e.tv as the applicant in that litigation does not share Telkom's view on the unavailability of a portion of the sub-1 GHz spectrum. E.tv assert in that litigation that the unavailability of a portion of the sub-1 GHz spectrum to the mobile network operators is not a hindrance to the auctioning of the same spectrum or the whole of it because of the provision that has been made by ICASA in the 2021 ITA. In fact, e.tv is correct that the unavailability of the portion of the sub-1 GHz spectrum does not impair the auctioning of the same spectrum which will be available in the near future.

101. Telkom has already purchased the same spectrum bands that it alleges are not available and there is no certainty about its availability. This ground of review is simply a smoke screen and has no merit. It falls to be rejected.

SA connect targets distributed amongst licensees

102. In paragraphs 302 to 305 Telkom raises the issues of the social obligations that

[41] Case line page 003-117

the holders of the spectrum purchased at the auction will have. Telkom seems not to be happy about its duty to ensure that certain social obligations are met. The SA Connect Policy is well known. Telkom has not challenged the policy but raises its objection as a ground of review without first challenging the policy.

103. Telkom is precluded by the Oudekraal principle from going beyond the policy without first attacking the policy.

104. There is no merit in Telkom's assertion that there was no compliance with section 4(3) of PAJA.

105. This ground of review falls to be rejected. In any event this ground does not impugn the 2021 ITA and the auction and it does not in any way impacting on the lawfulness of the auction process and the auction itself.

The deferral of the WOAN

106. Telkom has dealt with its complaint about the deferral of the WOAN from paragraphs 267 to 268.3 [42]and paragraphs 311 to 312 of the founding affidavit[43]. However, in paragraph 263 of the founding affidavit, Telkom records the reasons provided by ICASA for the deferral of the WOAN. ICASA said that it will engage with other international jurisdictions to draw lessons from their

[42] Case line page 003-116-003-122
[43] Case line page 003-109- 003 -110

experiences on the licensing of a typical WOAN and based on the outcomes of further engagements and subsequent analysis of the model thereof, coupled with the findings from the IMT consultation process (where applicable), ICASA will publish a notice advising on the process to be followed in respect of the licensing of the WOAN by no later than March 2022.

107. The 2019 Policy Directive is in the process of being amended by the Minister in terms of section 3 of ECA, and the amendment will do away with reference to a WOAN. There is no merit in the allegation in paragraph 266 of the founding affidavit that ICASA is acting in contravention of the Policy Direction. ICASA commenced with the process of both the ITA and the WOAN simultaneously, and the policy directive does not say that the award of both the ITA and the WOAN should take place simultaneously. Telkom has misread the policy directive and its ground of review is predicated on incorrect facts.

108. Paragraph 267 of the founding affidavit is speculative. In fact, it has been disproved by the outcome of the auction in that only 20 MHz of frequency bands has remained unsold and same will be sold in the near future. It is certain as to how much spectrum has been sold and the revenue that was generated by it.

109. There is no merit in the allegations made in paragraph 268 of the founding affidavit given the fact that the auction has not taken place at the time the application was filed, and the completion of the auction has brought certainty and specified outcomes.

110. In JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Another [44] Didcott J said the following at par [17]

"There can hardly be clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than on those on which our ruling is wanted have become".

111. The issue raised in paragraph 309 of the founding affidavit[45] has been dealt with by the Minister's publication in the Government Gazette of her intention to amend the Policy Directive. The Minister specifically states in the notice that:

"The available spectrum for licensing on the WOAN does not meet the viability threshold as determined in the study conducted by the CSIR on behalf of the Department of Communications and Digital Technologies. The policy objectives that were intended to be achieved by the WOAN, will be realised using the Next Generation Radio Frequency Spectrum policy that is currently being finalised for public consultations."

112. ICASA took into account relevant factors when it deferred the WOAN and since then the issue has been overtaken by events.

113. There is no merit in this ground of review and should be rejected.

Allegations about Cell C

114. In paragraph 308 of the founding affidavit Telkom alleges that: 'it is reasonable

[44] 1997 (3) SA 514 (CC) 1996 12 (BCLR).in legal aid SA Magidiwana and others (2014)4 all SA 570 SCA. the court said "the court should not and ought not to decide issues of academic interest only".
[45] Case line page 003-128

to infer that Cell C will decommission all its RAN sites within the 20 year term of the spectrum licenses. It states that an operator requires RAN to sites to connect to and utilise their spectrum.' The nub of Telkom's contention is that '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 by ICASA.' Telkom incorrectly proceed to allege in the same paragraph that Cell C is no longer a wholesaler, and that ICASA ought to have taken that into account. It alleges that ICASA would have adjusted the current spectrum caps designed to accommodate its envisioned five operators. It concludes by alleging that ICASA's failure to consider Cell C status as a national wholesaler has a material impact on the design of the 2021 Auction ITA.

115. The allegations made by Telkom in paragraph 308 are not factually correct. First Cell C has not yet exited the market. ICASA cannot make a decision on speculative basis. Besides, ICASA explained the position thus. If Cell C exit the market, its spectrum would be reassigned. The current position is that Cell C has not exited, and it competes with other operators in the retail customer market.

116. This ground of review is at best contrived. It should be rejected.

Appropriate remedy

117. We now deal with the remedy. This application falls to be dismissed for obvious reasons. First, Telkom has not made out a case for the review of the impugned

decisions. Second the relief sought was directed at the process adopted by ICASA leading to the auction. Telkom attempted to interdict the process and it failed. Telkom wished to have the date of the review fixed to a date before the auction date and it failed. Telkom agreed to a date after the auction despite that in its founding papers it asserted that the relief it seeks will be impossible if the auction were to take place. We submit that Telkom was correct. The relief sought is impossible to obtain given that the auction has taken place and Telkom has participated and bought spectrum at the auction. The auction has brought R14.4 billion into the fiscus. ICASA is in the process of issuing licences to the successful bidders and successful bidders are required to pay deposits by stipulated date. The egg is impossible to unscramble.

118. The court, even if it were to find one of the grounds of review are sustainable, it has a wide discretion to nevertheless decline to set aside the decisions in terms of section 172(1)(b) of the constitution read with section 8 of PAJA. In terms of section 172(1)(b) of the constitution the court has a wide discretion to make an order that is just and equitable in the circumstances of the case. We submit that it will not be just and equitable for the court to set aside the decision and require ICASA to start afresh. Such an order will not be in the public interest nor in the interest of the fiscus. It will not be in the interest of the country, nor will it be in the interest of Telkom. It will be in the interest of nobody. This is so given that Telkom itself has failed to obtain an interdict and it knew that should it fail to obtain an interdict, the horse would have bolted and indeed the horse has bolted.

119. Telkom cannot have its cake and eat it. It cannot blow hot and cold, and it cannot seek to impugn the very process it participated in and for which it derived substantial benefits. Telkom is precluded by the doctrine of peremption from acting in the manner in which it does. Further the relief it seeks has been overtaken by the auction and the issuing of licenses to the successful bidders. The review that seeks to challenge the process that has since concluded by the time the review is adjudicated is moot.[46]

120. The order will not have practical effect. The decisions sought to be impugned have since been overtaken by other administrative decisions that ICASA has taken such as the auction itself, the award of the spectrum and the licensing of the spectrum assigned to the successful bidders. These new decisions have not been impugned and they, in the principle set out in Oudekraal remain extant, lawful and valid until set aside by Court by way of review.[47]

121. Telkom also seeks a structural interdict. Structural interdict is not there for the taking. A case has to be made for it. Besides, in this matter the nature of the structural interdict sought by Telkom infringes on the doctrine of separation of powers. Telkom wants this Court to baby sit ICASA whilst the Court does not possess expert and specialist knowledge that ICASA has. ICASA has done nothing which suggests that it is incapable of conducting a spectrum auction. It

[46] JT Publishing (Pty) Ltd v Minister of Safety and Security 1997 (3) SA 514 (CC) at para 15; Cape Town City v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC) at para 54; National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) at para 21; Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC) at para 17; Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) at para 11.
[47] Independent Electoral Commission v Langerberg Municipality supra at para 11.

has in fact conducted a successful spectrum auction. It has not in the past found by the Court of failing to comply with court orders. The previous two litigations that Telkom seeks to rely on were not adjudicated on the merits. Only part A interdicts applications were adjudicated, and the reviews were settled out of court.

122. The assignment of high demand spectrum is long overdue, and its assignment on the 8th to 17 March signals an important technological era in South Africa, and South Africa's compliance with the International Telecommunications Union and resolutions taken in the WRC. The provisional spectrum regime is coming to an end on 30 June 2022. It is therefore impractical to expect that South Africa should return to the pre-covid 19 regime when no additional spectrum was available to the mobile network operators.

123. For all of the reasons herein canvassed, Telkom's application falls to be dismissed. We turn now to finally motivate on the costs including the costs of Part A which Telkom has to date not tendered.

Costs

124. The purpose of an award of costs is to indemnify a successful party who has incurred expenses in instituting or defending an action.[48] To the extent to which ethical considerations may enter the exercise of a presiding officer's discretion,

[48] Raboniwitz v Van Graan 2013 (5) SA 315 (GSJ).

this must also be determined by the facts of each case.[49]

125. The basic rule is that subject to express enactments to the contrary, all costs are in the discretion of the court. Even the general Rule, namely that costs follow the event is subject to the overriding principle. The discretion must be exercised judicially upon consideration of the facts of each case. In essence, it is a matter of fairness to both sides. *"judicially means not arbitrarily"*[50]

126. In giving presiding officers a discretion, the law as contemplated is that they should take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstance which has a bearing on the issue of costs and then make such an order as to costs as it would be fair and just between the parties.[51]

127. In the exercise of the discretion as to costs, a presiding officer may also attach weight to the moral obligations, as opposed to the legal obligations, of the parties.[52]

128. Such conduct is deserving of censure and it should attract the necessary cost order.

[49] McDonalds Trading v Huey Extreme Club 2008 (4) SA (C).
[50] Gcanga v AA Mutual Insurance Association Ltd 1 979 3 SA 320 (E) 330.
[51] Fripp v Gibbon & Co 1913 (AD) 354 at 363.
[52] Berkowitz v Berkowitz 1956 (3) SA 522 (SR).

129. It is ICASA's submission that the applicant upon receiving the respondent's answering affidavit in Part A ought to have realized that its proceedings are abortive and similar to the interdict application withdrew its review application without insisting on arguing this matter.

130. It is trite law that the litigant responsible for abortive proceedings is generally ordered to pay the costs. The criteria on determining the issue of costs has always hinged on whether or not it was clear that the proceedings in question would be abortive.

131. The applicant argues that this matter does not warrant it to pay costs in the event it is successful or otherwise, because according to the applicant, despite its conduct in wasting Court's time and resources by abandoning the interdict application, which led to this unnecessary review application, it should be spared the burden of costs. This cannot be.

132. The applicant filed a baseless interdict application on urgent basis, however, failed dismally to lay the basis for its urgency. The respondents meted out a watertight argument on the lack of urgency and interdictory relief for such an application in Part A, and argued for it to be dismissed with costs, the applicant simply removed the application from the roll without tendering costs.

133. It is submitted that the conduct of the applicant does indeed warrant a cost order, both in respect of part A and part B, which costs should include costs for three Counsel, one of whom is a Senior Counsel.

134. The court has a discretion whether to allow the fees of two or more Counsel.[53] In deciding whether or not the fees of other Counsel should be allowed, the court has regard to whether it was a 'wise and reasonable pre-caution' to employ such Advocate,[54] but this is not the only test: the court will also have regard to the amount involved in the action and to the nature of the issues in dispute between the parties.[55] The issues in dispute were compounded by the applicant who raised a number of meritless issues.

135. The persistence by the applicant to proceed with the application despite its full participation in the auction should be viewed as an abuse and thus warranting censure with a costs order.

136. ICASA was justified in opposing the relief sought in the present application. It should logically follow that ICASA is entitled to the costs thereof.

[53] Van Wyk v Rondalia 1967 (1) SA 373 (T) at 376D; Henry v AA Mutual Insurance Association Ltd 1979 (1) SA 105 (C) at 108H; Jerrier v Outsurance Insurance Co Ltd 2015 (5) SA 433 (KZP) at 449F-450A; AD v MEC for Health and Social Development, Western Cape 2017 (5) SA 134 (WCC) at 139J-140A and 141B-J. See also Ehlers v Rand Water Board 2006 (3) SA 299 (SCA).
[54] Steenkamp v Steenkamp 1966 (3) SA 294 (T) at 297G; Newman v Prinsloo 1974 (4) SA 408 (W) at 411B-F; Enslin v Vereeniging Town Council 1976 (3) SA 443 (T) at 453F.
[55] Barlow Motors Investment Ltd v Smart 1993 (1) SA 347 (W) at 352G.

137. The Biowatch Trust[56] principle in relation to costs does not find any legal application especially in circumstances where a litigant conducted itself like Telkom.

138. For all of the reasons canvassed in these heads we submit that Telkom has abysmally failed to make out a case for review of ICASA's decisions. Despite that, Telkom has many insurmountable huddles in this matter which we have canvassed above. Telkom submit that the process must be started afresh, despite that it is the beneficiary of the auction which delivered to it the maximum spectrum permitted by the 2021 ITA.

139. In the result, the application should be dismissed with costs inclusive of costs of the employment of three counsel.

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28 March 2022

[56] 2009 (6) SA 232 (CC)