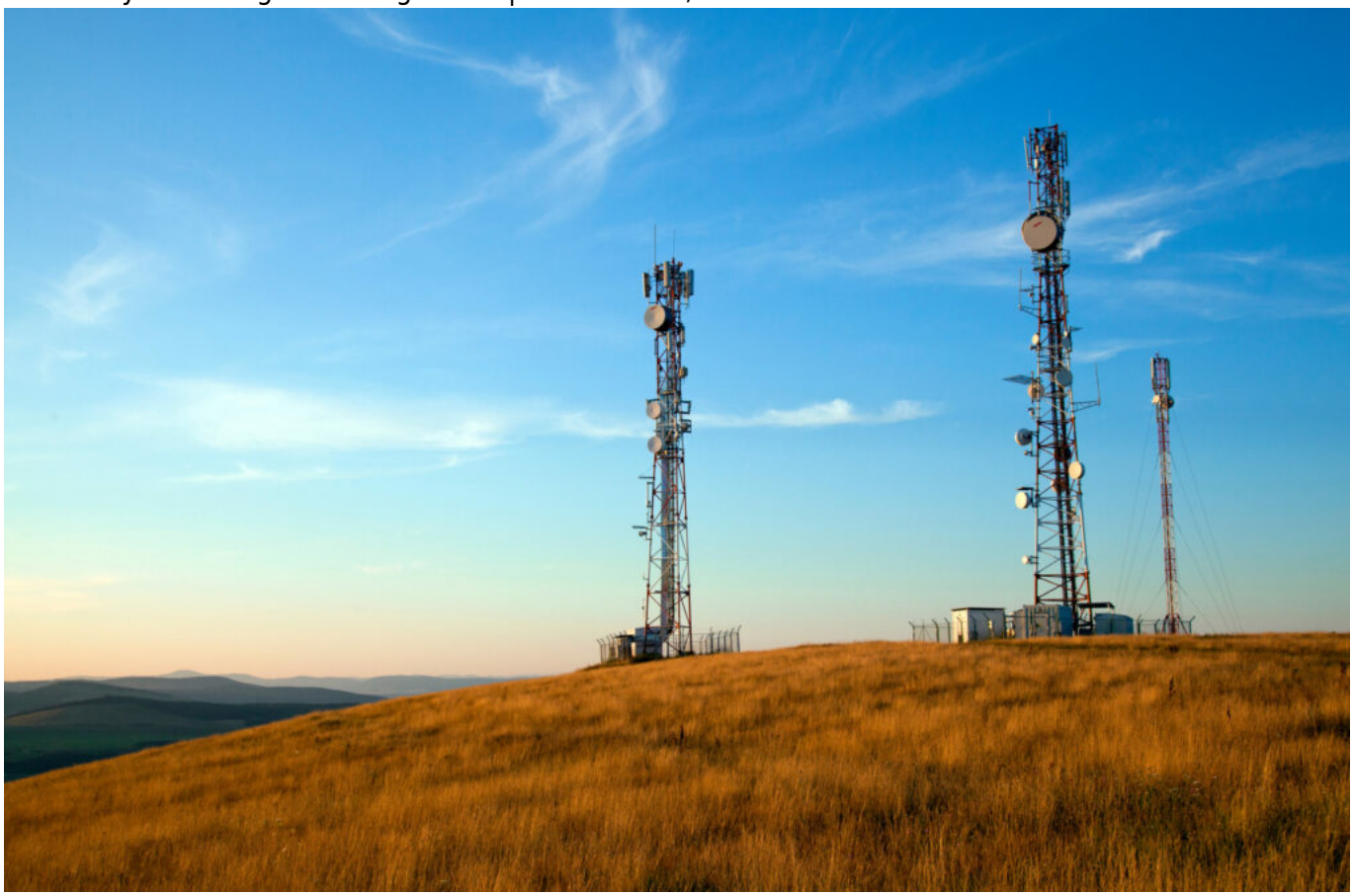
MTN TRIUMPHS IN LEGAL BATTLE OVER ICASA'S MOBILE BROADBAND REGULATIONS

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In a landmark ruling with far-reaching implications for South Africa's telecommunications landscape, The High Court Of South Africa, Gauteng Local Division, Pretoria has set aside critical provisions of the Mobile Broadband Services Regulations, 2021. The case, brought by Mobile Telephone Network ("**MTN**"), challenged the legality and rationality of the regulations published by the Independent Communications Authority of South Africa ("**ICASA**"), which aimed to address competition concerns in the mobile sector.

Background: The Regulatory Framework

ICASA's 2021 regulations sought to define retail and wholesale markets, assess market effectiveness, and impose pro-competitive conditions on operators deemed to have significant market power. These measures were intended to foster fair competition and improve consumer outcomes in a sector dominated by a few major players. However, MTN,, one of South Africa's largest mobile network operators, argued that the regulations were fundamentally flawed. According to MTN, ICASA relied on outdated data, misapplied economic tests, and failed to follow proper administrative procedures.

Legal Challenge

MTN's application was grounded in the *Promotion of Administrative Justice Act* 3 of 2000 ("**PAJA**") and the *Electronic Communications Act* 36 of 2005 ("**ECA**"). The company contended that ICASA's determinations regarding market definitions, ineffective competition, and significant market power

were irrational, procedurally unfair, and beyond the authority granted by the ECA.

The central legal question was whether ICASA had complied with its statutory obligations in defining markets and imposing regulatory conditions, and whether its decisions were rationally connected to the information before it.

Key Issues Raised by MTN

MTN's critique of ICASA's methodology was multifaceted:

- **Market Definitions**: MTN challenged the segmentation of retail markets into urban and rural regions, arguing that mobile services are consumed nationally. ICASA's failure to apply the Small but Significant Non-transitory Increase in Price ("**SSNIP**") test further undermined its market analysis. The SSNIP test is a widely recognised analytical tool used in competition law to define the boundaries of a relevant market. It evaluates whether a hypothetical monopolist could profitably impose a small (typically 5–10%) but lasting increase in price for a product or service without losing customers to alternative options. If consumers would switch in sufficient numbers to make the price hike unprofitable, the market definition is considered too narrow and must be expanded to include those substitutes. Conversely, if the price increase remains profitable, the market is appropriately defined. This test is crucial for assessing market power and determining whether competition is effective within a given segment. In regulatory contexts. such as ICASA's market inquiries under the ECA, the SSNIP test helps ensure that market definitions are grounded in consumer behaviour and economic realities.
- **Site Access Market**: The exclusion of micro-sites from the site access market lacked a rational basis, according to MTN. This is due to the fact that the decision to exclude micro-sites was based on the 'equivalent coverage and capacity' test, which does not engage the SSNIP test.
- **Roaming Market**: ICASA's separation of roaming into coverage and capacity markets ignored the functional interdependence of these services.
- **Vertical Relationships**: MTN accused ICASA of conflating "vertical integration" with "vertical relationships," leading to erroneous findings of significant market power.

ICASA defended its approach by referencing stakeholder submissions and international best practices but conceded several errors during the proceedings. Notably, the Competition Commission had also expressed concerns about ICASA's market definitions and regulatory strategy.

Court Finding

The High Court found that ICASA's market definitions were not supported by a proper application of the SSNIP test or its own guidelines. Specific flaws included:

- that the regional division lacked sufficient justification **(**Retail Market Segmentation**);**
- that the exclusion of relevant infrastructure was irrational, and (Site Access Market)
- that the artificial separation of coverage and capacity was unjustified (Roaming Market).

Moreover, ICASA failed to consider mandatory factors under section 67(4A) of the ECA, such as market shares and dynamics. Section 67(4A) of the ECA plays a pivotal role in shaping the regulatory framework governing competition in the telecommunications sector. It mandates that ICASA, following a formal inquiry, must define relevant markets and market segments through prescribed

regulations. Where competition is found to be ineffective, and where any licensee is determined to hold significant market power within those markets, ICASA is obligated to impose appropriate and sufficient pro-competitive licence conditions. This statutory provision ensures that regulatory interventions are not arbitrary but are grounded in a structured analysis of market dynamics, competitive conditions, and the relative influence of market participants. It serves as a safeguard against monopolistic practices and promotes a level playing field by compelling dominant operators to adhere to conditions that foster fair competition

MTN argued that the findings of ineffective competition and significant market power were based on outdated data and unsupported assumptions. The court also noted procedural unfairness, including ICASA's failure to disclose relevant information and adequately consider stakeholder representations.

The Verdict

The court ordered that Regulations 3, 5, 6, and 7 of the Mobile Broadband Services Regulations, 2021, be reviewed and set aside with immediate effect. These regulations relate to market definition, effectiveness or competition, market power determination, and pro-competitive terms and conditions.

Implications for the Telecom Sector

The court's decision in MTN's case against ICASA is a big moment for South Africa's telecom industry. It shows that regulators must follow fair procedures and use solid evidence when making rules. ICASA made mistakes by using old data and not properly checking how the market works, which led to unfair regulations. The court reminded ICASA that it must be more careful and transparent when setting rules. As South Africa builds better digital services, it's important to find the right balance between strong regulation and allowing innovation. This case could influence how future telecom rules are written and challenged.