



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 054724/2024

|                                                                                   |                                                 |
|-----------------------------------------------------------------------------------|-------------------------------------------------|
| (1)                                                                               | REPORTABLE: YES/ <del>NO</del>                  |
| (2)                                                                               | OF INTEREST TO OTHER JUDGES: YES/ <del>NO</del> |
| (3)                                                                               | REVISED.                                        |
|  |                                                 |
| 21/02/2025                                                                        |                                                 |
| .....                                                                             | .....                                           |
| SIGNATURE                                                                         | DATE                                            |

In the application of:

**VODACOM (PTY) LIMITED**

Applicant

and

**INDEPENDENT COMMUNICATIONS AUTHORITY OF  
SOUTH AFRICA ("ICASA")**

First Respondent

**CHAIRPERSON, INDEPENDENT COMMUNICATIONS  
AUTHORITY OF SOUTH AFRICA**

Second Respondent

**MOBILE TELEPHONE NETWORKS (PTY) LTD ("MTN")**

Third Respondent

**CELL C (PTY) LTD ("CELL C")**

Fourth Respondent

**LIQUID TELECOMMUNICATIONS SOUTH AFRICA  
(PTY) LTD ("LIQUID")**

Fifth Respondent

**TELKOM SA LIMITED**

Sixth Respondent

**RAIN (PTY) LTD**

Seventh Respondent

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**JUDGMENT**

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LABUSCHAGNE J

[1] Vodacom applies for interim relief in Part A of proceedings set down for a special allocation on the basis of semi-urgency. In Part A, Vodacom seeks, pending final determination of Part B proceedings, an interdict:

- 1.1 Interdicting MTN from using or transmitting on the following radio frequency spectrum (“RFS” or “spectrum”);
- 1.2 In the 1800 MHz band, from 1749.7 to 1759.9 MHz paired with 1842.9 to 1854.9 MHz, which is licensed to the fourth respondent (Cell C);
- 1.3 In the 1800 MHz band, from 1710.3 to 1722.3 MHz paired with 1805.3 to 1817.3 MHz, which is licensed to the fifth respondent (Liquid);
- 1.4 In the 1800 MHz band, from 1722.3 to 1722.7 MHz paired with 1817.3 to 1817.7 MHz, which is the guard band;
- 1.5 In the 2100 MHz band, from 1935 to 1950 MHz paired with 2125 to 2140 MHz, which is licensed to Cell C; and
- 1.6 In the 900 MHz band, from 880 to 890 MHz paired with 925 to 935 MHz, which is licensed to Cell C;

1.7 It seeks an interim interdict against Cell C, restraining it from transmitting on the following spectrum:

1.7.1 In the 2100 MHz band, from 1950 to 1965 MHz paired with 2140 to 2155 MHz, which is licensed to MTN; and

1.7.2 In the 900 MHz band, from 905 to 915 MHz paired with 950 to 960 MHz, which is licensed to MTN.

1.8 Interim relief is sought against Liquid restraining it from transmitting the following spectrum:

1.8.1 In the 1800 MHz band, from 1722.7 to 1734.7 MHz, paired with 1817.7 to 1829.7 MHz, which is licensed to MTN; and

1.8.2 In the 1800 MHz band, from 1722.3 to 1722.7 MHz, paired with 1817.3 to 1817.7 MHz, which is the guard band, for which each of MNT, Cell C and Liquid do not hold licenses issued by ICASA.

[2] In Part B proceedings, Vodacom seeks an order declaring that:

2.1 The decision taken by ICASA on or about 14 June 2022 to approve the applications by MTN and Liquid and by MTN and Cell C for RFS sharing in the form of RFS pooling is unlawful, reviewed and set aside.

2.2 Any decision taken by ICASA on a date unknown to Vodacom, authorising MTN, Cell C and Liquid to use and transmit on guard bands, whether done implicitly or otherwise, is reviewed and set aside.

### **RELEVANT BACKGROUND**

- [3] Radio frequency spectrum is the tool that mobile network operators (MNOs) use to compete. It is a finite resource under state control, to be used for the benefit of all. Lower frequency bands provide broader geographic coverage for mobile service communications. Higher frequency bands offer higher capacity and faster data speeds but cover smaller areas.
- [4] Three radio frequency bands are relevant to this application, namely the 2100,1800 and 900 MHz bands. The guard bands (buffers in between allocated spectrum) in the 900 MHz spectrum band have been removed by ICASA and the issued licences of the respondent MNOs have been amended to cater for the effect of the removal of guard bands.
- [5] A special spectrum sharing dispensation applied during the pandemic. On 24 April 2020 ICASA approved an application by MTN and Liquid to temporarily pool their radio frequency spectrum in the 1800 MHz band. The duration of the approved spectrum pooling arrangement would be from date of approval until three months after the end of the National State of Disaster.
- [6] There were legal disputes between cell phone companies and ICASA regarding spectrum allocation. The wrangling culminated in an auction of

spectrum which was held during March 2022. Billions were paid by MNOs for obtaining licences from ICASA for assigned spectrum.

- [7] In the period 4 to 11 April 2022 MTN, Cell C and Liquid applied to ICASA in terms of Regulations 18(3) and 18(4) for approval of spectrum pooling arrangements.
  
- [8] On 12 April 2022 ICASA asked MTN, Cell C and Liquid to *“provide more information/details on how the pooling arrangements as applied for will in particular promote the objects set out in terms of section 2(f) of the Electronic Communications Act No. 236 of 2005.”* The subsection states as one of the objects of the ECA the promotion of competition in the Information Communications and Technology Sector.
  
- [9] On 4 May 2022 MTN, Cell C and Liquid submitted a response to ICASA’s request in terms of section 2(f) of the ECA.
  
- [10] On 10 June 2022 ICASA’s CEO signed a memorandum to the Council, recommending approval of the applications.
  
- [11] On 14 June 2022 ICASA’s Council approved *“the application submitted by (MTN and Cell C) to share their respective assigned radio frequency spectrum in the IMT 900 MHz; IMT 1800 MHz and IMT 2100 MHz bands”* and *“the application submitted by (MTN and Liquid) to share their respective assigned radio frequency spectrum in the IMT 1800 MHz band.”*

- [12] On 21 June 2022 ICASA wrote to MTN, Cell C and Liquid, advising them that their applications have been approved subject to certain conditions.
- [13] On 30 June 2022 the temporary spectrum pooling arrangement between MTN and Liquid came to an end.
- [14] In the latter part of 2022, Vodacom contends that it started noticing anomalous results being yielded by its tests of the relative performance of MNOs in the market, especially as to speed relative to spectrum holding and site infrastructure.
- [15] In March 2023 Vodacom contends that it noticed that MTN's download and upload speeds consistently and increasingly outperformed other MNOs download and upload speeds.
- [16] In August 2023 Vodacom conducted further tests. Vodacom addressed a letter to ICASA requesting information about MTN's entitlement to transmit on spectrum not licensed to it by ICASA.
- [17] ICASA did not respond to Vodacom's letter and Vodacom made a formal request on 5 December 2023 for access to information in terms of the Promotion of Access to Information Act, 2 of 2000 (PAIA).
- [18] On 22 February 2024 Vodacom addressed a follow-up letter to ICASA, following up on the PAIA request.
- [19] On 28 February 2024 ICASA responded seeking an indulgence, contending that it is considering the request and has requested MTN, Cell C and Liquid's

consent in terms of sections 47 and 48 of PAIA and would respond on or before 26 March 2024.

- [20] On 4 March 2024 Vodacom agreed to ICASA's requested indulgence.
- [21] On 14 March 2024 ICASA responded and informed Vodacom that it received applications from MTN, Cell C and Liquid on 4 April 2022 and approved them on 14 June 2022 (and ICASA attached a redacted copy of the Council's meeting minutes and copies of the letters dated 21 June 2022, informing MTN, Cell C and Liquid of the approval of their applications). ICASA undertook to respond to the balance of the requests in response to Vodacom's 4 March 2024 letter by 29 March 2024.
- [22] On 29 March 2024 ICASA responded by refusing access to MTN, Cell C and Liquid's applications.
- [23] On 8 and 22 April 2024 Vodacom contends that it conducted further tests, which showed that the pooling arrangements were skewed in MTN's favour.
- [24] On 17 May 2024 Vodacom launched the current two-part application. Part A was set down for the hearing of urgent interim relief on 13 August 2024.
- [25] Answering affidavits were filed by Liquid (on 26 June 2024), ICASA (on 28 June 2024) and Telkom filed its explanatory affidavit on 27 June 2024.
- [26] On 4 July 2024 Vodacom wrote to the DJP requesting a special allocation for Part A.

[27] On 1 July 2024 Cell C filed its answering affidavit to Part A proceedings. MTN followed soon, on 5 July 2024. Vodacom filed its replying affidavit in Part A proceedings on 18 July 2024 and ICASA filed its answer to Telkom's explanatory affidavit in Part A proceedings on 30 July 2024. A meeting was secured with the DJP in August, a week after the set down of 13 August. The matter was removed from the urgent court roll and that meeting gave rise to the hearing before this court.

### **THE CASE FOR VODACOM**

[28] The licensing and the use of radio frequency spectrum is governed by the Electronic Communications Act, 36 of 2005 ("the ECA"). High Demand Spectrum (HDS) is a finite resource in the ICT sector. The demand for HDS far outstrips the supply.

[29] Section 31(1) of the ECA provides that no person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum license granted by ICASA to such person in terms of the ECA.

[30] In terms of the aforesaid section an individual applies for and is granted a license for a specific block of spectrum in a frequency band, measured in MHz. What Vodacom impugns in Part B proceedings is the approval by ICASA of the pooling of high density spectrum between MTN, Cell C and Liquid. Vodacom contends that particularly MTN is favoured in respect of its available spectrum bandwidth to the *"serious competitive prejudice of Vodacom (and Rain and Telkom)"*.

[31] Vodacom advances the following propositions :

First, that MTN and its pooling associates have been permitted to unlawfully transmit on significant blocks of HDS for which they are not licensed as required by the ECA in the regulatory framework. Vodacom contends that this was done in secret without notice to Vodacom and without public participation.

Second, an application for sharing has resulted in impermissible pooling – i.e. creation of a new block of spectrum that includes the previously unassigned guard bands – i.e. buffer zones between licensed spectrum bands. Without the incorporation of the unlicensed guard band into the pool of spectrum, the pooling in question would not work effectively. On this latter issue there is agreement between Vodacom and the respondent MNOs.

Third, that allowing the pooling parties to transmit on these guard bands without having had these licensed to them under the process prescribed for the licensing of HDS (i.e. Regulation 7), is unlawful. The application is aimed at directing MTN, Cell C and Liquid to refrain from transmitting on spectrum for which they are not lawfully licensed, pending the review and setting aside of ICASA's approval of the pooling arrangements in Part B.

[32] Vodacom posits the need for licences based on sec 31 and Regulation 18 for each pooling participant for the shared spectrum, after following a process of public participation, i.e. a transparently consultative process with role players in the ICT sector. The latter flows from the high demand and public interest

in HDS and the effect its assignment has on competition between MNOs. The need for public participation flows from the ECA and its regulations. Alternatively it flows from sec 3 or 4 of PAJA.

Vodacom contends that ICASA does not have the power to approve spectrum pooling arrangements under the spectrum sharing Regulations. Vodacom further contends that ICASA could not approve the use of guard bands in the 1800 MHz band without following a similar spectrum harmonization process and issuing or reissuing spectrum licenses, including the guard bands as it did in respect of the 900 MHz band.

## **URGENCY**

[33] ICASA, MTN, Cell C and Liquid dispute that the application is urgent, contending that Vodacom has been dragging its feet. They contend that Vodacom was already aware in November 2022 of Vodacom's enhanced performance. MTN contends that Vodacom has unreasonably delayed the commencement of the application contending that Vodacom knew in April 2022 of the pooling agreement. ICASA raises the same point, using April 2022 as starting date. MTN further contends that Vodacom can obtain substantial redress in due course.

[34] Vodacom points a finger at ICASA, contending that ICASA as regulator is to blame for the delay. The glacial pace at which it dealt with Vodacom's request for information in terms of PAIA caused an undue delay. In the end, the information sought was refused.

- [35] The application was launched in May 2024. The hearing dates of this matter before this Court (13 and 14 February 2025) were determined following the case management meeting with the Deputy Judge President in August 2024 as set out in the chronology above.
- [36] Vodacom did tests to determine the reason behind MTN's upload and download speed and it is contended by the respondents that the information derived from such tests should have caused the earlier institution of these proceedings. Vodacom contends that it was required to determine from ICASA whether there were licensed amendments to MTN's spectrum holdings and to determine how this was possible without a public participation process. Vodacom therefore engaged with ICASA as regulator and the regulator first delayed the process and then refused to provide the information as requested.
- [37] Vodacom contends that there is clear unlawfulness in the utilisation of pooled spectrum, which includes guard bands, and it is contended that the rule of law on its own could justify the Court being approached on the basis of urgency.
- [38] In **Pharmaceutical Manufacturers Association of SA and Others: In re: Ex parte application of President of the RSA and Others** 2000 (2) SA 674 (CC) at paragraph [40], the Constitutional Court held that:

*“The rule of law is specifically declared to be one of the foundational values of the constitutional order, fundamental rights are identified and entrenched, and provision is made for the control of public power including judicial review of all legislation and conduct inconsistent with the Constitution.”*

[39] In **Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others** [2014] 4 All SA 67 (GP); 2016 (4) SA 99 (GP) at paragraph [65] the following was stated regarding urgency in vindicating the rule of law:

*“The case for the applicant is that the respondents are seeking unlawfully to take away its lawfully derived power to govern the municipality at a local government level. That case, if ultimately substantiated, is directed at redressing nothing less than a serious violation of the rule of law. The prejudice to the applicant is manifest. Every action taken by someone who is in law a usurper of power is unlawful and, especially where third parties are involved, might give rise to complex questions of fact and law.”*

[40] The grounds for urgency raised by Vodacom include the following:

40.1 Vodacom suspected over time that there was something untoward with the enhanced performance of MTN’s network. However, it had no evidence nor any other basis on which it could approach a Court for relief until after 14 March 2024 when ICASA eventually disclosed that it had approved spectrum sharing and pooling arrangements by MTN, Cell C and Liquid;

40.2 This was after a protracted engagement since October 2023 by Vodacom trying to extract this information from ICASA;

40.3 The shortage of information and ICASA’s refusal to make the applications that it had approved available, resulted in further delays.

The application was brought as soon as ICASA had responded, and the respondents were provided with reasonable time periods to file their responses.

[41] In my assessment it would be premature to launch an application without obtaining information from the regulator. It is not unreasonable to seek clarity from ICASA on whether MTN or any other MNO was licenced to transmit and receive signal on spectrum bands not reflected in the public licence register. The regulator is the repository of public information on who is licensed for use of spectrum. A significant period of time was wasted by ICASA avoiding its duty to be transparent in the face of a reasonable request for information.

[42] It is also correct that a significant amount of time has elapsed since the application was instituted. It was envisaged to be heard in August 2024. However, the delay since then in hearing the matter is a function of the administration of justice. The papers were too voluminous for hearing in the urgent court in August 2024. The duration of argument was also two days. In terms of current practice directives as to the volume of papers and the duration of argument a special allocation was the only way for this matter to be heard on an expedited basis. If the matter were not heard in this special allocation on the basis of semi-urgency, a change in status quo that would set in and the establishment of entrenched rights before the proceedings are heard, may evolve.

[43] The applicant contends that the advantage that MTN has gained cannot be quantified in a damages claim. If Part A is not heard it will not obtain substantial redress in due course. The mere passing of time may result in review relief in Part B, though established, being declined (see **The Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty)(Ltd)** 2008 (2) SA 638 (SCA) at par [20] and [29]). This is a valid consideration.

[44] On balance, I am satisfied that the matter should proceed to be heard on the merits insofar as there are allegations of unlawful transmission arising from the pooling of spectrum. This is a rule of law issue which is sufficient to establish at least semi-urgency.

#### **THE OUTA PRINCIPLE**

[45] As a defence the respondents raise the OUTA principle, contending that the relief sought will cause separation of powers harm. It will interfere in the functioning of ICASA as regulator. Vodacom counters this contention by pointing out that it does not seek relief against ICASA in Part A. It seeks to prevent the implementation by private beneficiaries *“of an administrative authorisation given to them that was unlawfully given. This does not entail the OUTA principle at all”* (paragraph 36.3 of Vodacom’s heads of argument).

[46] As an alternative it is contended by Vodacom that the unlawfulness is so manifest that it meets the *“clearest of cases”* threshold applied in the OUTA context.

[47] In **EFF v Gordhan (Economic Freedom Fightrs v Gordhan and Others; Public Protector and Another v Gordhan and Others)** 2020 (6) SA 325 (CC) at paragraph [59] and [60] the Court held:

*“[59] While I acknowledge that OUTA is distinguishable on the facts from the present matter, it is this very distinction that highlights the lack of prospects of success in the present case. In OUTA, this Court held:*

*‘The order prohibits SANRAL from exercising statutory powers flowing from legislation whose constitutional validity is not challenged. In particular, the order prevents it from raising revenue through tolls, a power the statute vests in it ... At the behest of a court order, the National Executive is prevented from fulfilling its statutory and budgetary responsibilities for as long as the interim order is in place.’*

*[60] What is evident from the above is that the interim order sought in OUTA would thwart the Executive from carrying out its statutory and budgetary duties as required by statute. Plainly put, it would prevent the Executive from doing what it was meant to do. Here, the interim interdict sought is different. The Public Protector has already performed the duties and functions that the Constitution requires of her. As I have stated before, the SARS Report has been completed. Her powers have been exercised and the SARS Report has been published. The interim interdict sought in the High Court therefore did not have the effect of subverting her constitutional powers.”*

[48] In **Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd** 2023 (4) SA 325 (CC) at paragraph [303] the Constitutional Court stated:

*“OUTA must be read in the context of the fact that what was at issue there was a highly policy laden decision by a member of the Executive arm of government and violations of fundamental rights protected in the Bill of Rights were not at issue. In the main, it is those two considerations that informed the Court’s final conclusion. I believe that the role to be played by this factor must depend on the nature of the Executive decision. Ordinarily, this factor must apply on a sliding scale. The more policy laden or polycentric the decision, the more the role this factor must play in influencing the court’s determination. The lesser the policy-ladenness or polycentricity, the lesser the influence of this factor.”*

[49] Vodacom stresses that the Court is not requested to assess and weigh the decisions made by ICASA in Part A proceedings. The unlawfulness in question is a matter for the Court to determine, rather than ICASA. The question whether procedural fairness was required and properly afforded is not a question that in any way engages the need for deference on the part of the Court to any polycentric expertise driven or policy laden decision on ICASA’s part (see Vodacom’s heads of argument, paragraph 39).

[50] My assessment of this defence appears later.

## FAILURE TO EXHAUST INTERNAL REMEDIES

[51] The applicant approaches the Court on the basis of PAJA, contending that the decision in Part B is administrative action.

[52] Section 7(2)(a) of PAJA provides that no Court or tribunal shall review an administrative action in terms of the Act unless any internal remedy provided for in any other law has first been exhausted. The Court will however permit in exceptional circumstances an application to be exempted from this requirement – section 7(2)(c) of PAJA.

[53] In **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Other** 2014 (5) SA 138 (CC) the Constitutional Court stated:

*“[119] In clear and peremptory terms, section 7(2) prohibits courts from reviewing 'an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted'. Where, as in this case, there is a provision for internal remedies, the section imposes an obligation on the court to satisfy itself that such remedies have been exhausted. If the court is not satisfied, it must decline to adjudicate the matter until the applicant has either exhausted internal remedies or is granted an exemption. Since PAJA applies to every administrative action, this means that there can be no review of an administrative action by any court where internal remedies have not been exhausted, unless an exemption has been granted in terms of section 7(2)(c). This is apparent from the*

*terms of section 7(2)(a) which begins with the words '[s]ubject to paragraph (c).'*"

*[120] Section 7(2)(c) empowers a court to grant an exemption from the duty of exhausting internal remedies if, as observed by the Supreme Court of Appeal in **Nichol**, two pre-conditions are established. These are exceptional circumstances and the interests of justice."*

[54] MTN, Cell C and ICASA contend that Vodacom should have employed ICASA's own complaints procedure. Section 17C(1)(a) of the ICASA Act provides for disputes to be referred to the Complaints and Compliance Committee (the "CCC"). Vodacom contends however that the complaints procedure does not encompass instances where the complaint is against ICASA itself. The challenging of administrative action by ICASA is based on the contention that ICASA's decisions purport to authorise violations of the ECA and the RFS Regulations. Any such complaint could not be referred to an internal body such as CCC. ICASA cannot review its own approvals. I agree.

[55] Liquid and Cell C contends that Vodacom complains about the anti-competitive elements of the pooling arrangements (including that they amount to prohibited practices (including pre-implementation of an unnotified merger, as understood in Chapter 2 of the Competition Act) and contends that this Court lacks jurisdiction to determine this dispute. It is contended that Vodacom ought to have proceeded in the Competition Tribunal to enforce its allegations that the arrangements entail the prohibited implementation of

unnotified merges. Liquid contends that Vodacom should have applied for interim relief before the Competition Tribunal in terms of section 49C of the Competition Act.

[56] Vodacom's counter argument to these contentions is that it has not founded its case thereon that MTN, Cell C and Liquid have engaged in prohibited practices in terms of the Competition Act. The statutory violations relied upon by Vodacom are to be found in the licensing framework of the ECA and attendant Regulations, and not in a violation of the Competition Act.

[57] I accept as correct the submissions by Vodacom. While Vodacom initially considered approaching the Competition Tribunal, and requested the respondents to respond, the respondents were not amenable. To now suggest otherwise loses sight of the nature of the complaint of Vodacom. It is a legality issue framed in terms of PAJA, not a complaint about unlawful pre-implementation of an unnotified merger or prohibited practices under the Competition Act.

[58] None of the suggested internal remedies are adequate remedies, and none of them stands in the way of these Part A proceedings. This issue will also feature in Part B proceedings. I deal with the exhausting of internal remedies as precursor to the establishment of the prima facie right to review relief as there is no High Court review jurisdiction unless internal remedies have been shown to have been exhausted, or, in exceptional circumstances, where an exemption in terms of section 7(2) of PAJA is granted.

- [59] Even if I am wrong in this regard, the raising of this defence is to my mind premature. It is truly a matter for the review court. And the internal remedies, if established, may be exhausted even after initiating review proceedings (see section 7(2)(b) of PAJA).
- [60] It is necessary to understand the legislative landscape pertaining to radio frequency spectrum in order to assess the requirements for an interim interdict.

#### **THE LEGISLATIVE FRAMEWORK OF RADIO FREQUENCY SPECTRUM**

- [61] The radio frequency spectrum is a national asset. Deriving benefit from it through improved electronic communication is central to the attainment of social upliftment and the realisation of enshrined fundamental rights.
- [62] “Fast and reliable electronic communication services have the potential to improve the quality of life of all people in South Africa”- see **City of Tshwane Metropolitan Municipality v Link Africa (Pty)(Ltd)** 2015 (6) SA 440 (CC) at para121. ICASA is the broadcasting authority envisaged by section 192 of the Constitution. Its constitutional mandate is to regulate broadcasting in the public interest and to ensure fairness.
- [63] ICASA is established by means of the ICASA Act, 13 of 2000, which Act restates the constitutional mandate of section 192 in the objects of the Act as formulated in section 2(a).

- [64] The ICASA Act requires a public register (section 4A) of licenses to be kept by ICASA, that also reflects amendments to such licenses. The public, against payment of a prescribed fee, has access to the public register of licenses.
- [65] Complaints about misuse of licenses may be lodged with ICASA and, where ICASA deems it appropriate, such complaints will be referred to the Complaints and Compliance Committee (CCC). Such complaints may relate to use of spectrum by licensees or non-licensees. The complaints and Compliance Committee has the authority to investigate such complaints in terms of section 17C of the ICASA Act. It is this remedy which the respondents contend constitutes an alternative remedy to Vodacom.
- [66] The primary source of ICASA's powers pertaining to radio frequency spectrum is to be found in the Electronic Communications Act,<sup>36</sup> of 2005, the RFS Regulations and the ICASA Act. In what follows reference is made to those portions of the ECA that deal with the interests of the public and the issue of fairness as envisaged by section 192 of the Constitution and section 2(a) of the ICASA Act.
- [67] The provisions of the Electronic Communications Act are instrumental in securing reliable electronic communications. Access to these services are important for the achievement of constitutional rights and values. In **The Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa** [2016] ZAGPPHC 883 (30 September 2016) Sutherland J (as he then was) explained:

“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.”

[68] The objects of the Electronic Communications Act (ECA) include:

68.1 To promote and facilitate the development of interoperable and interconnected networks (section 2(b));

68.2 To ensure the efficient use of radio frequency spectrum (section 2(e));

68.3 To promote competition in the ICT sector (section 2(f));

68.4 To promote open, fair and non-discriminatory access to broadcasting services (section 2(g));

68.5 To refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public (section 2(y)).

[69] The means by which ICASA regulates radio frequency spectrum is through a system of licensing. Unless services have been exempted by ICASA in terms of section 6, no person may provide any service (as defined) without a license – section 7.

- [70] A license confers on the holder the privileges and subjects the licensee to the obligations in the Act and as specified in the license (section 5(12)).
- [71] When an application for an individual license is made, there is a process of public participation. ICASA is required to give notice of the application in the Government Gazette and the interested parties are offered an opportunity to submit written responses, which must be considered by ICASA (sections 9(2) and 9(5) of the ECA).
- [72] The renewal of licenses also attracts a public participation process (section 11(3) read with section 9(2)).
- [73] In licensing and assigning the use of radio frequency spectrum, ICASA must take into account the efficient utilisation of spectrum, including allowing shared use of spectrum when interference can be eliminated or reduced (section 30(2)(b) of the ECA).
- [74] Central to the issues in Part A of these proceedings is section 31. Section 31(1) makes it clear that no person may transmit any signal by radio or use a radio apparatus to receive any signal except in accordance with a radio frequency spectrum license.
- [75] The discretionary power of ICASA in prescribing procedures and conditions regarding applications for licenses appears from section 31(3). In terms thereof, the authority may take into account the objects of the Act in prescribing procedures and conditions for:

- 75.1 RFS licenses where there is insufficient spectrum available to accommodate demand (section 31(3)(a);
- 75.2 The amendment of a license or the transfer of control of a license (section 31(3)(b);
- 75.3 Where an application is made for sharing (section 31(3)(c)).
- [76] ICASA may amend a radio frequency license if requested and may grant such amendment if it is fair and does not prejudice other licensees (section 31(4)).
- [77] The interests of the public is apparent not only from the Act but from the published Radio Frequency Spectrum Policy of the government which was published in terms of section 3(1) of the ECA (Government Notice 306 in GG3119 of 16 April 2010). In terms of paragraph 2.1.2 of the policy the management of radio frequency spectrum is subject to government authority “and spectrum must be managed efficiently so to be of greatest benefit to the entire population.”
- [78] The Radio Frequency Spectrum Regulations (RFS Regulations of 2015) speaks of RFS assignments being exclusive or shared (Regulation 3(4)).
- [79] ICASA may subject even a standard application to a public consultation process (Regulation 5(5)).
- [80] More to the point in these proceedings is Regulation 18 which pertains to an application for sharing radio frequency spectrum. The concept of sharing is defined in Regulation 18(1). It relates to an instance where “two or more

licensees have been granted licenses for or part of same frequency assignment.”

[81] Even where a party seeks to have exclusive use of radio frequency spectrum, ICASA may require licensees to share in assigned frequency with other licensees (Regulation 18(2)).

[82] Where parties seek to apply for a sharing of radio frequency spectrum, they may apply to ICASA in terms of Regulation 18(3) based on an application form – Form D.

[83] All radio frequency spectrum sharing agreements are subject to approval by ICASA and to a non-discriminatory approach (Regulation 18(3)).

[84] High Density Spectrum (HDS) is a scarce commodity. This is evidenced by the proceeds of the auction conducted by ICASA in 2021 where the parties to these proceedings paid billions of Rands for specific allocations of RFS spectrum. The auction was preceded by litigation in which the competitive nature of public participation in acquiring such spectrum was required as a matter of legal principle (see the **Telkom cases** referred to below).

[85] The history preceding the aforesaid auction evidenced ICASA placing spectrum caps on the larger players so that an equitable distribution of radio frequency spectrum can take place. Caps were placed on Vodacom and MTN to prevent market domination to the exclusion of other role players.

- [86] The imposition of such caps is consistent with the obligation upon ICASA to ensure that the radio frequency spectrum is utilised to the benefit of the entire population as a scarce commodity under the control of the State.

***PRIMA FACIE RIGHT***

- [87] Vodacom contends that section 31(1) requires a new or an amended license to be issued to the parties to a sharing agreement. MTN, accepting the need for a licence, contends that the approvals are extensions of the existing licences.

- [88] Section 31 of the ECA reads:

*“Radio frequency spectrum licence*

- (i) *Subject to subsections (5) and (6), no person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum licence granted by the Authority to such person in terms of this Act.”*

- [89] In advancing the interpretation in favour of new or amended licences Vodacom contends that:

89.1 The ECA must be read as a whole, and section 31 in particular must be read as a whole.

89.2 It cannot be assumed that the legislature intended to do away with the right to procedural fairness.

89.3 The ECA is meant to be rational, i.e. taking into account all the other laws which the legislature is presumed to have known when passing the ECA.

89.4 ICASA is entrusted with management of a public asset – the radio frequency spectrum – it must do so in the public interest and in accordance with the values and principles enshrined in the Constitution and expressly provided for in the ECA (Vodacom’s heads, paragraph 57).

[90] ICASA contends that as long as the applicants for sharing each has a licence for its spectrum bands, sharing is competent. It is evident from section 31(1) of the ECA that no person may transmit any signal by radio or use any radio apparatus to receive any signal by radio without a radio frequency spectrum licence granted by the Authority. ICASA contends that there is already a licence for each sharing participant and no new licence is required.

[91] Vodacom contends that, when MTN transmits on spectrum licensed to Cell C:

91.1 It is not doing so “*under and in accordance with*” a license issued by ICASA to MTN; and

91.2 It cannot do so “under and in accordance with a license issued by ICASA to Cell C”.

[92] Vodacom therefore contends that ICASA is wrong in suggesting that, because MTN, Cell C and Liquid hold spectrum licenses, they are free to transmit on the frequencies for which they are not themselves licensed.

[93] Vodacom contends that spectrum sharing as defined in Regulation 18(1) refers to an act of licensing to use the same spectrum. It is contended that it cannot be effected without licensing on such basis.

[94] Regulation 18(1) reads:

*“(1) Radio frequency spectrum sharing is where two or more licensees have been granted radio frequency spectrum licences for all or part of the same frequency assignment.”*

[95] ICASA’s interpretation of the Regulation is that, where radio frequency spectrum licenses have been issued, those with adjacent spectrum may apply to share in terms of Regulation 18(1).

[96] But the issue is not who is competent to apply. Having licences for adjacent spectrum bands is a locus standi issue when applying to share spectrum.

[97] Regulation 18(3) refers to applications for licenses. The approval that MTN, Cell C and Liquid applied for was for approval in terms of RFS Regulation 18(3). They accordingly applied *“for radio frequency spectrum licences for spectrum assignments on a shared basis”*.

[98] Vodacom contends that the word *“licences”* in Regulation 18(3) indicates that the application in respect of sharing is an application for a license. Where

licensees already had licenses for the respective individually assigned spectrum, so Vodacom contends, this means that they needed amended or new spectrum licenses for the shared spectrum.

## **GUARD BANDS**

- [99] MTN admits that it is using the guard band, claiming that *“ICASA has approved and authorised the transmission of signal on the guard band frequency between MTN and Liquid and Cell C’s adjacent spectrum assignments that are the subject of the pooling applications.”* (MTN, AA, paragraph 176, CaseLines 02-614).
- [100] Liquid does not address the question of guard bands at all. Cell C accepts that the spectrum pooling cannot be achieved without entailing the assignment of unassigned and unlicensed spectrum in the form of the guard band in the 1800 MHz range.
- [101] The respondents play down the significance of the guard bands as a technological relic, contending that it stands in the way of pooling (Cell C, AA, paragraph 18, CaseLines 02-736).
- [102] Vodacom contends that the creation of a new block of pooled spectrum that has swallowed up guard bands is not what section 31(1) and regulation 18(1) and (3) contemplated.
- [103] The papers reflect ICASA’s position to be the following:

103.1 The applications by MTN, Cell C and Liquid for sharing of radio frequency spectrum do not expressly refer to the inclusion of the guard bands;

103.2 ICASA, in granting its approvals in **ICASA 1**, **ICASA 2** and **ICASA 3** makes no reference to an approval that includes use of the guard bands. The only relevant guard bands in this instance are indeed in the 1800 MHz spectrum;

103.3 ICASA has annexed tables reflecting the approved radio frequency spectrum after the approval of the applications for sharing by MTN, Cell C and Liquid. Those tables do not reflect the guard bands as part of the approved sharing. The position advanced by ICASA is therefore that the approval granted merely provides the parties to sharing agreements to transmit and receive signal on the previously licensed radio frequency spectrum, but on a shared basis. There is no official approval by ICASA for the utilisation by MTN, Cell C and Liquid of the guard bands in question.

[104] When Vodacom stated in its founding affidavit (paragraphs 12 and 13) that MTN, Cell C and Liquid are using the guard bands, this was expressly denied by ICASA. However, MTN, Cell C and Liquid are in agreement with Vodacom regarding the question whether they are using the guard bands or not. Cell C contends that ICASA had utilised an implied power to consent to the use of the guard bands as, without the guard bands, the pooling would not be effective. However, as ICASA has ostensibly not applied its mind to assign

the guard bands to the applicants for sharing, the question of whether an implied power was used or not does not arise.

[105] Vodacom advances the following propositions based on section 31(1) of the ECA and RFS Regulation 18:

105.1 Whether or not RFS Regulation 18 contemplates “*pooling*” as a form of “*sharing*”, it requires this to be done by means of licensing the shared spectrum, something that was not done in the instant case;

105.2 RFS Regulation 18 in any event does not authorise pooling of the kind at issue in these proceedings, which includes the guard bands.

105.3 Even on ICASA’s interpretation of RFS Regulation 18(1), the pooling arrangements could not have been lawfully approved under that Regulation.

[106] I agree with the first proposition. The clear wording of sec 31(1) is consistent with the interpretation of Vodacom and MTN. A successful application to share spectrum must be reflected in a license. But such licence must be issued by ICASA and registered in the public register- sec 4A, ICASA Act.

[107] The other two propositions are not accepted. The sharing regime in the ECA is governed by sec 31 and Regulation 18. As sharing contiguous assigned and separately licensed spectrum bands cannot be effective without including the guard bands, the assignment of such guard bands must form part of the application and the approval. However, as the guard bands are unassigned

spectrum, the need for public participation and the extent thereof must be considered. The process is akin to an amendment of a licence in terms of RFS Regulation 9(3).

## **PUBLIC PARTICIPATION**

- [108] Telkom SA and Vodacom make common cause in contending that the sharing or pooling arrangements require public participation as a precursor to the decision made by ICASA in granting such applications.
- [109] Telkom SA filed a notice to abide but filed an explanatory affidavit in which it advances the position that consultation by ICASA was required. It is contended by Telkom SA that ICASA, as an organ of state, must adopt a procedurally fair process, which rationally required consultation. This is because of the nature of HDS spectrum arrangements and the allocation thereof having an impact on competition between mobile network operators.
- [110] If the sharing of spectrum is required to be done by means of licensing, that opens the door for the requirement of public participation. Licensing of HDS entails requirements, including a competitive process and a public participation process. Vodacom invokes RFS Regulation 7 which reads:

*“The Authority will at all times publish an ITA where a radio frequency spectrum licence will be awarded/granted on a competitive basis and where it*

*determines that there is insufficient spectrum available to accommodate demand in terms of section 31(3)(a) of the Act.”*

[111] ICASA contends that HDS once assigned loses its character as HDS and thereby the need for public participation in respect of sharing falls away. This position by ICASA is based on its contention that Regulation 18 does not entail a new act of licensing.

[112] In section 31(3)(a) of the ECA, the spectrum at issue is insufficient spectrum available to accommodate demand – i.e. spectrum which is scarce and that licensees would, if made available, pay billions for to be able to use under section 31(1). Vodacom contends that other licensees would apply for this spectrum and be willing to pay large amounts for spectrum at auction were it to be surrendered by the licensee. Even if the control of the spectrum changes, it remains scarce when it is then licensed to be used between licensees under RFS Regulation 18.

[113] Regulation 9(3) provides for public participation when a license amendment relates to HDS (a license that was subject to an extended application procedure).

[114] Vodacom contends that, even if it is found that the ECA and the RFS Regulations do not envisage public participation, then, independent thereof, such public participation is imposed upon the process by section 3 of PAJA.

- [115] Section 192 of the Constitution enjoins ICASA to act in the public interest. ICASA, so contends Vodacom, must be open and transparent whenever it exercises its powers. That is the constitutional framework against which the provisions of the ICASA Act and the ECA must be understood and interpreted.
- [116] Vodacom contends that, where proposed administrative conduct affects the rights and interests of role players like Vodacom, they have a right to be heard. Vodacom had the right *“to administrative action that is lawful, reasonable and procedurally fair in terms of section 33(1) of the Constitution.”*

*Conclusion on public participation*

- [117] The approvals by ICASA meet the definition of administrative action. Administrative action which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair. Section 3(2)(b) sets out the process for a procedurally fair administrative action, requiring adequate notice, a reasonable opportunity to make representations, a clear statement of the administrative action, adequate notice of any right of review of internal appeal where applicable, and adequate notice of the right to request reasons in terms of section 5.
- [118] The impact of section 3(5) of PAJA is that ICASA can only be excused from complying with PAJA if the ECA empowers it *“to follow a procedure which is fair but different from the provisions of subsection (2).”*
- [119] ICASA contends that it did not follow a public participation process in respect of the sharing of spectrum applications in question since the applicable

provisions did not provide for public participation. It further contends that in terms of Regulation 5(5), ICASA retained a discretion, even where a standard application for RFS licensing and assignment is concerned, on whether such application should be subjected to a public consultation in terms of sections 3 and 4 of PAJA (ICASA AA, paragraph 100, CaseLines 02-430).

[120] This indicates that even where a case is not dealing with HDS, ICASA would have a discretion to impose public participation processes in terms of sections 3 and 4 of PAJA. ICASA however does not advance any evidence that in this instance it exercised the discretion not to hold public participation processes.

[121] In 2021/22 ICASA applied a spectrum cap in respect of the auctioning of HDS in order to avoid an unfair advantage to the bigger players. Vodacom and MTN were capped. This took place in the period preceding the auction in March 2022. It is contended by Telkom SA that the spectrum arrangements now make a mockery of those caps as spectrum assignments through sharing can exceed the caps previously imposed.

[122] I accept this proposition. When ICASA was considering approving arrangements that would materially deviate from the outcomes of the auction process, that on its own triggered a need for consultation with Vodacom, as it is intimately affected by the outcome and its interest in the HDS at issue (see Vodacom Heads, paragraph 117, CaseLines 19-56). On the facts that would constitute a legitimate expectation to be heard.

[123] I am satisfied that ICASA erred in not following a process of public participation. While regulation 18 and sec 31 do not expressly prescribe such

a process, there are cogent reasons for it. The spectrum in question is HDS. ICASA must act in the public interest in determining how spectrum is allocated and used. As an organ of state, ICASA must follow procedures that are fair to all affected parties. ICASA did not assess the fairness of the process as against competitors and the public in general when it was so obviously required. The right to fair administrative action protects rights that are adversely affected by the exercise of power by ICASA. In considering and approving the sharing arrangements applied for, sec 3 in general and sec 3(5) of PAJA require a fair process.

[124] The sharing arrangements approved by ICASA has the capacity to adversely affect the rights of other MNOs who have licences for spectrum. What makes it clear that there should have been public participation in this instance is the procedural rationality consideration referred to by TelkomSA. ICASA imposed caps on Vodacom and MTN. But the sharing applied for has the effect of enlarging the spectrum available to the sharing participants, particularly MTN. Vodacom and affected parties have a right to be heard in the application process on the impact this will have on competition between the MNOs. The process followed was flawed. And the need to assign the guard bands to make the pooling efficient places the need for public participation beyond doubt.

[125] As the guard bands are not available or of use to parties other than the licence holders of contiguous spectrum band, the interest of the public in assigning such spectrum relates to the impact of the pooled spectrum on outside parties like Vodacom. The larger the spectrum pooled the faster the service provided by means of it. It provides a competitive edge for the pooling participants. And

affected parties are required to be notified of their right to make submissions and to be heard on this. This was not done.

## **ASSESSMENT OF THE IMPACT ON COMPETITION**

- [126] There are two considerations in this regard. The first is that ICASA did not consider the impact of sharing arrangements applied for on competition in the ICT sector. It is limited to the question whether ICASA in fact considered the information on competitiveness submitted by the applicants for sharing approval. This is the issue I deal with first.
- [127] It is accepted by most parties (excluding Liquid that was silent on the topic), that ICASA should have conducted a competition assessment, and the respondents contend that such an assessment was in fact done.
- [128] The duty to conduct a competition assessment arises from section 2(f) of the ECA that enjoins ICASA to achieve the purpose of *“promotion of competition in the ICT sector”*.
- [129] ICASA contends that *“it was alive to the issue of keeping alive the competitiveness of each party”*. To this end, the applicant for sharing of spectrum were requested to provide details on how the pooling or sharing arrangements as applied for, in particular, would promote competition as per the object of the ECA in terms of section 2(f).

[130] The need for ICASA to take into account competitiveness was established in case law that preceded the auction proceedings in March 2022 (see **Telkom SA SOC Ltd v Mncube NO and Others; Minister of Telecommunications v ICASA** [2016] ZAGPPHC 883 (30 September 20216); **Telkom v ICASA** [2021] ZAGPPHC 120 (8 March 2021).

[131] In ICASA's submission that served before its Council, the reference to the Promotion of the Objects of the ECA reads as follows:

*“Therefore the Authority is comfortable that the RFS pooling arrangement between the parties does not in any way exclude other licensees from entering into similar arrangements with the parties. The allowance for potential spectrum sharing arrangements with other licensees by the parties ensures fairness and openness which promotes competition within the ICT sector.”*

[132] Vodacom contends that this is insufficient to establish an assessment of the information provided. This only addresses the competitiveness assessment of the submissions by MTN CELL C and Liquid. The approval of the pooling arrangement indicates an awareness on the part of ICASA of the consequences of the application on competitiveness in the sector. Far from indicating that ICASA did not consider competitiveness, the quoted paragraph is consistent with ICASA having considered it. A failure to set out the content of submissions made does not mean that everything was not considered by ICASA. On this score Vodacom's contention is not accepted.

[133] But it brings me to the second consideration at play. Even if their submissions were duly considered, this does not deal with the question whether the public,

including Vodacom, should have been granted an opportunity to make representations in this regard. As they had a right to be heard, and were not afforded a hearing or an opportunity to make representations, the process was procedurally unfair.

#### ESTABLISHING A RIGHT TO REVIEW RELIEF

[134] The Constitutional Court has found that, for purposes of a prima facie right to interim interdictory relief, it is sufficient for a party to assert a right adversely affected by the exercise of public power which that applicant seeks to review and set aside (**Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd** supra at paragraphs [212] to [214]; [282] to [283]).

[135] A similar proposition is stated by the Constitutional Court in **South African Informal Traders Forum and Others v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg and Others** 2014 (4) SA 371 (CC) at paragraph [25].

[136] In the **Vaal River Development** matter the following was stated at paragraph [64]:

*“Before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review. The claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict.”*

See **EFF v Gordhan** *supra* at paragraph [42]:

*“The enquiry is of necessity provisional because the available evidence is usually incomplete, untested under cross-examination (where there are disputes of fact), and the case may yet be more fully developed.”* (See **Vaal River Development** *supra* at paragraphs [64] and [272]).

[137] MTN and Cell C contend that the applicant does not require a right to a review to be preserved through an interim interdict. It has that right in any case. The requirement is more stringent in that it requires a right to a review which is facing irreparable harm unless protected by an interim interdict. I disagree.

[138] The requirement to establish a reasonable apprehension of irreparable harm covers this concern raised by the respondents. To require the assertion of a risk of irreparable harm as part of the *prima facie* right is conflating the requirements for an interim interdict. The apprehension of irreparable harm is a separate requirement that needs to be established in any case. If it were part of the *prima facie* right, the need for that requirement in the case law for

interim interdicts would fall away. There is no need to expand the requirements for an interim interdict in this way.

[139] The respondents contend that the applicant has the onus to show that in Part B proceedings it will succeed with relief precluding the pooling. MTN and Cell C contend that, even if Vodacom succeeds in setting aside the approvals, the likely outcome of those proceedings in that event would be that the setting aside would be suspended pending a remittal to ICASA. As that would not in itself prohibit the pooling, it is contended that no *prima facie* right is established for interim relief

[140] The respondents place too high a burden on the applicant in establishing its *prima facie* right for interim relief pending a review. It is sufficient to establish good prospects of obtaining review relief in Part B proceedings without having to show what the Review Court would find other than setting aside the impugned administrative actions.

## INFRINGEMENT OF A RIGHT TO FAIR COMPETITION

[141] The second basis on which a *prima facie* right is asserted by Vodacom is based on a right to fair competition. Vodacom relies on **Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and Another** 2016 (6) SA 1 (SCA) at paragraph [16] where the common law right to fair competition is described as follows:

*“As a general rule, every person is entitled freely to carry on his trade or business in competition with his rivals. But the competition must remain within*

*lawful bounds. If it is carried on wrongfully, in the sense that it involves a wrongful interference with another's rights as a trader, that constitutes an injuria for which the Aquilian action lies if it has directly resulted in loss."*

[142] Vodacom contends that particularly MTN has been provided with benefits that are unlawful in the sense of unlawful competition.

[143] There is a fundamental difficulty regarding the assertion of this right. Admittedly it is merely advanced by Vodacom as an adjunct to its primary contention for a prima facie right. But still the assertion of this right presupposes that the breach of statutory provisions by MTN, Cell C and Liquid translates into an actionable Aquilian claim in the hands of Vodacom.

[144] A finding of objective wrongfulness as against Vodacom requires more facts and a broader considerations than are available to this court. If the unlawful spectrum sharing is actionable by a competitor, the question arises why Vodacom should have the claim, when the same claim would lie in the hands of Rain (the seventh respondent) and Telkom SA (the sixth respondent). Further, Liquid is not alleged to be a thorn in the side of Vodacom in the sense that it is causing irreparable harm to Vodacom. But the interdict is sought against Liquid as well on the basis of unlawful competition. In considering objective unlawfulness Liquid features in two respects. If Vodacom were correct, that would give Liquid a similar claim against MTN and Cell C on the spectrum pooling to which it is not a party, while Vodacom would have a claim against Liquid based on the same principle on the pooling arrangement to

which Liquid is a party. And this while Liquid is not the focus of Vodacom's contention on unlawful competition.

[145] I further take into account that the MTN, Cell C and Liquid had written approvals for what was being done. Statutory authorisation will stand as valid until set aside by a court. To permit a claim for unlawful competition in such circumstances while the ICASA approvals are in place is inherently contradictory. This is not objectively reasonable. Unlawfulness is not established even on a *prima facie* basis. The second right asserted has not been established and is unpersuasive for purposes of Part A.

[146] CONCLUSION ON PRIMA FACIE RIGHT

[147] The *prima facie* right asserted by Vodacom, namely strong prospects of success in the review proceedings in Part B is established. Vodacom contends that it has established a clear right, meaning that the balance of convenience does not have to be established. On my analysis of the legal position, there is unlawfulness in respect of the approval process and the use of guard bands. That would represent a clear right.

### **IRREPARABLE HARM**

[148] MTN contends that Vodacom has not made out a case for irreparable harm. It suffers no prejudice through the respondents' utilisation of RFS on a shared or pooled basis. MTN states that Vodacom could not even, regarding the use

of guard bands, point to prejudice to Vodacom which is irreparable. The same sentiments are echoed by Cell C and Liquid. They stress that Vodacom has increased its market share since the auctions and only Cell C has had a slight drop in market share.

[149] MTN and Cell C and Liquid make the point that Vodacom has not alleged and established the risk of irreparable harm.

[150] Vodacom contends that it does not have to show actual harm, but “*only potential impending or continuing harm*”. (See **Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Ltd** 2017 (1) SA 613 (CC) at paragraph [30]).

[151] Vodacom has to establish a basis for why it contends that the potential or impending or continuing harm that it faces is irreparable. In **City of Tshwane Metropolitan Municipality v AfriForum and Another** 2016 (6) SA 279 (CC) at paragraphs [55] and [56] the Constitutional Court described the harm that ought to be established as follows:

*“[55] Before an interim interdict may be granted, one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing. It must not have taken place already. ...*

*[56] Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection. It is the tangible or intangible effect of deprivation or adverse action taken against someone. And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection, however much others might doubt its existence, relevance or significance. Ordinarily, the harm sought to be prevented through interim relief must be connected to the grounds in the main application.”*

[152] Vodacom contends that the growth of particularly MTN is at its expense and the risk of further harm continues. MTN contends that it was within Vodacom’s powers to make a similar application for sharing. It contends that the application is borne of regret at being “*left behind*” by MTN in this regard.

[153] Vodacom contends that, if it does not obtain interim relief, the passing of time might in itself be the reason why it does not succeed in the review proceedings, even if establishing a case for review (see **Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others** 2008 (2) SA 381 (SCA) at paragraph [31]).

[154] Vodacom further contends that harm is reasonably apprehended as spectrum is the tool used by mobile network operators to compete. Vodacom contends that it cannot quantify its losses arising from the advantage that MTN has obtained based on the pooled spectrum that it utilises to transmit and receive signal.

[155] I am not persuaded that the competitive advantage gained by MTN is at the expense of Vodacom. More evidence of such causation would be required. That does not mean that Vodacom does not face a reasonable apprehension of irreparable harm. I am satisfied that the position arising from the approval of shared spectrum may result in the risk to Vodacom that its review remedy is jeopardised, unless interim relief would be granted. In that sense, its apprehension of risk relates to irreparable harm.

[156] The counter to this contention by MTN and Cell C is that the approvals for the sharing of spectrum obtained from ICASA stand as valid until set aside on the **Oudekraal** principle. They argue that their conduct in transmitting and receiving signal on the shared spectrum must be deemed to be valid. There is therefore no bad faith and there is no unlawful conduct on the part of the respondents.

[157] The effect of the interim relief sought would be a *de facto* suspension of the operation of the approvals. In that sense the **Oudekraal** principle does not assist the respondents. However, the fact that direct relief against ICASA is not sought, i.e. a *de jure* suspension of the approvals, is relevant to the Court's overriding discretion.

#### **BALANCE OF CONVENIENCE**

[158] It is trite that where an applicant for interim interdictory relief asserts and establishes a clear right, the need to consider the balance of convenience attenuates. I have found that Vodacom has established a clear right.

However, this finding is based on my interpretation of the ECA and its relevant regulations.

- [159] If I am wrong in finding that a clear right has been established, then it is self-evident that I am satisfied that a prima facie right has been established. If I err in not dealing here with the balance of convenience, I deal with such considerations in the context of the court's overriding discretion.

### **NO ADEQUATE ALTERNATIVE REMEDY**

- [160] I have already found that the suggested internal remedies of section 17C of the ICASA Act and seeking interim relief before the Competition Tribunal are not adequate or appropriate in this matter.
- [161] ICASA has mooted a third alternative remedy, namely an expedited review. However, Vodacom's suggestion to this effect before the meeting with the DJP was refused. If the respondents were averse to an expedited review, then they cannot now seek to benefit from the opposite stance.
- [162] While an expedited review would take the court to the legality of the approvals, that would not mean that the relief sought in Part A would be before the review court. It would not. The applicant seeks the setting aside of the approvals. Whether interdictory relief were to be granted after a successful review does not flow from the relief in Part B as currently formulated. The review court would be exercising its just and equitable relief powers flowing from Sec 8 of PAJA. But such interdictory relief would not be on the same footing as the Part A relief sought.

- [163] I am satisfied that there is no adequate alternative legal remedy available to the applicant.

### **THE COURT'S OVERRIDING DISCRETION**

- [164] Granting interdictory relief is discretionary. It is trite that it is within a Court's discretion to grant or refuse interdictory relief, where the right to such relief has otherwise been established – See e.g. **JFE Sapela Electronics** supra at paragraph [ 28]. In that matter considerations of pragmatism and practicality informed the issue. See also **Steam Development Technologies 96 Degrees (Pty) Ltd v Minister, Department of Public Works and Infrastructure 2024 ZAECGHC 20 (16 February 2024)** where at para 8 the **Court** held that: -

*“Even if all these requirements are met, the Court still enjoys an overriding discretion whether or not to grant the interim interdict.”*

- [165] Having come so far, the applicant still needs to persuade the court to exercise its overriding discretion in favour of granting the interim interdict sought. It is at this juncture that the application falters. There are a number of considerations relevant to the exercise of the Court's overall discretion militating against granting the relief.
- [166] The overriding consequence of pooling of spectrum is the improvement of fast and reliable electronic communications. It has improved access for millions of members of the public to information for trade purposes , education etc.To

deprive the public of such benefit is no small matter. They would be prejudiced. It is the grass that gets trampled when elephants fight.

[167] The improvement in services has come at great cost, incurred under an approval that has not been set aside. Due to the delay, particularly MTN has made large capital investments in infrastructure based on the approvals obtained from ICASA. During argument reference was made to the installation of infrastructure at more than a thousand locations in the country.

[168] Cell C has restructured its business model, based on the approved sharing of spectrum and contends that it faces devastating consequences if the interdict were to be granted. It goes so far as stating that its viability is threatened.

[169] Cell C caters for customers who fall in the poorer segment of society. Cell phones are their primary and often only means of communication. An interdict threatens to cut off this lifeline, placing livelihoods, education and access to information at risk.

[170] I take account of the counter-argument that such consequences are the result of the unlawfulness of the shared use regime. And it flows from the rule of law as pillar of our constitutional democracy.

[171] That is not the end of the debate. I have a duty to consider justice and equity in terms of sec 8 of PAJA.

[172] ICASA as regulator is satisfied that the spectrum sharing is lawful. The MNOs are therefore not undermining the regulator. Although ICASA has been

remiss in many respects, it is responsible for monitoring the ICT sector. It failed to call for public participation, in the limited sense I have referred to, and having approved the sharing, failed to issue and register licences based on its approval of spectrum sharing.

[173] The respondent MNOs acted *bona fide* in applying in terms of current regulations for the approval of the sharing of radio frequency spectrum and such applications were successful. From the vantage point of the respondent MNOs they had done what they could, relying on published regulations, to obtain official approval for what they are doing at present. And ICASA as regulator contends that official approval is in place. I disagree, but at least the regulator has been satisfied.

[174] I further taken into account that it was within Vodacom's powers to apply for a sharing agreement with another MNO on a similar basis as those applied for as the applications made by the respondent MNOs. The fact that Vodacom did not do so may underpin why it now seeks redress through interim relief. However, it was not deprived of the chance of similarly applying for sharing in the hope of obtaining the same type of benefit that it now begrudges MTN as having obtained. And despite the benefit to MTN, Vodacom's market share has also improved.

[175] The relief Vodacom seeks is overbroad. The application not merely seeks an interdict as far as transmitting of signal is concerned but also of "*using*" of the pooled spectrum. The respondents have contended that the relief would

interfere with roaming arrangements and agreements to the detriment of the public.

[176] Vodacom contends that this is a fallacious argument as the use of roaming does not entail transmission of signal. It is a transmission of signal which is the focus of the interim interdict sought. However, the interdict is not limited to transmission. The reference in the relief to the interdicting of “*using*” of the pooled spectrum does to my mind interfere with roaming agreements. The relief sought is consequently overbroad. An invitation was extended to the Court to delete the word “*using*”, but it is not for the Court to formulate the relief which the applicant seeks.

[177] A further consideration militates against the granting of the relief, namely the OUTA principle. The OUTA principle was argued by all the parties. Vodacom contends that ICASA is *functus officio*, that no relief in Part A is sought against ICASA, and that the issue of separation of powers harm does not arise. On the face of it, there is substance to this contention. However, the restraint sought seeks to undo the approvals granted by ICASA for the transmitting and receipt of signal on the pooled radio frequency spectrum listed in the notice of motion. Had the applicant sought an interim interdict against ICASA suspending its approvals to share, pending to setting aside the Part B proceedings, the restraint provisions flowing from the suspension would have read the same. There is therefore an effective suspension of the approvals implicit in the relief sought in Part A. That constitutes separation of powers harm as ICASA would be hamstrung by the interdict sought in effective monitoring and regulating of the approved sharing of spectrum.

[178] I am concerned about the potential for interference of an interim interdict with the exercise by OUTA of its supervisory role of approved shared spectrum in the public interest.

[179] Licensees in respect of radio frequency spectrum are liable for fees based per MHz of spectrum licensed to them. If the respondents are restrained from utilising the pooled radio frequency spectrum, this has the potential of interfering with the power of ICASA to recover fees for the approved spectrum blocks. If use of shared spectrum is interdicted, non-payment of fees that are due to ICASA is on the cards. There is therefore a risk of separation of powers harm.

[180] The applicant contends that, as an alternative, the current proceedings constitute the “*clearest of cases*” as required by OUTA before a Court would grant an order which interferes with the exercise of executive power. It is not the clearest of cases, in my view. No direct relief is sought against ICASA and the effect on ICASA of an interdict against the respondent MNOs is a matter of inference. My finding of unlawfulness and a clear right flow from my interpretation of the legislation. The “clearest of cases” requirement in OUTA point to an inevitable and obvious resolution of a dispute based on the facts. This is not such a case.

[181] The cumulative effect of the aforesaid considerations is that, despite the applicant establishing the elements required for an interim interdict, the Court, in the exercise of its overall discretion, declines to grant the interim relief.

[182] In the premises I make the following order:

1. The application for interim interdictory relief in terms of Part A of the Notice of Motion is dismissed with costs, such costs to include the costs of two counsel, on Scale C.



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**LABUSCHAGNE J**  
JUDGE OF THE HIGH COURT