IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

08/03/21
DATE

SIGNATURE

CASE NUMBER: 66778/2020

In the matter between:

TELKOM SA SOC LIMITED	**First Applicant**
e.tv (PTY) LIMITED	**Second Applicant**
and	
INDEPENDENT COMMUNICATION AUTHORITY OF SOUTH AFRICA	**First Respondent**
CHAIRPERSON: INDEPENDENT COMMUNICATION AUTHORITY OF SOUTH AFRICA	**Second Respondent**
VODACOM (PTY) LIMITED	**Third Respondent**
MOBILE TELEPHONE NETWORKS (PTY) LIMITED	**Fourth Respondent**

CELL C (PTY) LIMITED	**Fifth Respondent**
WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED	**Sixth Respondent**
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED	**Seventh Respondent**
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	**Eighth Respondent**
COMPETITION COMMISSION OF SOUTH AFRICA	**Ninth Respondent**
SOUTH AFRICAN COMMUNICATIONS FORUM	**Tenth Respondent**
SOUTH AFRICAN BROADCASTING CORPORATION LIMITED	**Eleventh Respondent**
SENTECH SOC LIMITED	**Twelfth Respondent**
NATIONAL ASSOCIATION OF BROADCASTERS	**Thirteenth Respondent**

JUDGMENT

(Handed down electronically to the parties' legal representatives by email, uploading on Caselines and release to SAFLII. The date and time for delivery of judgment is deemed to be 10h00 on 08 March 2021.

BAQWA J

Introduction

[1] This is an application set down in the urgent court in which the applicant, Telkom SA ("Telkom") seeks interim relief against the Independent Communications Authority of South Africa ("ICASA").

[2] E.tv (Pty) Limited seeks to make common cause with Telkom and has simultaneously lodged an application to intervene as the second applicant and

CELL C (PTY) LIMITED	**Fifth Respondent**
WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED	**Sixth Respondent**
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED	**Seventh Respondent**
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	**Eighth Respondent**
COMPETITION COMMISSION OF SOUTH AFRICA	**Ninth Respondent**
SOUTH AFRICAN COMMUNICATIONS FORUM	**Tenth Respondent**
SOUTH AFRICAN BROADCASTING CORPORATION LIMITED	**Eleventh Respondent**
SENTECH SOC LIMITED	**Twelfth Respondent**
NATIONAL ASSOCIATION OF BROADCASTERS	**Thirteenth Respondent**

JUDGMENT

(Handed down electronically to the parties' legal representatives by email, uploading on Caselines and release to SAFLII. The date and time for delivery of judgment is deemed to be 10h00 on the day.

BAQWA J

Introduction

[1] This is an application set down in the urgent court in which the applicant, Telkom SA ("Telkom") seeks interim relief against the Independent Communications Authority of South Africa ("ICASA").

[2] E.tv (Pty) Limited seeks to make common cause with Telkom and has simultaneously lodged an application to intervene as the second applicant and

the application to intervene has not been opposed. At the commencement of these proceedings I granted e.tv's application and the matter proceeds with e.tv as the second applicant.

[3] The main issue is ICASA's publication of an invitation to Apply ("ITA") for the licensing and auctioning of spectrum in the IMT 700; IMT 800; IMT 2600 and IMT 3500 bands issued by ICASA on 2 October 2020.

[4] Telkom has brought the application in parts A, B and C but Part A has been removed by consent between Telkom and The First and Second Respondents.

[5] In Part B, Telkom seeks to interdict The Authority from implementing the licensing steps and processes referred to or contemplated in the ITAs. The relief is intended to operate pending the determination of Part C.

[6] In Part C Telkom seeks an order declaring that the two decisions of the Authority are unlawful, and stand to be set aside, namely:

6.1 The decision to publish the composite ITA for an individual electronic communications network services (I-ECNS) and Radio Frequency licences for the purposes of operating a Wireless Open Access Network published as Notice 534 of 2020 in Government Gazette No 43767 of 2 October 2020: the WOAN ITA.

6.2 The decision to publish the ITA for licensing process for international mobile telecommunications in respect of the provision of mobile broadband wireless access services for urban and rural areas using the complimentary bands IMT 700, IMT 800, IMT 2600 and IMT 35000 spectrum frequency through an auction published as Notice 535 of 2020 in Government Gazette 43768 of 2 October 2020: the Auction ITA.

[7] This Court, therefore has to determine whether the applicants have made out case for an interim interdict.

Background

[8] The ICASA publication of the ITA was preceded by a market inquiry on the data services market by The Competition Commission ("The Commission"). A report in that regard was published on 2 December 2019.

[9] The findings of the Competition Commission can be summarised as follows: the Commission found that the lack of competition in the mobile market had a negative effect on the consumers in that it impeded the achievement of lower prices and that addressing that issue and assigning spectrum would not only result in the lowering of prices but also impact on the levels and extent of competition in the mobile market.

[10] The Commission also found that a larger assignment of spectrum would result in the entrenchment of the duopoly constituted by Vodacom and MTN and that an asymmetric assignment to the smaller operators would assist in levelling the playing field whereas a symmetric assignment would lock the large operators into their current market shares thus entrenching the currently existing uncompetitive market structure.

[11] The Commission found it imperative that spectrum assignment be designed to achieve a pro-competitive outcome in order achieve lower prices.

[12] Lastly, the Commission found that any wireless open-access network licensee needs to be competitive and that Telkom's lack of sub 1GHZ spectrum relative to its competitors creates a risk that competition can be weakened if Telkom is unable to compete for that band effectively.

The Radio Frequency Spectrum

[13] The issue of a lawful and rational licensing process was recently considered in the matter of *The Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa; Cell C (Pty) Ltd v Acting Chair, Independent Communications Authority of South Africa. (2016/59722; 2016/68096) [2016] ZAGPHC 883 (30 September 2016) ("Minister of Telecommunications")*, where the importance of Radio Spectrum Frequency was commented upon by Sutherland J as follows:

1.

" [10] Our everyday experience of telecommunicatons in the form of radio, television, internet and cellular telephones and so on, is made possible by the service providers utilising a portion of the radio frequency, which exists naturally, to transmit electronic signals. The radio frequency spectrum, like water and electricity is a crucial dimension of social life. Access to the utility of the frequency spectrum implicates the optimal achievement of several constitutional values and rights, including the freedom of trade, modern education and the dissemination of information pursuant to freedom of expression. Achieving effective access to its utility implicate equality too because of its role in facilitating these several rights. The regulatory regime owes, as alluded to earlier, in part, its lineage to The Constitution. Accordingly, radio frequency spectrum is a highly regulated affair because of its scarcity and critical role in the communications industry and the importance, in turn, of that industry to modern economic and social activity. [11] This resource is optimally usable when a single provider has exclusivity over a band of the frequency spectrum; were it otherwise, transmission would overlap and render the communications network incoherent and unreliable. Spectrum bandwidth is finite and is the object of keen competition by servicer providers. The spectrum is therefore "allocated" to various uses in three

regions worldwide by the International Telecommunications Authority (UTA) of which South Africa is a member and locally by MOT in the radio frequency plan. ICASA is responsible for licensing its use and in that context assigning bandwith."

[14] The quoted paragraphs succinctly set out not only the context in which the present application has been brought but also underlines the intensity of the competitive environment in which spectrum is assigned.

The Information Memorandum

[15] On 1 November 2019 ICASA published The Information Memorandum ("2019IM") in which it outlined its "intentions with regard to the licensing process for International Mobile Telecommunications (IMT) spectrum pursuant to consideration of the Policy on High Demand Spectrum and Policy Direction on the Licensing of a Wireless Open Access Network dated 26 July 2019."

[16] A consultation process was conducted by ICASA and parties made submissions about draft rules for assigning spectrum as per 2019 IM. ICASA was criticised in those submissions for failing to conduct a competition assessment which would have contributed to formulation of the rules for assignment of spectrum.

[17] ICASA submits that it did conduct a competition assessment prior to making a decision to publish the ITAs but this is contradicted by its own assertion in its answering affidavit where it states that " ICASA appointed Acacia Economis, Cenerva and Real Wireless to advise it on all competition matters relevant to the current auction process."

[18] The report of these experts confirms that they encouraged ICASA to conduct its own competition assessment before publication of the ITAs and that they identified "The lack of comprehensive analysis of the state of competition in the mobile sector in South Africa" as a risk in the proposed auction process. They advised that ICASA should ensure that a competition assessment is finalised before the conclusion of the issuing of the final ITA.

[19] It is common cause that the competition assessment as advised by the experts was not conducted by ICASA until the issuing of the final ITA.

Unlawfulness of the ITAs

[20] In the 2019 Information Memorandum it was stated that "the obligation set for IMT 700 and IMT 800 are to be synchronised with the Analogue Switch-off"

and that the three year period to comply with the conditions would commence running "from the date that the 700 MHZ and 800 MHZ spectrum becomes available to provide services"

[21] Further, ICASA's reasons document of 4 December 2020 states categorically that *"The authority extended the licence period of the RFSL from 15 years as it was stipulated on the IM to 20 years, in order to accommodate the delays in the availability of the spectrum in IMT 700 and IMT 800 bands which are subject to digital migration process which is currently underway."*

[22] The above references are but just a few examples of many documents issued by ICASA in which it was made abundantly clear that ICASA's position was that IMT 700 and IMT 800 spectrum being utilised by the broadcasters would only become available after the completion of the digital migration process. This is how the applicants herein understood the position.

[23] It is submitted by the applicants that the auctioning of the spectrum is irrational for various reasons, one of which is that the spectrum is still being used by the broadcasters and would not be available to a potential bidder until after the digital migration process had been completed. They further point out that the digital migration process had stalled and that it is unlikely to occur in the near future.

[24] In response to these submissions ICASA states in its answering affidavit that successful bidders for the IMT 700 and IMT 800 spectrum bands would immediately following the auction become entitled to enjoy the full commercial benefits of the spectrum.

[25] ICASA's new position is a direct contradiction to what it had stated previously, namely, that IMT 700 and IMT 800 spectrum was to be auctioned at a "discount" because mobile operators would have to wait the terrestrial television broadcasters migration of the frequencies.

[26] The departure from the preceding position was not discussed by the affected parties. Its affidavit does not suggest that it did. Etv also submits that even though it is the incumbent occupant of the spectrum it was also not consulted.

[27] ICASA's belated change in approach would seem to point to the unreasonableness of its decision to continue with the ITA. It would, for example interfere with etv's usage of its licensed spectrum in that it would result in the degradation and interference with its broadcast signal and dilute its commercial exclusivity and competitive strength in proportion to the "full commercial benefits" that ICASA promises to the mobile operators. The interference factor is mentioned in etv's founding affidavit and admitted by ICASA in its answering affidavit.

[28] In the words of etv's expert: "It is simply factually impossible for a telecommunications company to "share" spectrum in any meaningful manner with a broadcaster as suggested by ICASA. A broadcast transmitter is very powerful and operates on a significant scale. A cellular transmitter, by contrast, is weak in comparison. The signal of the mobile operator will be obliterated by the strong broadcast signal, but it will also cause degrading to the broadcaster's signal." This demonstrably illustrates ICASA's error which is further explained by Sutherland J in Minister of Telecommunications (*supra*) as follows: spectrum is *"optimally usable when a single provider has exclusivity over a band of the frequency spectrum; were it otherwise, transmissions would overlap and render the communications network incoherent and unreliable."* Similarly in the present case ICASA's new position signifies an intent to add additional users onto etv's spectrum resulting in overlapping transmissions and rendering the communications network incoherent and unreliable. Such conduct by ICASA can only be described as impermissible and irrational.

[29] ICASA's change of stance is tantamount, to use a colloquial phrase, to changing horses midstream which would seriously impact the interests of not only the parties who had responded to the ITA but also those who had decided not to respond. The actions of ICASA in the change of stance are unlawful because in tenders or processes which are tender-like in their application, the rules of the process can generally not be changed after the process has commenced as this is fundamentally unfair:

See Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and Others (CCT48/13)[2013] ZACC 42; 2014 (1) SA 604 (CC); 2014(1) BCLR 1(CC) (29 November 2013).

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

[31] Icasa ought to have given notice of its intention to institute an alteration to the fundamental tenets of the ITA, the digital migration process and the policy direction previously conveyed to the stakeholders and the public. ICASA failed to do that.

[32] In AllPay (*supra*) para 40 the following was stated: *"Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair."*

[33] In the present case I am not persuaded that ICASA's about-turn was reasonable, justifiable or procedurally fair. Consequently, the impact on the fate of the IMT 700 and IMT 800 spectrum subsequent to the auction renders the ICASA decision to pursue the ITA unlawful and irrational.

[34] This view is endorsed in Premier, Province of Mpumalanga and Another v Executive Committee of The Association of Governing Bodies of State-Aided School: Eastern Transvaal 1999 (2) SA 91 (CC) Para 41 where the following was stated:

"[C]itizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker."

[35] ICASA had a duty to apply the fundamental principles of hearing the other side (*audi alteram partem*) and ensure that all the affected parties were informed of the proposed change. One of those parties was e.tv which not only had a clear interest in the matter by was also possessed of significant expertise in the field. It is difficult to understand how ICASA came to ignore etv's letter on 29 September 2020 in which concerns were raised about the spectrum auction. When ICASA failed to respond, a follow up letter was addressed to ICASA and it also failed to elicit a response.

[36] ICASA failed to respond to e.tv's concers even in the clarification document and the reasons document which were subsequently published by ICASA. This single failure by ICASA to address the concerns of a significant stakeholder in the industry does not speak well of ICASA's willingness to uphold is statutory duties such those prescribed in section 3(3) of the ICASA Act: "*The Authority is ..... subject only to The Constitution and the law, and*

must be impartial and must perform its functions without fear, favour or prejudice."

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

Interim Relief

[38] The principles applicable in an application for an interim interdict have been established in numerous court decisions including National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) ("OUTA"). In terms of those principles the applicants must establish a *prima facie* right (though open to some doubt); a well grounded apprehension of irreparable harm if the interim relief (Part B) is not granted and the ultimate relief (Part C) is eventually granted; whether the balance of convenience favours the granting of an interim interdict and whether there is no other satisfactory remedy. In weighing these requirements the court has to consider the prospects of success of the review application on the following basis. The stronger the prospects of success, the less need for the applicants to show that the balance of convenience favours the grant of the interdict and the weaker the prospects of success, the stronger the case of the balance of convenience should be.

See Olympic Passenger Services (Pty) Ltd v Ramlakan 1957 (2) SA 382 (D) at 383 D-E.

Prima Facie Right

[39] The applicants have to prove a *prima facie* right on a balance of probabilities. In South African Informal Traders Forum v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) The Constitutional Court held that *"a prima facie right may be established by demonstrating prospects of success in the review."*

[40] The applicants submit that they had a right to know the rules of the game. As alluded to above, ICASA amended the rules after the ITA process had been set in motion. This was done without notice to the affected parties and in that way created an unfairness. This creates a right which entitles the applicants to the relief sought. The experts employed by ICASA warned the Authority about consultation as follows: "we judge the legal risks (judicial review) due to no re-consultation (after the last 1st of November 2019 IM) to be VERY HIGH." This warning was ignored by ICASA.

[41] The duty to involve the parties who have a special interest or expertise before an important and far - reaching decision is made was emphasised in EarthLife Johannesburg and Another v Minister of Energy and Others (19529/2015)

[2017] ZAWHC50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) 26 April 2017 where Bozalek J and Baartman J said:

"*[50] In the present matter NERSA must have been aware that there were sectors of the public with either special expertise or a special interest regarding the issue of whether it was appropriate for extra generation capacity to be set aside for procurement through nuclear power. In addition, in taking the decision, NERSA was under a statutory duty to act in the public interest and in a justifiable and transparent manner whenever the exercise of their discretion was required but also to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. These requirements were clearly not met by NERSA in taking its far reaching decision to concur in the Minister's Sec 34 determination. It has failed to explain, for one how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party. For these reasons I consider that Nersa's decision fails to satisfy the test for rationality based on procedural grounds alone.*"

[42] The sentiments expressed by the Court in the Nuclear case apply with equal force in the present case. ICASA did not play open cards with the stakeholders. It was not transparent when making a decision with significant consequences. This gives the applicants a *prima facie* right to apply for an interdict.

[43] ICASA concedes that after the auction etv will be forced to share licenced spectrum with other successful bidders and that this would result in the degradation of its broadcast signal. ICASA is dismissive of this possibility and as a solution suggests that parties must "co-operate" and "share." ICASA proffers no clear plan to eliminate the potential interference as it licences both telecommunication companies and broadcasters in the IMT 700 – 800 spectrum. Etv has a *prima facie* right to utilise its licence without interference.

[44] ICASA is currently concluding a Chapter 10 inquiry into Mobile Broadband Services (MBSI). This is intended to ensure that the assignment of spectrum post-auction should not have a negative impact on competition. The inquiry is supposed to inform ICASA on "the state of competition in the mobile market" It is therefore unreasonable and irrational to publish the auction ITA prior to the completion of the inquiry. A review on this ground alone has very good prospects of success and it affords the applicants a *prima facie* right to apply for an interdict.

Incomplete Digital Migration

[45] The radio frequency spectrum in the bands IMT 700 and IMT 800 will only become available on completion of the digital migration process. Despite its

unavailability ICASA has included the IMT 700 and IMT 800 bands of spectrum in the spectrum to be licenced in terms of the auction ITA. This is likely to result in successful bidders deriving no commercial benefits upon being awarded a licence. This bidders have invested huge sums of money. The decision of ICASA is intrinsically irrational.

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

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

Irreparable Harm

[48] Irreparable harm is defined in City of Tshwane Metropolitan Municipality v Afriforum and Another 2016 (9) BCLR 1133 (CC) at para 54 as follows:

"Irreparable implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm. That would mean that a favourable outcome by the court reviewing allegedly objectionable conduct cannot make an order that would effectively undo the harm that would ensue should the interim order not be granted."

[49] Bidders like Telkom would be forced to expend not less than R1 billion in acquisition costs immediately after the auction in the event of it being successful. It would however not be able exploit is acquisition fully due to the unavailability of spectrum nationally. Even if the review application were to succeed, the lost opportunity would be total and irreversible hence the need for an interdict.

[50] One of the outcomes envisaged by the spectrum offering is to try and level the competitive playing field due the current stark dominance of the duopoly consisting of Vodacom and MTN. If the ITA is allowed to proceed as presently structured, the assignment of spectrum would give the duopoly an opportunity to entrench their position by increasing the spectrum they currently hold supplemented by sharing arrangements they presently have with smaller operators. Their offering to customers would thus be enhanced and reinforce their advantage against applicants like Telkom. This skewed positioning would not be remedied by the review application.

[51] The 700 MHz and 800 MHz frequency bands are on for sale at the auction. Considering that e.tv is the incumbent licence holder in those bands, once they are sold, that will send a negative message to the market (advertisers) and e.tv's financial and commercial interests will be permanently and

irreversibly harmed in a manner that cannot be cured by the outcome of the review process.

[52] For the above stated reasons it is quite evident the dangers highlighted in City of Tshwane v Afriforum are present and real and that unless the interdict is granted irreversible and permanent harm will ensue.

Balance of Convenience

[53] This application calls for interference with the exercise of power by an independent chapter 9 institution and in a sense touches on the doctrine of separation of powers. In Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC) para 200 The Constitutional Court endorsed the fact that the separation of powers often requires judicial intervention as follows:

"While the doctrine of separation of powers is an important one in our Constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty."

What this means is that court ought to intervene when the need arises to protect against unlawful invasion of rights. Put differently, respect for the doctrine of separation of powers must not be mistaken for judicial passivity or undue deference.

[54] A further basis for judicial intervention arises from need to protect the cornerstone of our democracy. In Electoral Commission v Mhlophe CCT55/16;[2016] ZACC15; 2016 (8) BCLR 987 (CC) The Constitutional Court held;

"The rule of law is one if the cornerstones of our constitutional democracy. And it is crucial for the survival and vibrancy of our democracy that the observance of the rule of law be given the prominence it deserves in our constitutional design. To this end, no court should be loathe to declare conduct that either has no legal basis, or constitutes a disregard for the law, as inconsistent with legality and the foundational value of the rule of law. Courts are obliged to do so. To shy away from this duty would require a sound jurisprudential basis. Since none exists in this matter, it is only proper that we do the inevitable."

[55] A number of instances have been referred to above in which ICASA has not complied with the provisions of ECA or the Constitution and other statutory obligations. In the circumstances there is no room to allow ICASA to continue with the implementation of the auction process.

[56] Reference was made earlier to a decision which mirrors the facts of this case in a unique manner, that is, Minister of Telecommunications. The similarity of the context and the facts in both cases sadly suggests that ICASA has not learnt from its mistakes but instead repeated the same mistake by issuing a similar ITA without properly considering the incumbent licencees and other stakeholders by seeking to re-allocate spectrum already allocated to analogue broadcasters.

[57] In its answering affidavit ICASA submits that if the review succeeds the review court can under its remedial powers provide relief to those that have submitted bids in the unlawful auction. This submission is a repeat of what was said in Minister of Telecommunications and to which Sutherland J commented as follows:

"82 One response offered by ICASA on the balance of convenience is that at worst, if the ITA is set aside, a court can fashion appropriate remedial relief for the industry actors. This is not a good answer. In my view, to throw the responsibility onto a court to craft a pragmatic solution to ameliorate the fall-out from an irregularity is simply wrong; a court cannot be likened to a proto – team sent into a colliery to rescue miners trapped by a collapsed hanging. The better approach is to examine the hanging before initially entering the mine. That approach, in this matter, is to look coldly at the alleged risks and the strength of the facts adduced to substantiate the alleged risks."

Sutherland J went on to conclude as follows regarding the balance of convenience*: "[84] ICASA qua regulator suffers no irreparable harm, but of course, as guardian of the public interest is entitled to advance that concern. The critical contention on that score is the justifiable impatience of consumers to get access to better services. Can the envisaged delay undermine this interest? In my view it cannot. First, a messy process is undesirable. Second, ICASA itself has twice since publishing the ITA, postponed the deadlines to apply, the most recent being to February 2017 This points the direction of an absence of prejudice by the delay. The deadline for 2020 is, in any event, a specious target given the deferment of a need to achieve full roll out until access to 100% of the assigned spectrum is made available. The balance of convenience favours a grant of the relief."*

[58] Considering the fact that none of the bidders and major stakeholers, including the Minister of Telecommunications are opposing this application for an interdict, I also come to the conclusion that the balance of convenience favours the grant of the relief sought.

Absence of any other satisfactory remedy

[59] The applicants have endeavoured to engage ICASA with a view reaching common ground and avoiding litigation without success.

[60] ICASA has made it public that its going forward with the auction. There is no other conceivable method in which the applicants can stop ICASA from implementing its intended action in breach of its statutory and constitutional obligations other that by way of the relief sought in this application.

Urgency

[61] ICASA produced the reasons for the ITAs on 4 December 2020 and this application was lodged on 22 December 2020, 12 days after the reasons were furnished.

[62] The reasons were furnished after Telkom had requested ICASA for the basis for the publication of the ITAs. From that sequence of events it is apparent that Eskom acted expeditiously in launching the application.

[63] As explained above spectrum plays a critical role in all spheres of life in the modern world. It is a scarce resource that has to be dealt with efficatiously by all the stakeholders and on that basis an application such as the present one ought to be treated as inherently urgent. At the same time assignment of spectrum must be done transparently, efficiently, fairly and most of all in terms of the law. The inherent urgency is underlined by the fact that the auction of the spectrum is scheduled to begin on 24 March 2021.

[64] The present application for an interdict is Part B, to be followed by Part C which is the review application. The necessity and the urgency of the court's intervention is further emphasised by the further need to protect the integrity of the review application.

[65] In Pikoli v President of the RSA 2010 (1) SA 400 GP at 404 the court held:

"*the requirements for an interim interdict are well established, and I shall in due course deal with each of them. More in general, one of the aims of an interim interdict is to preserve the status quo pending the final determination of the rights of the parties to pending litigation. The interim interdict does not involve a final determination of the parties rights, and it does not affect such final determination. When considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case. The court seeks to ensure, as far as is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief. The court itself has an interest to ensure that it will ultimately be in a position to grant effective relief to the successful party. For reasons that will appear in due course, the issues in the main application and also in this application are constitutional issues, in such cases the court considering whether to grant or refuse an interim interdict must also bear in mind that the courts have a constitutional obligation to uphold the constitution and to 'declare that any....conduct that is inconsistent with the constitution is invalid to the extent*

of its inconsistency' The court must also bear in mind that not only the parties but society as a whole have an interest in upholding The Constitution and that relief in cases of constitutional breaches must vindicate The Constitution."

[66] Evidently from the above dictum, even though there are various factors which establish the urgency of the matter, the need "to protect the integrity of the proceeding in the main case" alone justifies the urgency of the matter. The consequences of the auction would be devastatingly far reaching and long lasting that even if the applicants were to succeed in the review, irreparable harm would have been caused in such a manner that no just and equitable order by the review court could cure it or ameliorate it.

Conclusion

[67] It is true that ICASA has to navigate numerous legal prescripts and weigh a number of policy considerations in the execution of its mandate. We have just entered the twenty seventh year of our democracy and the digital migration issue has been on the table now for about fifteen years. Despite the importance of the spectrum issue, government has been dithering and not moving swiftly on the issue.

[68] ICASA has been in existence as a chapter 9 institution since the advent of a Constitutional State and I have no doubt that it has gathered considerable amount of experience during that time. One would expect that where the institution has made mistakes, it would use such instances to reflect and ensure that they are not repeated. This would ensure growth and development at a significant pace in all spheres of development in the country. The technological developments that have occurred and can still occur, spear – headed by ICASA and other stakeholders since its establishment are phenomenal. Still, much more can be done. It is concerning therefore that ICASA can still find it possible to repeat exactly the same mistakes as it has done after these had been spelt out in very clear terms a mere five years ago. Whilst a finger can be pointed at government regarding the digital migration issue, ICASA is not making things better in the manner it is handling the spectrum issue. The questions it should have asked itself are well set out in the judgment of Sutherland J. I can do no better than refer thereto where he stated as follows in Minister of Telecommunications (*supra*):

"58. First, the concern is a matter of interpretation of the plan and its enabling legislation. Is a 're-allocation' implicated? Should the 'allocation by MOT, for exclusive use by mobile operators, not precede a decision by ICASA to 'assign' a licence, 'exclusively' for only one of the eligible usages? Should the assignments ICASA contemplates be restricted only to unassigned spectrum? Is such an assignment out of kilter with the prescribed 'allocations'? Second should MOT not defer such an amendment until a secure harbour is found for

the operators who are to exit this spectrum, especially given the uncertainty as to when that can be effected? On the facts at a practical level, does it make sense to assign space in the spectrum that is, at present inaccessible on the basis that at a future unknown date, access will be made available when two other have to take place to give effective access to the newcomers, ie, first, the migrated operators need to have another spot assigned to it they have to make do with a reduced bandwidth and second, in terms of the amended Broadcasting Digital Migration Policy of 18 March 2015, the analogue – to – digital Migration Policy of 18 March 2015, the analogue –to – digital migration process is subject to a switch off date which is to be determined by MOT in consultation with the Cabinet, a decision which shall be made after a process of engagement with the affected parties has been concluded and is not expected to be soon. Accordingly, ICASA cannot migrate the current non-mobile users without MOT's participation and an orderly process requires co-ordination between them. This gives rise to a highly problematic set of circumstances not capable of being managed by ICASA on its own.

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

[69] Counsel for the first respondent submits that the ITA process was embarked upon at the instance of the Minister of Telecommunications. To me, that instruction to embark upon the publishing of the ITAs ought to have presented ICASA with an opportunity to engage the Minister regarding an orderly process with a view to responding to the concerns raised by Sutherland J. In that way the current impasse could have been avoided. Be that as it may the irrationality of the ICASA decision to publish the ITA's without addressing the concerns that have been raised before and which it is aware of or ought to have known remains.

Costs

[70] The applicants seek costs in respect of Part B including the costs of two counsel. I have considered the fact that there is still Part C to come and the possibility of ordering the costs to be costs in the review. Given the facts of this application, particularly the fact that ICASA ought to have been aware of the pitfalls of proceeding with the ITA process I have decided against that option.

ORDER

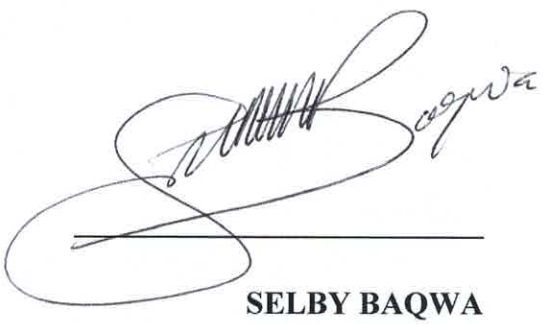
[71] Having considered all of the above, I make the following order:

Pending the final determination of the order sought in Part C, the following order is made:

71.1 An order interdicting the first respondent from assessing or adjudicating any applications received by it pursuant to the ITA for the licensing spectrum in the IMT 700, IMT800, IMT2600 and IMT 3500 bands issued by the first respondent on 2 October 2020 under gazette No 43768 [notice 535 of 2020].

71.2 An order suspending the closing date for the submission of applications for the licence to operate a Wireless Open Access Network as stated in the ITA issued by the first respondent on 2 October 2020 under government gazette no. 43767 [Notice 534 of 2020].

71.3 The first and second respondents shall pay the costs of the applicants jointly and severally, the one paying, the other to be absolved in respect of Part B, including the costs of two counsel.



SELBY BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA