IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 55311/2015

In the matter between: 26/2/2016

TELKOM SA SOC LIMITED Applicant

and

DR STEPHEN MNCUBE N.O. & OTHERS Respondents

and in the matter between: Case No: 77029/2015

MOBILE TELEPHONE NETWORKS (PTY) LTD Applicant

and

MS KATHARINA PILLAY N.O. & OTHERS Respondents

and in the matter between: Case No: 55311/2015

CELL C (PTY) LIMITED Applicant

and

THE CHAIRPERSON OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA & OTHERS Respondents

and in the matter between: Case No: 82287/2015

DIMENSION DATA MIDDLE EAST & AFRICA (PTY) LTD t/a INTERNET SOLUTIONS Applicant

and

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA & OTHERS Respondents

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

26/2/16
DATE

SIGNATURE

JUDGMENT

D S FOURIE, J:

[1] This matter concerns four review applications brought by four different applicants who are Telkom, MTN, Cell C and Internet Solutions. The decision sought to be reviewed in all four applications is the conditional approval by the Independent Communications Authority of South Africa (ICASA) relating to an application brought by two of the respondents, Vodacom and Neotel, for the transfer of control of individual and spectrum licences from Neotel to Vodacom.

[2] The parties have agreed that all the applications should be heard together, but no order for consolidation should be granted. This arrangement was agreed upon for purposes of costs and/or any possible application for leave to appeal. However, I was requested to prepare only one judgment in all the applications.

BACKGROUND

[3] On or about 18 May 2014 all of the various shareholders of Neotel sold their shares in and claims against Neotel to Vodacom in terms of a written sale agreement which is subject to a number of conditions precedent. Two of the conditions are the approval by ICASA in terms of the Electronic Communications Act No 36 of 2005 ("EC Act") for the transfer of control of certain licences and approval by the relevant Competition Authorities under the Competition Act No 89 of 1998.

[4] Pursuant to the conclusion of the sale agreement the Neotel shareholders and Vodacom applied to ICASA for the approval of the following:

- transfer of control of the Individual Electronic Communications Network Service Licence of Neotel to Vodacom in terms of section 13(1) of the EC Act;

- transfer of control of an Individual Electronic Communications Service Licence of Neotel to Vodacom in terms of section 13(1) of the EC Act; and

- transfer of control of Radio Frequency Spectrum Licences of Neotel to Vodacom in terms of section 31(2A) of the EC Act.

[5] On 15 September 2014 ICASA published a general notice in the Government Gazette inviting interested parties to lodge written representations within 21 days. The notice also indicated the possibility of making oral submissions.

[6] Written representations were received from seven interested parties, namely Cell C, Telkom, MTN, the Service Providers Association, the Web Access Providers Association, Internet Solutions and Crystal Web. They all indicated an intention to also make oral representations. ICASA then established a special committee known as the Market Consolidations Committee to *inter alia* consider the application, conduct public hearings and make recommendations to the ICASA Council regarding the application.

[7] ICASA thereafter convened and held public hearings on 15 and 16 January 2015. Subsequent to the public hearings, ICASA received what it describes as "unsolicited supplementary written responses" from Cell C, MTN, Neotel and Vodacom which led to the remaining interested parties being invited to submit supplementary written responses.

[8] On 15 May 2015 the special committee provided the Council of ICASA with an analysis report in terms of which the committee recommended that the Council approve the application subject to a 30% historically disadvantaged groups-requirement be met by the parties within a timeframe still to be decided. ICASA resolved to approve the application on 11 June 2015. The approval was subject to:

- a 30% equity ownership as contemplated in section 13(6), read with section 9(2)(b) of the EC Act and a requirement that the equity ownership be met within a reasonable period; and

- consideration of a broadband roll-out obligation in under-serviced areas.

[9] The decision was published in the Government Gazette on 2 July 2015. ICASA then invited the applicants and other interested parties on 2 July 2015 to lodge written representations in relation to the reasonable period for compliance with the black economic empowerment-requirement and whether the roll-out condition referred to above, should be imposed. Having received written representations on 22 July 2015, ICASA is yet to make a determination in relation to the timeframes for complying with the black economic empowerment-requirement and the appropriateness of the roll-out obligation.

[10] In its reasons for its decision, ICASA recognised that it had not promulgated regulations as contemplated in the EC Act with regard to the procedure relating to the transfer of control of licences when the application of Neotel and Vodacom was submitted. It decided that the 2015 regulations which deal with transfer of control of licences did not apply to the application, because they only came into effect on 1 April 2015 after the application was submitted.

STATUTORY FRAMEWORK

[11] ICASA is a juristic person established in terms of section 3(1) of the Independent Communications Authority of South Africa Act, No 13 of 2000 ("ICASA Act"). ICASA's primary objects and functions are set out in section 2 of the Act. They are, *inter alia*, to regulate broadcasting and electronic communications in the public interest and to achieve the objects contemplated in the underlying statutes.

[12] The underlying statutes, as defined, include the EC Act, which assigns to ICASA additional responsibilities and obligations specifically pertaining to the regulation of electronic communications within the Republic of South Africa. The primary object of this Act is set out in section 2 thereof which includes, *inter alia*, to promote competition within the information, communications and technology sector, to promote broad-based black economic empowerment and to ensure that broadcasting services and electronic communication services are provided by persons or groups of persons from a diverse range of communities in the Republic.

[13] Section 9 of the EC Act makes provision for application and the granting of individual licences, whereas section 13 provides for the transfer of individual licences, the transfer of control of individual licences or the change of ownership with regard to such licences. Section 31 regulates the use and licensing of a radio frequency spectrum licence. Subsection (2A) thereof provides that a radio frequency spectrum licence may neither be transferred

nor may the the control of such a licence be transferred without the prior written permission of ICASA.

[14] Chapter 10 of the EC Act deals with competition matters. Section 67(9) provides that, subject to the provisions of the EC Act, the Competition Act No 89 of 1998 applies to competition matters in the electronic communications industry. In terms of subsection (10) ICASA is, for the purposes of the Competition Act, a regulatory authority defined in section 1 of that Act.

ADMINISTRATIVE ACTION

[15] On the papers it appears that ICASA denies that the "processes" adopted by it constitute administrative action within the meaning of the Promotion of Administrative Justice Act, No 3 of 2000 ("PAJA"). Although this issue was not pursued during argument, it is necessary to make a ruling in this regard.

[16] The definition of "administrative action" in PAJA (in so far as it is relevant) refers to any decision taken, or any failure to take a decision, by an organ of State when exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct and external legal effect. Both these requirements, i.e. "which adversely affects the rights" and "direct (and) external legal effect"

have been explained as follows by Nugent JA in Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA) at par 23:

> *"The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."*

[17] ICASA has been established in terms of section 3 of the ICASA Act and is a juristic person. The object of this Act (section 2) is to empower ICASA to regulate broadcasting and also to regulate electronic communications in the public interest. No doubt, having regard to these provisions and the definition of an "organ of State" in section 239 of the Constitution, ICASA is an organ of State exercising a public power or performing a public function in terms of the EC Act.

[18] Furthermore, the consequence of ICASA's decision is that Vodacom has been given permission to acquire control of Neotel's licences. This is a decision that has direct and immediate consequences for all operators in the mobile communication market and also for the public. Put differently, this decision has the capacity to directly affect legal rights. I therefore conclude that ICASA's decision to approve the Neotel/Vodacom application amounts to administrative action within the meaning of PAJA.

GROUNDS OF REVIEW

[19] The grounds of review advanced by the reviewing parties fall into three main categories:

- the first main category concerns the question of what regulations, if any, were applicable to Neotel and Vodacom's application to ICASA;
- the second main category concerns the procedure followed by ICASA; and
- the third main category concerns the substance of ICASA's decision.

[20] There are various review grounds raised on the affidavits but not pursued in the reviewing parties' heads of argument. These grounds of review were also not pursued during oral argument. I shall therefore accept that those grounds have been abandoned and that it is not necessary to deal with them in this judgment.

FIRST MAIN CATEGORY: REGULATIONS

[21] A number of the reviewing parties' grounds of review relate to the question of which regulations, if any, were applicable to ICASA's

consideration of the application. Some of the reviewing parties contend that the 2015 Spectrum Regulations (published under GN 279 in Government Gazette 38641 of 30 March 2015) were applicable to the application and had to be applied by ICASA. However, Cell C contends in the alternative that the 2011 Spectrum Regulations (published under GN 184 in Government Gazette 34172 of 31 March 2011) were applicable to the application and had to be applied by ICASA. On the other hand, it was pointed out by ICASA, Neotel and Vodacom that there were no regulations in place which governed the application. According to them ICASA simply had to exercise its statutory powers in terms of sections 13(1) and 31(2A) of the EC Act. I shall first consider the question whether the 2015 Spectrum Regulations were applicable and thereafter the question, as contended for by Cell C in the alternative, whether the 2011 Spectrum Regulations were applicable.

[22] The relevant chronology of events is briefly as follows: On 17 June 2014 Neotel and Vodacom applied to ICASA for the necessary authorisation in terms of sections 13 and 31 of the EC Act. On 15 September 2014 ICASA invited interested parties to submit written representations. On 15 and 16 January 2015 ICASA held public hearings on the application. During February and March 2015 ICASA received supplementary written submissions from various parties. It was only thereafter, on 30 March 2015, that the 2015 Spectrum Regulations were published. They came into force on 1 April 2015. ICASA resolved to approve the application on 11 June 2015.

[23] It is common cause that ICASA did not apply the 2015 Spectrum Regulations when it made its decision to approve the Neotel/Vodacom application. Regulation 15(5) of the 2015 Regulations provides that an application to transfer control over a spectrum licence will be evaluated on the basis of five criteria, including technical efficiency, functional efficiency and economic efficiency. Regulation 15(8) provides that ICASA will not approve an application for the transfer of control of a spectrum licence if the "transaction will not promote competition". It has been contended by the reviewing parties that since the 2015 Spectrum Regulations were in force at the moment when ICASA made its decision, it had to apply these regulations and its failure to do so constitutes a material error of law justifying the decision to be reviewed and set aside.

[24] I do not agree with this submission. These regulations are silent on the question of retrospective application. There is no express indication that they were intended to apply to applications which were already pending before ICASA and in respect of which public hearings had already been completed. Our courts have repeatedly made it clear that there is a strong presumption against statutes having retrospective effect. For a statute to have a retrospective effect, there must be clear language requiring such an interpretation. That legislation will affect only future matters and not take away existing rights, is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution

(Veldman v Director of Public Prosecutions 2007 (3) SA 210 (CC) at par 26-27).

[25] In Unitrans Passenger (Pty) Ltd v Chairman, National Transport Commission 1999 (4) SA 1 (SCA) the question was whether a proclamation could apply to matters which were already pending before the National Transport Commission. Olivier JA said the following in paragraph 24:

> *"It is unthinkable that the amending legislation should affect cases where the hearing has already taken place and the NTC, having reserved judgment, is within a day or two of announcing its decision. The gross injustice and impracticability of applying the amending legislation to such a case is obvious. The principle is the same whether the application has just recently been made or just recently been heard."*

[26] This approach was approved by the Constitutional Court in Sigcau v President of the RSA 2013 (9) BCLR 1091 (CC) at par 20. The Court pointed out, with reference to Unitrans, the following:

> *"The ordinary rule of our law is that statutes operate only prospectively. A distinction was often made between substance and procedure which then allowed rules that affected only procedural matters to operate retrospectively. In Unitrans the Supreme Court of Appeal refined this to a distinction between cases where the amending procedures come into effect before the old procedures had been initiated and situations where the amendments only come into effect after the old procedures had*

been initiated. In the latter case, unless a contrary intention is clear from the amendment, the old procedure remains intact."

[27] In Poswa v President RSA 2015 (2) SA 127 (GJ) at par 63 CJ Claassen J pointed out that the new statutory provisions regarding the "lodgement" of complaints must be distinguished from the new procedures for their "investigation". The Court held that it was permissible to apply procedural changes to already pending processes. However, this approach is of no assistance to the reviewing parties, because the decision in Poswa does not suggest that it would be permissible to apply substantive changes to pending applications in the absence of clear language to that effect.

[28] It is clear that the 2015 Spectrum Regulations would, if applicable, stipulate substantive criteria to be applied by ICASA's. None of these appear in the EC Act as "criteria" per se for the transfer of control over a spectrum licence. Furthermore, these regulations came into operation after the application had been submitted and after the public hearings took place. The injustice and impracticability of applying these regulations at such a late stage of the application is obvious. Having regard to these considerations, I have to conclude that these regulations were not applicable.

[29] I shall now consider the 2011 Spectrum Regulations. It is common cause that these regulations were in operation when Neotel and Vodacom applied for the necessary authorisation as well as on 11 June 2015 when ICASA resolved to approve the application. ICASA was (and still is) of the

view that the 2011 Spectrum Regulations applied only to applications for the approval of the "transfer" of spectrum licences and not to the "transfer of control" of spectrum licences. Three of the reviewing parties do not take issue with ICASA on this issue. However, Cell C persists (in the alternative and if it is found that the 2015 Regulations did not apply to the application) in contending that ICASA was wrong in concluding that the 2011 Spectrum Regulations were not applicable to the application. In advancing this argument, Cell C contended that there had never been any true distinction between a transfer and a transfer of control of a licence.

[30] I cannot agree with this submission. It is the EC Act itself that distinguishes between the transfer of a licence and the transfer of control of licences. Initially, section 13(1) of the EC Act dealt only with the "transfer" of an individual licence. It was only on 21 May 2014 that section 13(1) was amended to deal both with the "transfer" and the "transfer of control" of an individual licence and that section 31(2A) was introduced to provide the same in relation to a spectrum licence. If the transfer of a licence and the transfer of control of a licence amounted to the same kind of transfer, there would be no need for the Legislature to distinguish between the two. Taking into account that the application only concerned a transfer of control, I am of the view that ICASA was correct to conclude that the 2011 Regulations were not applicable.

[31] The fact that there were no regulations in place which governed the application, does not mean the application could not properly be considered.

In the absence of regulations contemplated in sections 13(2) and 31(3)(c) of the EC Act at the time the application was lodged, Neotel and Vodacom nevertheless provided information in terms of the Regulations in respect of the Limitation of Ownership and Control of Telecommunication Services. They contended that in terms of section 95 of the EC Act these are the regulations which were in existence at the time the application was lodged and that these regulations were applicable, albeit only to the extent that they prescribed the form in which applications for ICASA's approval must be prepared and submitted.

[32] In Verstappen v Port Edward Town Board & Others 1994 (3) SA 569 (D&CLD) it was held that the Minister's failure to promulgate regulations foreshadowed in section 20(2) of the Environment Conservation Act No 73 of 1989 did not render lawful the conduct of the local authority in operating a waste disposal site without a permit. In view of the fact that no regulations dealing with waste management have been promulgated under that Act, Magid J said the following at 537 E-G:

> *"If some person desires to 'establish, provide or operate' a waste disposal site he requires a permit from the Minister to do so. And if the Minister has failed to prescribe the form on which such application is made or the information which must accompany it, such person may make an application to the Minister in whatever reasonable form he desires, furnishing all such information as the Minister might reasonably be likely to need. If the Minister were to decline to deal with the application because it was not on the appropriate form or did not contain sufficient information, I have no*

doubt at all that any Court would hold such a decision by the Minister to be so grossly unreasonable as to justify review. That is not to say, of course, that the Minister would not be entitled to require that such an applicant furnish such further information as might reasonably be required to enable the Minister properly to assess the merits of the application."

[33] I associate myself with this approach. The absence of applicable regulations does not render the application submitted, or the procedure followed thereafter, unlawful. The EC Act itself provides a statutory framework and ICASA was therefore entitled, in my view, to exercise its statutory powers in terms of sections 13(1) and 31(2A) of the EC Act (the transfer of control of an individual licence and the transfer of control of a radio frequency spectrum licence respectively) with regard to the application. I therefore conclude that this ground of review falls to be dismissed.

SECOND MAIN CATEGORY: PROCEDURAL GROUNDS

[34] While a range of procedural challenges are raised on the papers, it appears that only three remain. First, Telkom contends that the notice published by ICASA in the Government Gazette on 15 September 2014 and 12 December 2014 was misleading and confusing and did therefore not comply with the EC Act and PAJA. Second, Telkom contends that the exclusion of Counsellor Batyi from the Special Committee established on 20 October 2015, was procedurally irregular. Third, according to Telkom it

reasonably suspects that ICASA was biased within the meaning of section 6(2)(iii) of PAJA. I shall now deal with each of these grounds in turn.

NOTICES PUBLISHED BY ICASA

[35] The first notice to which Telkom objects is a general notice published in the Government Gazette of 15 September 2014 (Notice 799 of 2014). The objection is twofold, namely this notice is misleading and defective. I shall now only consider the question whether the notice is misleading. At a later stage, when I consider the 30% equity ownership issue, I shall also deal with the question whether or not this notice is defective.

[36] This notice (15 September 2014) recorded that Neotel and Vodacom had made an application to ICASA that, *inter alia*, Vodacom would acquire the entire share capital of Neotel, that Neotel will remain a licensee and that it will retain all its licences which had already been granted by the authority. The notice also invited interested parties to lodge written representations in relation to the application and it gave the interested parties 21 working days to do so. Telkom contends that this notice was misleading and confusing as it did not reflect the true nature of the transaction between Vodacom and Neotel accurately, i.e. an application for the transfer of control of licences.

[37] Sections 9(2) and 13(6) of the EC Act, read together, required ICASA to give notice in the Government Gazette of the application by Neotel and Vodacom to it. The same sections require that interested persons be given an opportunity to make representations in this regard. On a proper reading of the notice, it is difficult to see how the notice could be misleading. It clearly sets out:

- the names of the parties to the application;
- that the notice was published in terms of section 13(6) read with section 9(2) of the EC Act (section 13 deals with the cession, assignment, transfer and transfer of control of individual licences);
- that the application and any representations would be made available for inspection by any party; and
- that the application was for approval of the acquisition of Neotel by Vodacom.

[38] Any party interested in the issue would be aware, by a proper reading of the notice, that Neotel holds various licences issued by "the authority" and that the necessary consequence of the acquisition would amount to a transfer of control of these licences. The specific reference to section 13(6) of the EC Act could leave no doubt in this regard.

[39] After publication of the notice Telkom provided its written representations in line with the requirements of the notice. There is nothing in those submissions to suggest that Telkom was in any way confused as to the nature of the exercise ICASA was undertaking. Telkom also did not contend that the notice was inadequate or misleading at any point prior to the launch of its review application. Telkom and the other parties also participated in public hearings which were held on 15 and 16 January 2015. None of them complained that they did not understand the nature of the application under consideration by ICASA. Having regard to all these considerations, I am of the view that the complaint that this notice was misleading, is without any merit.

[40] Telkom contended that on 12 December 2014 ICASA published another misleading notice pertaining to public hearings. Telkom pointed out for the notice to be adequate, it must contain all relevant information. The complaint, as I understand it, is that this notice does not provide sufficient information with regard to the nature of the transaction for which public hearings had been scheduled.

[41] On a proper reading of the notice, it is again difficult to identify how the notice could be misleading. The notice clearly sets out:

- a reference to the application received for the acquisition of Neotel by Vodacom;

- that public hearings have resulted from the authority having called upon any interested persons to lodge written representations in response to the application;

- that the public hearings will be held on 15 and 16 January 2015 at 09h00 at Block C Presentation Room, 164 Catherine Street, Sandton; and

- that a programme for the hearings has been attached in the schedule to the notice.

[42] Any party sufficiently interested in the issue would be aware that this notice was preceded by the notice of 15 September 2014 and that the public hearings are a further step in the process in respect of the application which had already been presented by Neotel and Vodacom. It should again be pointed out that after publication of this notice (12 December 2014) Telkom also participated in the public hearings which were held on 15 and 16 January 2015. It did not complain that it did not understand this notice. Having regard to all these considerations, I am of the view that there is no merit in this complaint and therefore this ground of review cannot succeed.

CONSTITUTION OF THE SPECIAL COMMITTEE

[43] This ground of review concerns the constitution of the special committee known as the Market Consolidations Committee. This committee

was established by ICASA to consider the application, conduct public hearings and make recommendations to the ICASA Council regarding the Neotel/Vodacom application. According to the resolution in terms of which this committee was established, the committee consisted of two counsellors, namely Counsellor Pillay (Chairperson) and Counsellor Batyi (Deputy Chairperson). The committee was required to be supported by 11 staff members. The quorum of any meeting of the committee is one counsellor and 50% of the staff members. Resolutions were to be taken by way of a majority vote. The functions and powers of the committee are outlined in the resolution delegating the functions to the committee.

[44] Telkom points out that according to the record of proceedings, Counsellor Batyi attended only four out of twelve meetings of the special committee, two of which she is indicated to be an "observer". The consequence is, so goes the argument, that only one person, as opposed to a committee, was performing the functions of the committee and this is contrary to ICASA's delegation which appointed a committee consisting of two counsellors. It is therefore contended by Telkom that the absence of Counsellor Batyi from certain meetings constituted an irregularity that was fatal to the special committee's decision-making process.

[45] The Delegation Resolution provides *inter alia* as follows in paragraph 2.4.5 thereof:

"The quorum for any meeting of the committee is a counsellor and 50% of the staff and resolutions are to be taken by way of a majority vote. Where the votes are equal, the chairperson has a casting vote. The project leader or project manager from the staff must be present at all meetings as well as a majority of the other members of staff. Where a committee member or a member of staff cannot be present at a meeting for good cause, due notice, as agreed with the committee, must be given to the chairperson."

[46] The fact that the Delegation Resolution set the quorum for resolutions at one counsellor (and 50% of the staff) is in my view a clear indication that the special committee was empowered to meet and take resolutions with one counsellor. Also the fact that this resolution made provision for the absence of a committee member at a meeting is another indication that the special committee was empowered to meet and take resolutions with one counsellor. This was clearly a realistic approach to appoint two counsellors in order to ensure that the committee remained properly constituted should one counsellor be unavailable. It does not mean that both counsellors had to be present at every meeting. Having regard to these considerations, I am of the view that the absence of Counsellor Batyi from certain meetings does not constitute an irregularity as contended by Telkom and therefore this ground of review cannot be upheld.

THE PERCEPTION OF BIAS

[47] Telkom has argued that it reasonably suspects that ICASA was biased, within the meaning of section 6(2)(iii) of PAJA. The substance of this

complaint is that the record of proceedings reveals that ICASA and its Committee held several confidential meetings with Vodacom and its agents and exchanged correspondence with them, to the exclusion of other interested parties.

[48] During oral argument counsel for Telkom indicated that this ground of review is founded upon "perceived bias, not actual bias". It was contended on behalf of ICASA that Telkom failed to put forward facts to demonstrate a reasonable perception of bias and that ICASA has demonstrated there was nothing untoward about the meetings held between Vodacom and ICASA. It was pointed out on behalf of Neotel and Vodacom that this ground of review was not raised on the papers, suggesting that ICASA had no opportunity to answer it.

[49] I shall first consider the question whether or not this ground was raised on the papers. In Telkom's supplementary founding affidavit reference is made to so-called "undisclosed interactions". It has been articulated as follows in paragraphs 26, 27, 28, 33, 79 and 131 of the affidavit:

> *"26. Undisclosed interactions concerning crucial issues bearing on the N/V application occurred between members of ICASA's so-called special committee and Vodacom/Neotel on numerous occasions. For example on 11 November 2014 when an undisclosed meeting was held between ICASA and Frontier Economics, an agent for Vodacom and on 15 April 2015 when ICASA*

met with Vodacom, at its request, 'to receive feedback on progress, the path being navigated towards a decision on the aforesaid application, and to address any concerns'.

27. *Record two reveals nine of the letters exchanged between Counsellor Pillay and Vodacom during the period from 16 September 2014 to 10 March 2015, which were not brought to the attention of Telkom and other interested parties until Record 2 was recently made available – see Record 2 items 1-9 at pp 1-20. The Vodacom letter dated 16 September 2014 (from Vodacom to ICASA) is referred to in Ms Pillay's letter dated 9 October 2014 (Record 2, item 1 p 1), but has inexplicably been withheld.*

28. *It is disturbing, to say the least, that ICASA's special committee indulged in such improper activities behind the backs of interested parties like Telkom and in circumstances where it pretended to be conducting the investigation in an open and transparent forum where all interested parties were given access to the relevant information placed before ICASA and the special committee.*

33. *Telkom submits that the undisclosed meetings with Neotel and Vodacom must in themselves result in the setting aside of the process under judicial review.*

79. *The fact that such a meeting was not disclosed to the interested parties, as previously stated, is of itself such a serious departure from the requirements for procedurally*

fair administrative action that the delinquent ICASA process falls to be reviewed and set aside.

131. The fact that Vodacom and the special committee had arranged and planned yet another secret meeting is in itself of significance in the circumstances of this review – it is improper conduct consistent with the special committee's willingness to indulge Vodacom privately, to the exclusion of all interested parties and the public, in violation of PAJA and the principles of 'administrative action' that is lawful, reasonable and procedurally fair."

[50] Section 6(1) of PAJA provides that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. Subsection (2)(a)(iii) stipulates that a court has the power to judicially review an administrative action if the administrator who took it was biased or reasonably suspected of bias. The question is whether the facts pleaded by Telkom (as referred to above) can be regarded as a clear formulation of a ground of review as referred to in section 6(2)(a)(iii) of PAJA? In Yannakou v Apollo Club 1974 (1) SA 614 (A) at 623G Trollip JA said the following in this regard:

> *"Hence, if he relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it ..."*

[51] However, it is not necessary to refer specifically to the statute or section relied on, provided that the case is formulated clearly. Put differently,

it is sufficient that the facts pleaded justify the conclusion that the provisions of the statute apply (Fundstrust (Pty) Ltd v Van Deventer 1997 (1) SA 710 (A) at 725H-J and 726A). Telkom referred to undisclosed interactions between ICASA and Vodacom, to the exclusion of other interested parties and the public, as improper conduct in violation of PAJA. Having regard to the principles referred to above, I am satisfied that the facts pleaded in Telkom's supplementary founding affidavit, and the reference to PAJA therein, are sufficient to justify the conclusion that the provisions of PAJA, more particularly section 6(2)(a)(iii) thereof, are being relied upon.

[52] What is the test for bias? Although the rule against bias finds application essentially in judicial and "*quasi*-judicial" contexts, the Constitutional Court has made it clear that the rule against bias applies in all types of decisions (President of the RSA v South African Rugby Football Union 1999 (4) SA 147 (CC) par 35 where the Court referred to both criminal and civil cases as well as to *quasi*-judicial and administrative proceedings). It should also be pointed out immediately that absolute neutrality on the part of a judicial or administrative officer can hardly, if ever, be achieved and a reasonable person should expect that triers of fact will be properly influenced in their deliberations by their individual perspectives (President of the RSA v South African Rugby Football Union *supra*, par 42). It would also be a mistake to assume that a fundamental breach of administrative justice necessarily indicates bias on the part of the administrator (Commissioner, Competition Commission v General Council of the Bar of South Africa 2002

(6) SA 606 (SCA) at par 16 where Hefer AP said that the mere fact that *audi alteram partem* was not observed does not by itself justify an inference of bias). Put differently, the mere fact that a party considers that the decision-maker erred at the level of substance or procedure to their prejudice does not necessarily amount to bias.

[53] In President of the RSA v South African Rugby Football Union, *supra*, par 48 the test for bias has been formulated as follows:

> *"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience."*

[54] Although this dictum refers to judicial officers, there appears to be a considerable overlap in the law as it applies to administrators and as it relates to judicial officers. However, it appears that the burden is generally heavier on the litigant who alleges bias in a Judge as the reasonableness of the apprehension must be assessed in the light of the oath of office taken by Judges and the fact that they are judicially trained officers. What is the position with regard to administrative decision-makers who are not subject to an oath of office and who are not necessarily judicially trained persons? This

question has been dealt with as follows by Conradie J (as he then was) in Monnig & Others v Council of Review & Others 1989 (4) SA 866 (CPD) at 880D-E:

> *"(I)n the case of non-judicial officers performing functions indistinguishable from the judicial process, the test operates more strictly even than in the case of judicial officers. Reasonable litigants are less likely to regard judicially trained officers as inclined to succumb to outside pressures or to be influenced by anything other than the evidence given before them. The quality of impartiality is not so readily conceded to non-judicial adjudicators."*

[55] This differentiation should still be read subject to the requirement of reasonableness, i.e. that both the person who apprehends bias and the apprehension itself must be reasonable (*cf.* Bernert v ABSA Bank Ltd 2011 (3) SA 92 (CC) par 34). No doubt, the party who relies on bias or reasonably suspected bias bears the onus to prove this ground of review.

[56] When applying these principles the next question should be, what are the correct facts? The following appears from the record of proceedings:

- On 1 April 2015 (after the public hearings were held but before the special committee provided the Council of ICASA with their analysis report) the Chief Executive Officer of Vodacom addressed a letter to the Chairperson of ICASA (also copied to Ms Pillay, Ms Batyi and the Chief Executive Officer of ICASA in which *inter alia* the following

was said: "... *we will appreciate having a meeting as soon as possible with the ICASA Council Committee on Market Consolidation to receive feedback on progress, the path being navigated towards a decision on the aforesaid application, and to address any concerns*";

- On 2 April 2015 Ms Pillay replied by saying that "... *the authority is currently obtaining the availability of key members of the Committee on Market Consolidations and will revert with the proposed dates for said meeting*";

- On 24 April 2015 Ms Pillay addressed another letter to the Chief Executive Officer of Vodacom in which reference is made *"... to the meeting between the Independent Communications Authority of South Africa ... and Vodacom ... held on 15 April 2015"* and also to the fact that Vodacom requested the authority to provide it with *"... an estimated date by which the authority would finalise its assessment and determination of the application for approval of the acquisition of Neotel (Pty) Ltd by Vodacom"*;

- On 11 May 2015 another letter was addressed to the Chief Executive Officer of Vodacom by Ms Pillay in which reference is made to a meeting between ICASA, Neotel and Vodacom *"... scheduled for today, 11 May 2015 at*

13h00" but which apparently did not take place as *"... the authority has decided that it will no longer be necessary to meet with the parties in this regard".*

[57] In its answering affidavit ICASA, under the heading *"OVERVIEW OF THE GROUNDS OF OPPOSITION"* states that Telkom's complaints that there were inappropriate discussions between ICASA and Vodacom is misplaced (par 7.9). According to ICASA only one meeting was held which dealt with substantive issues. This related to the Frontier Report which, at the time, was the subject of an application by Vodacom for confidentiality. Before that application had been decided, it was not open for ICASA to share the contents of the report with other parties. According to ICASA another meeting with Vodacom was held, but it related to an enquiry from Vodacom regarding timelines within which ICASA envisaged finalising the application. It further explains that Vodacom was advised that ICASA was not in a position to give an indication, given the processes which were underway. A third meeting (requested by ICASA) was cancelled by ICASA.

[58] In the answering affidavit to Telkom's supplementary founding affidavit ICASA again draws a distinction between the meeting relating to the confidential Frontier Report which was held following requests by Neotel and Vodacom for certain information to be treated as confidential under section 4D of the ICASA Act (par 136.2), and another meeting which was held on 15 April 2015. With regard to this meeting the following explanation has been given (par 136.4):

> *"The meeting of 15 April 2015 was held pursuant to a request from Vodacom for such a meeting. At that meeting Vodacom wanted an indication of when the application was going to be finalised. We informed them that we would revert on this. This was reflected in the letter from ICASA to Vodacom and Neotel dated 24 April 2015."*

[59] With regard to the so-called third meeting, ICASA explains (par 153.1) that this meeting would be different from the other two meetings as it sought to deal with substantive issues which were not subject to a confidentiality application. The committee then took advice on the appropriateness of such a meeting. According to ICASA:

> *"The advice received was that the scheme of the ECA did not envisage nor permit issues of a substantive nature being embarked upon other than by way of a process open to the public. In view of that advice, the Committee cancelled the meeting of 24 April 2015."*

[60] In their combined answering affidavit Neotel and Vodacom under the heading *"Meetings and engagements between Vodacom, Neotel and ICASA"* also distinguish between the meeting relating to the confidential Frontier Report and *"other meetings"* which, according to them, did not deal with any issue of substance. The explanation with regard to these other meetings reads as follows (par 98):

> *"There were no other meetings or engagements between ICASA and Vodacom or Neotel which dealt with any issue of substance. The only other meetings or engagements that occurred were concerned exclusively with the attempts by Vodacom and Neotel to*

ensure that ICASA made a decision on the application before it expeditiously – whatever that decision was to be. This was because, as a matter of public record, Vodacom and Neotel were concerned about the length of time the process was taking. There is nothing unlawful or improper about this."

[61] Having regard to the record of proceedings and the explanations given by ICASA, Neotel and Vodacom, the following appears to be common cause (or at least not in dispute):

- There was a meeting between ICASA, Vodacom and Neotel during November 2014 following requests by Neotel and Vodacom for certain information in the Frontier Report to be treated as confidential under section 4D of the ICASA Act;

- There was another meeting at the request of Vodacom held on 15 April 2015 between ICASA and Vodacom;

- The request for this meeting (15 April 2015) is contained in a letter of Vodacom dated 1 April 2015.

[62] The November 2014 meeting with regard to the Frontier Report has been explained with reference to the provisions of section 4D of the ICASA Act. Subsection (1) thereof provides that a person may request that specific information be treated as confidential. The fact that such a request was

received appears in the minutes of the committee meeting dated 22 April 2015 in paragraph 4 thereof under the heading *"Request for confidentiality"*. However, no harm would be done if at least the interested parties who submitted written representations (Telkom, Cell C, MTN, the Service Providers Association, the Web Access Providers Association, Internet Solutions and Crystal Web) were to be informed about the fact that a request for confidentiality had been received under section 4D of the ICASA Act as such an approach would dispel any suspicion about private meetings. Notwithstanding the failure to do so, I am satisfied that the explanation given with regard to this meeting is acceptable. Taking also into account the correct facts in this regard I am of the view that a reasonable, objective and informed person will also accept this explanation. I therefore conclude, as far as the November 2014 meeting is concerned, that no inference of bias or perceived bias can be drawn.

[63] Unfortunately, I am not convinced that the same can be said with regard to the April 2015 meeting. The purpose of this meeting is unrelated to confidential information referred to in section 4D of the ICASA Act. The purpose of this meeting is clearly stated in Vodacom's letter of 1 April 2015 *"to receive feedback on progress, the path being navigated towards a decision on the aforesaid application, and to address any concerns."* The stated purpose was not limited to a discussion *"regarding timelines"*. It also included a request to discuss *"the path being navigated towards a decision"* and *"to address any concerns"*. In the absence of a proper explanation in this

regard, I find it difficult not to conclude that this meeting was intended to also deal with issues of substance.

[64] This meeting is also veiled in obscurity if one takes into account the following. First, there appears to be no minutes of this meeting. Neither ICASA nor Telkom or Neotel referred to any minutes to indicate what was discussed at this meeting. Second, if the intention was to only discuss timelines, why was a meeting necessary? The same purpose could have been achieved by correspondence, also copied to the other interested parties. Third, there appears to be a contradiction between the answer given by ICASA and that of Neotel and Vodacom. According to ICASA a third meeting was cancelled, suggesting that only two meetings took place, i.e. the November 2014 and April 2015 meeting. However, according to Neotel and Vodacom *"other meetings or engagements"* also occurred which were concerned with attempts by Vodacom and Neotel to ensure that ICASA made a decision on the application before it expeditiously. No particulars are pleaded with regard to how many other meetings took place, when they were held and where the minutes are. Finally, if it was not for the record of proceedings, it is possible that Telkom would not have been aware of these other meetings.

[65] The context within which the April 2015 meeting (and possibly other such meetings as well) took place, is also important. The EC Act makes provision in section 9(2) read with section 13(6) that the authority (ICASA) must give notice of the application in the Gazette and invite interested

persons to submit written representations. It is also authorised to conduct a public hearing in this regard. Written representations were received from seven interested parties, namely Cell C, Telkom, MTN, the Service Providers Association, the Web Access Providers Association, Internet Solutions and Crystal Web. They all indicated an intention to also make oral representations. ICASA convened and held public hearings on 15 and 16 January 2015. Subsequent to the public hearings, ICASA received what it describes as *"unsolicited supplementary written responses"* from Cell C, MTN, Neotel and Vodacom which led to the remaining interested parties being invited to submit supplementary written responses. The four reviewing parties – Telkom, MTN, Cell C and Internet Solutions – are all commercial firms in the telecommunications industry. At least three are direct competitors of Vodacom and/or Neotel. This is not a case where the interested parties, more particularly the four reviewing parties, supported the Neotel/Vodacom application. Fierce competition and opposition indicated from the beginning that this would be an opposed application between opposing parties. For an administrator to attend a private meeting with one of the parties under these circumstances is, in my view, not only improper, but also unlawful. The public and interested parties will have more faith in the administrative process when justice is not only done, but also seen to be done. Having regard to all these considerations, I am of the view that a reasonable, objective and informed person, having regard to these facts, would reasonably apprehend that ICASA would not have brought an impartial mind to bear on the application before it. I therefore conclude that it has been

proven that ICASA as the administrator who took the decision is reasonably suspected of bias. I have to point that Vodacom played an active role in this regard by initiating the process giving rise to this finding.

THIRD MAIN CATEGORY: ICASA'S DECISION:

[66] The reviewing parties engaged in a number of substantive attacks on ICASA's decision. These attacks are essentially twofold:

- ICASA's alleged failure to have regard to the impact on competition; and

- ICASA's treatment of the 30% equity ownership requirement which is allegedly unlawful.

I shall first consider the competition issue and thereafter the 30% equity requirement.

THE COMPETITION ISSUE:

[67] In its answering affidavit (par 31) ICASA states that after receipt of the Neotel/Vodacom application it commissioned Acacia Economics to provide a preliminary economic analysis of the proposed transaction.

Following a consultation process that was conducted by Acacia with various major licensees, ICASA received a report from Acacia which indicated that the proposed transaction may raise a number of potential anti-competitive effects and recommended various possible remedies that could be undertaken by ICASA. ICASA then took the view (answering affidavit, par 33) that the Competition Commission was best placed to adequately assess and regulate the potential effects on competition arising from the proposed transaction. It decided to defer the competition issue to the Competition Commission and "did not pursue the competition related issues any further". ICASA's answering affidavit (par 96) also states that it considered its statutory obligations and is of the view that these "obligations can, if necessary, be exercised post the process to be undertaken by the Competition Commission". The question is whether ICASA misdirected itself in law by concluding that it was not necessary to consider the impact of the Neotel/Vodacom application on competition and by deferring this issue to the Competition Commission.

[68] In considering this question I should remind myself of the principle that a review is not concerned with the correctness of a decision made by a functionary, but with whether it performed the function with which it was entrusted. When the law entrusts a functionary with a discretion the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted and it is not open to a court to second-guess this evaluation (MEC for Environmental Affairs and Development Planning v

Clairison's CC 2013 (6) SA 235 (SCA) at par 18). I also have to take into account the constitutional principle of the separation of powers. In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC) O'Regan J sounded a warning (in par 48) that a court should be careful "not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government". It was also pointed out that a court should therefore give due weight to findings of fact and policy decisions made by those with special expertise and experience in their field.

[69] It was contended on behalf of ICASA that there was no clear and direct obligation to consider and determine whether the Neotel/Vodacom application would promote competition in the ICT sector or not. It was pointed out in this regard that the Competition Commission has primary authority to investigate past or current commissions of alleged prohibited practices within any industry or sector and to review mergers in terms of the Competition Act. Therefore, so it was submitted, the decision by ICASA to defer to the Competition Commission on this issue is entirely consistent with the provisions of the ICASA Act and the Memorandum of Agreement between these two authorities. It was also contended on behalf of Neotel and Vodacom that the reviewing parties overstated the role to be played by competition considerations and failed to recognise that ICASA took a perfectly legitimate decision to defer the resolution of the competition issues to the Competition Commission.

[70] Section 13 and 31(2A) of the EC Act provide that the transfer of control of individual licences and a radio frequency spectrum licence may not be assigned, ceded or in any way transferred without the prior written permission of the authority (ICASA). These sections confer a discretion on ICASA. When it comes to exercising that discretion, ICASA is required to have regard to all relevant considerations. The question is whether the competition issue is a relevant consideration? The object of the EC Act is set out in section 2 thereof. The primary object is to provide for the regulation of electronic communications in the public interest and for that purpose to, *inter alia*, promote competition within the ICT sector. In their written submissions to ICASA (Record: Notes for Public Hearing, p 298, par 19.1.5) Neotel and Vodacom accepted that ICASA "must consider competition, as one factor among many, in order to promote the goals of the ECA".

[71] Furthermore, it has also been pointed out by MTN in its founding affidavit that:

- Spectrum is a scarce resource and access to spectrum is a critical constraint in the mobile telecommunication sector at the current time (par 126);

- Vodacom has a greater market share than the other mobile network operators (par 112);

- If Vodacom were to acquire control of Neotel's IMT spectrum, Vodacom would be able to create a national LTE network at a time when its competitors are unable to do so (par 116).

[72] Following a consultation process that was conducted by Acacia, ICASA received a report from Acacia which indicated that the proposed transaction may raise a number of potential anti-competitive effects and it recommended various possible remedies that could be undertaken by ICASA. It was also pointed out by MTN in its founding affidavit (par 144) that Counsellor Pillay has admitted in her affidavit in proceedings before the Competition Tribunal that "if Vodacom is assigned Neotel's spectrum, it will gain an irrevocable advantage in the market and further delay the full benefits that would result from there being a competitive market for information and communication technology services in South Africa".

[73] Section 4B(8)(b) of the ICASA Act specifically refers to the Competition Commission which has primary authority to detect and investigate past or current commissions "of alleged prohibited practices within any industry or sector" and also to review mergers. In terms of section 1 of that Act "prohibited practice" means a practice prohibited in terms of Chapter 2 of the Competition Act which is primarily concerned with restrictive practices in terms of an agreement between parties and the abuse of a dominant position by a particular firm. The purpose of this Act is to promote and maintain competition "in the Republic" in order to, *inter alia*, promote the efficiency, adaptability and development of the economy. The purpose of the

EC Act is, on the other hand, much more defined and focused when it refers "to promote competition within the ICT sector". It therefore appears that the Competition Act does not deprive ICASA of jurisdiction over competition matters relevant to the communications sector or that ICASA is exempted from its duty to properly consider the competition issue.

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

THE 30% EQUITY OWNERSHIP ISSUE

[75] The next ground of review relates to ICASA's treatment of the 30% equity ownership requirement which was, according to Cell C and Internet Solutions, unlawful. This ground of review is also linked to the condition relating to a 30% ownership requirement. It was contended in this regard that once ICASA considered that such a requirement was mandatory, it was not lawfully open to ICASA to make compliance with that requirement the subject of a further open-ended condition. ICASA is of the view that it had a discretion to direct compliance by a future date and that its discretion is inherent in the empowering legislation which entitles ICASA to impose conditions of this nature.

[76] ICASA approved the Neotel/Vodacom application subject to the condition of a 30% equity ownership as contemplated in section 13(6), read with section 9(2)(b) of the EC Act and a further requirement that the equity ownership be met within a reasonable period. The decision was published in the Government Gazette on 2 July 2015. ICASA then invited the applicants and other interested parties to lodge written representations in relation to the reasonable period for compliance with the Black Economic Empowerment requirement.

[77] With regard to an application in terms of the EC Act section 9(2)(b) provides as follows:

> *"[2] The Authority must give notice of the application in the Gazette and –*
>
> *(a) ...*
>
> *(b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act;".*

[78] Section 13 makes provision for the transfer of the control of an individual licence and subsection (6) thereof provides that the provisions of section 9(2) to (6) apply, with the necessary changes, to this section. Given the use of the word "must" in section 9(2)(b), it appears that the provisions of this section, with regard to the minimum requirement of 30% equity ownership, are peremptory. To the extent that there is a discretion, it appears that such discretion relates only to a higher percentage or such other conditions as may be prescribed under section 4(3)(k) of the ICASA Act.

[79] The notice referred to in section 9(2) of the EC Act was published on 15 September 2014 by ICASA in the Government Gazette inviting interested parties to lodge written representations within 21 days. Although it is clearly stated that this is a notice in terms of section 13(6) read with section 9(2)(a) of the EC Act, no reference to equity ownership was included, let alone a reference to the minimum requirement of 30%. It was submitted in this regard that the words "with the necessary changes" as they appear in section 13(6) justify the omission as the Neotel/Vodacom application was not made at the instance of ICASA as envisaged in section 9(1) of the EC Act. I do not

agree with this submission. If the intention was to differentiate between an application referred to in section 9(1) and an application for permission in terms of section 13(1) with regard to the 30% equity ownership requirement, any reference thereto in section 13(6) could and would have been omitted. On the contrary, it has been included. As was already pointed out above, that requirement is peremptory. The notice was therefore defective as it did not comply with the provisions of section 9(2)(b) of the EC Act.

[80] The defective notice has further been compounded by the approval of the application subject to a 30% equity ownership to be met within a reasonable period. This means that compliance with a statutory requirement has been postponed *sine die*. It also implies that for the interim any percentage equity ownership would be sufficient and acceptable. I find it difficult to reconcile such a condition with the clear language of section 9(2)(b) and the fact that the 30% minimum requirement appears to be peremptory. In my view the language of section 9(2)(b) presupposes that an applicant must arrive at ICASA's door with a minimum of 30% BEE shareholding. An applicant does not have an opportunity to garner the necessary shareholding after the application has been made, let alone after the application has been approved. ICASA's decision to postpone the date by which equity should have been obtained has the effect of condoning the applicant's failure to meet the threshold requirements, contrary to the express intention of the EC Act. I therefore conclude that ICASA's approval of the Neotel/Vodacom application subject to the condition that they comply with the

requirement of 30% equity ownership at a time yet to be determined was contrary to the provisions of section 9(2)(b) of the EC Act and therefore unlawful. The approval and condition attached thereto was materially influenced by an error of law within the meaning of section 6(2) of PAJA.

REMEDY:

[81] It has been contended on behalf of Neotel and Vodacom that if this court finds that the decision of ICASA was unlawful, this court should exercise its remedial discretion to allow the decision to stand for reasons which are mainly concerned with prejudice. It has been argued that Neotel and Vodacom are being prejudiced by the considerable delay that has thus far characterised their application and by strategic uncertainty caused thereby. It has been argued on behalf of the applicants that the court should follow the "default position" by setting aside the unlawful conduct and its consequences.

[82] Section 172(1)(a) and (b) of the Constitution provides that when deciding a constitutional matter, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency and may then make any order that is just and equitable. This case is, in my view, a constitutional matter as it deals, *inter alia*, with "just administrative action" as provided for in section 33(1) of the Constitution. Section 8 of PAJA gives legislative content to this remedy. It also allows the court to grant any order that is just and equitable.

[83] I have already concluded that ICASA's decision is unlawful as it is reasonably suspected of bias, it failed to take account of relevant considerations and was materially influenced by errors of law, all within the meaning of section 6(2) of PAJA. In Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency 2014 (1) SA 604 (CC) the Constitutional Court has pointed out (in par 25) that once a ground of review under PAJA has been established there is no room from shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable manner. In the follow-up decision between the same parties (2014 (4) SA 179 (CC) at par 30) the Constitutional Court explained that:

> *"Logic, general legal principle, the Constitution and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality."*

[84] As was explained in Joubert Galpin Searle v Road Accident Fund 2014 (4) SA 148 (ECP) at par 97, there must be compelling reasons to depart from the default position that unlawful administrative action should be corrected. It is therefore not surprising that our courts have exercised their discretion not to set aside invalid administrative actions very sparingly (Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd

2008 (2) SA 638 (SCA) and Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province 2008 (2) SA 481 (SCA)).

[85] Having regard to these principles, the reasons advanced by Neotel and Vodacom why ICASA's decision should not be set aside, are not convincing. Even if Neotel and Vodacom are being prejudiced by delay, this would not make it appropriate to decline setting aside ICASA's decision. If that were the case, no regulatory decision of this nature would ever be set aside. For these reasons I am of the view that ICASA's decision should be reviewed and set aside. Taking into account my findings in this regard, more particularly that of suspected bias and the fact that the statutory notice of 15 September 2014 did not comply with section 9(2)(b) of the EC Act, I do not deem it appropriate to refer the matter back for reconsideration on the same papers.

[86] This brings me finally to the question of costs. The issue as to what order of costs would be appropriate falls primarily within the discretion of a court which must be exercised in a judicial manner. I take into account that this is a constitutional matter and one should be sensitive to the fact that an adverse costs order may have a potentially "chilling effect" on prospective litigants in relation to suits between private parties and the State (Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC) at par 21). However, this litigation is between private commercial entities (as opposed to private individuals) and ICASA, a statutory body who has decided to oppose

the application. Having regard to these considerations, I fail to see why the usual rule, i.e. that costs should follow the event, should not be applied.

ORDER:

In the result I grant the following order:

1. The decision of the Independent Communications Authority taken on or about 11 June 2015 in terms of sections 13(1) and 31(2A) of the Electronic Communications Act No 36 of 2005 and published in General Notice 684 on 2 July 2015 in terms whereof the transfer of control of various individual and radio frequency spectrum licences of Neotel (Pty) Ltd to Vodacom (Pty) Ltd has been approved, is hereby reviewed and set aside in its entirety;

2. Neotel (Pty) Ltd, Vodacom (Pty) Ltd and the Independent Communications Authority are ordered to pay the costs of all four applications (referred to in the heading), jointly and severally, costs of two counsel included.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 26 February 2016