TELKOM WANTS TO INTERDICT RETURNING EMERGENCY SPECTRUM TO ICASA: WHY TELKOM (MTN AND VODACOM) LOSING IS IN THE PUBLIC INTEREST

Category: Administrative and Procurement Law,Commercial Law,Infrastructure and Telecommunications,Technology Law
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Telkom launched legal proceedings against South Africa's telecommunications regulator, the Independent Communications Authority of South Africa ("ICASA"), in early October 2021. Telkom wants to interdict returning emergency spectrum to ICASA. ICASA had licensed this spectrum to Telkom, MTN, Vodacom and others at the onset of the Covid-19 lockdown in early 2020 ("the Lockdown"). MTN and Vodacom support Telkom's litigation. This article argues why it is in the public interest that their litigation must fail.

BACKGROUND

From the Lockdown's outset, "work-from-home" became the norm. Access to the internet became even more important for those working and studying from home. The quickest and easiest way to access the internet in South Africa was, and still is, through mobile broadband.

Mobile broadband is delivered using radio frequency spectrum. Spectrum is used for many purposes,

for example to broadcast radio and television signals. But internet connectivity, using "data", has probably become the most important use for frequency spectrum.

Figure 1: The electromagnetic spectrum and its uses

ICASA administers South Africa's radio frequency spectrum. When the Lockdown started, the Government made use of the Disaster Management Act to issue various regulations. Ministers were also empowered to issue regulations related to their area of responsibility.

Realising the importance of internet connectivity for consumers during the Lockdown, the Minister of Communications and Digital Technologies ("the Minister"), on 26 March 2020, issued directions to ICASA relating to electronic communications, broadcasting and postal services ("the Directions").

The Directions dealt with availability of communications and digital services during the Lockdown, and allocated ICASA tasks regarding frequency spectrum. This is because ICASA regulates the use of frequency spectrum in South Africa. For example, it passes regulations that determine what certain parts (bands) of the frequency spectrum may be used for. So, as shown on Figure 1 above, some frequency bands may be used for broadcasting services, others may be used for military communications and some may be used for mobile telecommunications, for example the data used on cell phones.

The process of regulating frequency spectrum can be slow and sometimes full of red tape. It is for this reason that the Minister issued the Directions. Regarding licensing frequency spectrum, she said:

"*To the extent possible, the Authority must relax spectrum regulations to enable the temporary licensing of all available spectrum bands including the unassigned high demand spectrum for [the] duration of the COVID19 national disaster.*

The temporary assignment of the unassigned high demand frequency spectrum must be focused on those licensees that would be able to implement and use assigned frequency spectrum for [the] duration of the COVID19 national disaster on an expeditious basis. Frequency coordination and planning will be necessary to effect this assignment."[1]

ICASA, on 6 April 2020, issued regulations called the Information and Communications Technology ("ICT") COVID19 National Disaster Regulations ("the ICT Regulations"). The ICT Regulations dealt with several issues, the most important for purposes of this article are Regulations 6(3) to 6(7). They say:

(3) The following International Mobile Telecommunications (IMT) spectrum bands shall be made available for temporary assignment: 700MHz, 800MHz, 2300MHz, 2600MHz, and 3500MHz and shall be assigned in accordance with the criteria and conditions stipulated in Annexure A.

(4) The Authority shall from time to time publish details of further bands that are available for temporary assignment.

(5) Any prescribed fee, that would have been applicable to the bands identified in sub regulations (3) and (4), is waived.

(6) Subject to sub-regulation (7), any radio frequency spectrum assigned temporarily to licensees in terms of sub regulations (3) and (4) shall be revoked upon the expiry of three (3) months of termination of the National State of Disaster.

*(7) No radio frequency spectrum licence assigned pursuant to sub-regulations (3) and (4) shall be valid after 30 November 2020.**[2]***

ICASA also invited mobile network operators ("MNOs") to apply for temporary emergency radio frequency spectrum ("Emergency Spectrum"). Several MNOs, including Telkom, MTN and Vodacom, were assigned Emergency Spectrum in various frequency bands.[3] These assignments were subject to certain licence terms. For example, Telkom's Temporary Radio Frequency Spectrum Licence ("the Temporary Licence") has a few pertinent terms.

Telkom's Temporary Licence, issued on 20 April 2020, records how long the licence is valid for. It says:

2.1. Subject to regulation 6(6) of the Information and Communications Technology ("ICT") COVID-19 National Disaster Regulations as published on 06 April 2020 ("ICT COVID-19 Regulations"), any radio frequency spectrum assigned temporarily to licensees shall be revoked upon the expiry of three (3) months post termination of the National State of Disaster.

2.2. No radio frequency spectrum licence assigned pursuant to the ICT COVID-19 Regulations shall be valid after 30 November 2020.

5.10 The Authority reserves the right to amend, suspend, revoke, or withdraw its authorisation as it sees fit.

With the Pandemic clearly not abating, on 27 November 2020, ICASA published amendments to the ICT Regulations. It then added a revised Regulation 6(5), which now required MNOs with Temporary Licences to start paying frequency spectrum licence fees. It said:

(5) Licensees shall pay pro-rated radio frequency spectrum licence fees, in terms of the Radio Frequency Spectrum Licence Fees Regulations, 2010, for the period commencing on 1 December 2020 to 31 March 2021, in relation to the bands specified in sub-regulations (3) and (4).

It also added a revised Regulation 6(7), which extended the Temporary Licence period. It said:

(7) No radio frequency spectrum licence assigned pursuant to sub-regulations (3) and (4) shall be valid after 31 March 2021.

It is significant that 31 March 2020 was the date by when ICASA had hoped to have completed its high demand frequency auction. This auction was due to permanently release desperately needed spectrum, some of which had been assigned as part of the Lockdown temporary licensing process.[4]

The Lockdown continued in 2021 and, on 31 March 2021, ICASA published further amendments to the ICT Regulations. Regulations 6(5) and 6(7) were revised again and extended the Temporary Licences. They said:

(5) Licensees shall pay pro-rated radio frequency spectrum licence fees, in terms of the Radio Frequency Spectrum Licence Fees Regulations, 2010, for the period commencing on 1 April 2021 to 31 May 2021, in relation to the bands specified in sub-regulations (3) and (4).

(7) No radio frequency spectrum licence assigned pursuant to subregulations (3) and (4) shall be valid after 31 May 2021.

On 22 April 2021, ICASA initiated a consultation process with a view to reviewing the ICT Regulations. It invited submissions on a range of aspects, including whether it should extend the Temporary

Licence duration beyond 31 May 2021. [5] Fifteen interested parties, including Telkom and MTN, made submissions in response to this invitation.

After the consultation process of April 2021, ICASA then, on 28 May 2021, published revisions to the ICT Regulations. It revised Regulations 6(5) and 6(7) and inserted an additional regulation – 6(7A). The revised Regulations said:

(5) Licensees shall pay pro-rated radio frequency spectrum licence fees, in terms of the Radio Frequency Spectrum Licence Fees Regulations, 2010, for the period commencing on 1 June 2021 to 31 August 2021, in relation to the bands specified in subregulations (3) and (4).

(7) No radio frequency spectrum licence assigned pursuant to subregulations (3) and (4) shall be valid after 31 August 2021.

(7A) Notwithstanding the provisions of sub-regulations (6) and (7), the Authority may revoke the temporary radio frequency spectrum licences issued in terms of these Regulations earlier than the dates contemplated in sub-regulations (6) and (7), by publishing a 30-day notice in the Gazette.

ICASA then issued a further amendment to the ICT Regulations on 31 August 2021. It made a few amendments, but the amendment to Regulation 6(7) is relevant. It said:

(7) No radio frequency spectrum licence assigned pursuant to subregulations (3) and (4), will be valid after 30 November 2021. Any Licensee assigned with radio frequency spectrum pursuant to subregulations (3) and (4) must wind up their operations, on or before 30 November 2021. The Authority will not extend any further, the utilisation of the radio frequency spectrum contemplated in sub-regulations (3) and (4), beyond 30 November 2021.

In September 2021, Telkom, concerned by the deadline imposed by the 31 August 2021 amendments, exchanged correspondence with ICASA. These exchanges came to nought. Telkom then launched urgent court proceedings on 5 October 2021, with the objective of interdicting ICASA from requiring Temporary Licence holders to cease using the Emergency Spectrum from 30 November 2021. It wants ICASA to extend the Temporary Licences until the end of the national state of disaster or the finalisation of the high demand spectrum auction process.[6]

TELKOM'S ARGUMENTS

Telkom raises various arguments regarding why it should be allowed to continue using the Emergency Spectrum.[7] Its arguments include:

- When the Pandemic began, there were huge increases in demand for data.[8] These increases impacted customer experience and overall network quality. If the Emergency Spectrum is revoked now, this would have a catastrophic effect on Telkom's network performance and its customers ("the Performance Argument").
- There has been improved coverage in underserviced (rural) areas because it has been able to use the 700 MHz and 800 MHz spectrum. If the Emergency Spectrum is revoked, it will adversely affect customers in underserviced areas ("the Rural Area Argument").
- The process that ICASA followed to come to the decision to revoke the Emergency Spectrum was neither lawful, fair nor reasonable because:
    - ICASA failed to consult the public, including Telkom, before it took the decision;
    - ICASA took account of irrelevant considerations and disregarded relevant considerations;
    - the decision was not rationally connected to the purpose for which it was taken, the purpose of the empowering legislation and the information which was before ICASA;

and[9]
    - it is entitled to a stable ICT sector and no undue influence on its commercial activities.

("the Unreasonable Decision Argument")

- Revoking the Emergency Spectrum will have a significantly prejudicial effect on Telkom, other mobile operators, the greater public and the functioning of the national economy[10] and will have irreversible consequences ("the Irreversible Consequences Argument").
- There will be no adverse consequences if the status quo is maintained until the high demand spectrum is permanently licenced, for example until a spectrum auction is held ("the Status Quo Argument").
- There will be "digital load-shedding", employees will be forced back to offices, exposing them to COVID-19 and the economic recovery agenda will be undermined ("the Digital Load-shedding Argument").[11]
- The Emergency Spectrum will lay dormant until such time that ICASA finalises the permanent licensing of the spectrum ("the Dormant Spectrum Argument").[12]

This is a distillation of the main arguments that Telkom raises. Each is dealt with in more detail below.

WHY TELKOM'S ARGUMENTS HAVE NO MERIT

The Performance Argument

Telkom's Performance Argument is that network operators had to cope with sudden and dramatic increases in demand for broadband[13] and that the huge increase in data demand impacted the user experience and overall network quality.

Telkom says that its mobile network data traffic jumped from almost 72 Peta Bytes in March 2020 to more than 87 Peta Bytes in April 2020. It is important to remember that South Africa's lockdown started on 26 March 2020 and Telkom and the other Temporary Licence holders received their Emergency Spectrum licences on 20 April 2020. Significantly, Telkom explains that during 2021 (the 8 months from January to August), in 4 of the 8 months , demand did not exceed 85 Peta Bytes.[14]

Telkom was able to cope with the demand for 87 Peta Bytes, between 26 March 2020 and 20 April 2020, without the Emergency Spectrum it has since received and, importantly, without "digital load-shedding" (It is assumed that this would have been the same for other MNOs). Telkom does not reveal what demand was during the worst stages of the lockdown during 2020. What we do know is that for four of the 8 months of this year, demand exceeded 85 Peta Bytes, reaching 92 Peta Bytes in one month – July 2021. We are not told what the exact amounts were for the other three months that were over 85 Peta Bytes, but if they were below 87 Peta Bytes, then Telkom would have still coped, even without Emergency Spectrum.

Importantly, as much as Telkom says data traffic reached 87 Peta Bytes in March and April 2020, it does not disclose what the critical upper limit of its network was or is. This would allow the Court hearing the current litigation to assess whether Telkom's network could have coped with, for example, 87 Peta Bytes, 95 Peta Bytes or 150 Peta Bytes. Without disclosing to the Court, even on a confidential basis, what its network's upper data traffic limit is, how is the Court to accept that the situation was, and still is, critical and that Telkom will suffer irreparable harm?

Figure 2: South African Telecommunications Sentiment Index 2020, Brandseye & Deloitte

Interestingly, as is evident from Figure 2 above, if MNOs were under pressure, especially in the period 26 March to 20 April 2020 when Telkom says that network operators were impacted because "*data demand impacted the user experience and overall network quality*", complaints are likely to have increased. Instead, complaints regarding MNOs' networks declined during this period.

It seems therefore, that Telkom has not provided sufficient evidence to demonstrate that it and other MNOs faced dire and critical circumstances before the Emergency Spectrum was issued. Telkom has not proved that, in fact, it is the Emergency Spectrum that has allowed it to maintain the public's access to mobile data, during the Lockdown. It seems that, from decreasing network complaints during March and April 2020, Telkom and the other MNOs coped well with the increased data demand, importantly, without Emergency Spectrum.

The Rural Area Argument

Decent, affordable access to broadband in underserviced (rural) areas is an absolute priority. It is crucial that this digital inequality be resolved as a matter of urgency. It is an economic imperative.[15]

Telkom has long been aggrieved at the fact that it has not been assigned sub-1 GHz frequency spectrum.[16] In order to resolve this, Telkom hopes to eventually secure frequency spectrum in the 700 MHz and 800 MHz bands ("the sub-1 GHz band"). When issuing Telkom a Temporary Licence, ICASA assigned it 40 MHz of sub-1 GHz band spectrum.

As Telkom says, and as is widely acknowledged in the industry, sub-1 GHz band frequency spectrum "*has propagation characteristics that enable the efficient coverage of distance and inbuilding penetration*." This would make it ideal for use in rural, underserviced areas because it covers a wider area. Unfortunately, as Telkom has argued in previous interdicts and the current interdict against ICASA, it is impossible to optimally deploy mobile systems in the sub-1 GHz spectrum bands, in all the critical areas of a network.[17] This is because much of the sub-1 GHz band spectrum is still being used by broadcasters and must still be transferred away from them through a digital migration process. In essence, Telkom has regularly argued that this sub-1 GHz spectrum is unavailable: one of the bases it used to successfully interdict ICASA's most recent spectrum auction attempt, published in late 2020.

What is not clear from Telkom's Rural Area Argument, is how much of the sub-1 GHz band was deployed for use in rural areas. Telkom says that 45% of its intended sites "*had to be replanned and re-acquired after interference studies were done together with Sentech.*"[18] Whilst it is not clear what this means and whether these sites could eventually be used after replanning, it is not possible to tell what proportion of the other 55% of the sites, that did not experience interference, were in rural areas. Further, Telkom does not tell us how much of the data traffic over that 55%, related to consumers in rural or underserviced areas.

It is, of course, possible that Telkom used Emergency Spectrum in the 2300 MHz, 2600 MHz and 3500 MHz bands in rural areas, but it has not told us whether it did indeed do so and, if so, how much of the data traffic could be attributed to consumers in rural areas. Bald claims that the Emergency Spectrum benefits users in rural areas, without evidence to support such claims, are not sufficient to support an argument that keeping the Emergency Spectrum is in the public interest. If the sub-1 GHz spectrum cannot be used in any meaningful way, why push to keep it?

In reality, the long-term benefits for consumers in rural areas would be better served by ensuring that all the high demand spectrum, especially the sub-1 GHz spectrum, is available for licensing, ideally through a spectrum auction. Such an auction would impose licence terms and conditions requiring that awarded spectrum first be rolled out in rural and underserviced areas, before being deployed in urban areas.[19] These licence terms and conditions would bring more certainty to the deployment of broadband in rural areas, than leaving rural area broadband roll out to a Temporary Licensee's discretion. This is because urban areas are simply more profitable and, without any legal obligation to do so, licensees are likely to delay any rural area roll out.

A further consideration is that any delays in making the spectrum available for permanent licensing, is that such delays then delay the licencing and launch of the contemplated Wireless Open Access Network ("WOAN"). The intention behind the WOAN is to introduce service-based competition. Any delay in the WOAN's launch, delays the entry of another competitor for the current MNOs. Such delays benefit them. This is because a competitor like the WOAN is likely to result in further reductions in the cost of data for consumers, with a concomitant reduction in profits for the existing MNOs.

Interestingly, Telkom argues that MNO customers have benefitted from price decreases that have been passed onto them during the Lockdown. The reality is that after South Africa's Competition Commission released its *Data Services Market Inquiry* in December 2019, [20] it imposed incremental price decrease obligations on MNOs – MTN and Vodacom, compelling them to reduce their data prices by 30-50%.[21]

So, it appears that Telkom has not provided sufficient evidence to show that underserviced areas benefit from it retaining the Emergency Spectrum. In fact, as is argued above, the sooner the high demand spectrum is permanently licenced, the more quickly we will see actual measurable benefits for consumers in rural areas.

The Unreasonable Decision Argument

Telkom argues that ICASA failed to consult the public, including Telkom, before it took the Decision. This is difficult to accept. ICASA published the ICT Regulations on 6 April 2020. They were unequivocal regarding the Temporary Licences' duration. It is necessary to repeat, here, what they said:

(6) Subject to sub-regulation (7), any radio frequency spectrum assigned temporarily to licensees in terms of sub regulations (3) and (4) shall be revoked upon the expiry of three (3) months of termination of the National State of Disaster.

(7) No radio frequency spectrum licence assigned pursuant to sub-regulations (3) and (4) shall be valid after 30 November 2020.

Simply put, Regulations 6(6) and 6(7) say that the Temporary Licences will be valid until 3 months after the National State of Disaster ends (in layperson's terms – 3 months after the Lockdown ends). But, and this is a big but, if the National State of Disaster continues beyond 30 November 2020, then the Temporary Licences end on 30 November 2020. Those MNOs who were awarded Temporary Licences accepted this without any complaint.

ICASA extended the Temporary Licences' duration on three more occasions: on 27 November 2020, 31 March 2021 and 31 May 2021. In the May 2021 extension, it emphasised that "*the Authority may revoke the temporary radio frequency spectrum licences issued in terms of these Regulations earlier*

than the dates contemplated in sub-regulations (6) and (7), by publishing a 30-day notice in the Gazette." Significantly, on none of these three occasions, did any of the Temporary Licence holders raise any objections, especially given the very clear statement in the May 2021 extension.

The most important consideration, that demonstrates the extent to which ICASA went to consult with the public and Temporary Licence holders, was the consultation process initiated on 22 April 2021. This consultation process included a request for comment on further extensions of the Temporary Licences. Despite ICASA's publication that 31 August 2021 would be the termination date for all Temporary Licences, again, no Temporary Licence holders took issue with this.

To say that ICASA failed to consult before taking the Decision, cannot be correct. All Temporary Licence holders were always aware that their Temporary Licences were only valid until the date that ICASA stipulated in both their Temporary Licences, and in the ICT Regulations. How much more was ICASA supposed to consult? It would be unreasonable for it to go further than it did.

Telkom's argument is similar to one raised in the 2017 United Kingdom case of *Hutchinson 3G UK Limited & British Telecommunications PLC and Others v Ofcom*.[22] In this case Ofcom, the United Kingdom's telecommunications regulator, undertook a spectrum auction process. Early in the process, Ofcom decided to take a particular approach regarding contiguous spectrum arrangements. It later changed its mind regarding the approach, but recorded this new approach in the next draft of its regulations. British Telecommunications argued that Ofcom failed to properly consult on this changed position. The Judge, in essence, said that an experienced licensee like British Telecommunications, advised by a phalanx of lawyers and other technical advisors, would have understood what the changes meant. Similarly, Telkom, certainly backed by a highly experienced and competent team of legal and technical advisors, would have been aware of ICASA's position. If they had been unclear about ICASA's position regarding when the Temporary Licences terminated, they would have been wise to clarify this when the ICT Regulations were first published, or when they received their Temporary Licences.

Given the extent to which ICASA went to be unequivocal in the ICT Regulations regarding the Temporary Licences' duration, and to consult further in April 2021 on the same topic, it cannot realistically be argued that the process ICASA followed was unfair.

Telkom also argues that ICASA took account of irrelevant considerations and disregarded relevant considerations. It is unclear from Telkom's affidavit what the irrelevant and relevant considerations are. Without the required clarity, it is difficult, if not impossible, to provide a counter argument to this assertion.

Telkom also argues that the Decision was not rationally connected to (i) the purpose for which it was taken, (ii) the purpose of the empowering legislation and (iii) the information which was before ICASA. This cannot be correct.

Regarding point (i), the purpose of ICASA's decision to revoke the Temporary Licence holders' use of the Emergency Spectrum is to ensure that the Emergency Spectrum is available by the time the contemplated spectrum auction occurs in March 2022. There is a rational reason for this: ICASA wants to ensure that the spectrum is available for use by the successful bidders. This is a major consideration, as Telkom has successfully argued in the past, that it is irrational to have a spectrum auction when the spectrum is not available for use by the successful bidders (i.e., it is held by someone else). Telkom's own evidence appears to support the position that ICASA has taken:

- Telkom's argument on how long it takes to wind down the use of Emergency Spectrum is not clear, but Telkom appears to argue that even 3 months are insufficient to "*switch-off the use of*

temporary spectrum", with a further 7 months required "*after the switch-off to further optimise the network and manage customer experience fallouts.*"[23]
- If ICASA is to avoid the same argument that Telkom raised during the last spectrum auction litigation, namely that the spectrum is not available for use by the successful bidders, then it must ensure that the spectrum is available and capable of being used by the successful bidders, immediately after the auction ends. If the spectrum is not available, considering that Telkom could take any amount of time greater than 3 months, to wind down its use of the Emergency Spectrum, any other disgruntled interested party could challenge the auction process on the same grounds that Telkom has used in the past. It would be irresponsible of ICASA to not have learned from the previous legal challenges and allow itself to be attacked on the same grounds that were used in the past.

Regarding point (ii), that ICASA's decision was not rationally connected to the empowering legislation, again, Telkom's argument appears to be without merit. The overarching piece of legislation is the Electronic Communications Act, 26 of 2005 ("the EC Act"). Some of its objects include:

- encouraging investment, including strategic infrastructure investment, and innovation in the communications sector;[24]
- ensure efficient use of the radio frequency spectrum;[25] and
- promoting stability in the ICT sector.

Regarding investment in the communications sector, new investors are only likely to invest in frequency spectrum if there is certainty regarding the permanent licencing of high demand frequency spectrum. The uncertainty that comes with the indefinite and repeated extensions of Temporary Licences, that Telkom argues for, discourages investment in the sector. As matters stand, lower-income and many middle-income countries are unlikely to see the end of the Covid-19 pandemic before the end of 2022 or early 2023.[26] Investors are more likely to invest in a licensee which holds a permanent spectrum licence. Based on Telkom's primary argument, that Temporary Licences be kept until 3 months after the national state of disaster ends, and on its argument that spectrum can only be licenced for use if it is available, any contemplated spectrum auction could only realistically happen towards the end of the first half of 2023. South Africa cannot afford another delay of almost two years.

Regarding the efficient use of the radio frequency spectrum, this will be better achieved by the permanent licencing of such spectrum. This is because:

- Temporary Licences do not promote certainty and therefore discourage long-term investment in the telecommunications sector.
- Telkom appears to confirm that, at best, it is only currently able to use 55% of the sub-1 GHz spectrum. If this is the case, given that digital migration is still to be completed, it is of no use to the public for Telkom to simply sit on spectrum that it is not capable of using efficiently. It makes more sense to ensure an unassailable spectrum auction process by ensuring that the spectrum is available for licensing by ICASA (i.e., it is not held by another licensee who may claim title to use it).
- As explained below, there are more benefits to the South African public if a spectrum auction occurs, as there are at least three financial benefits. ICASA will be able to collect licence fees from the permanent licensing of such spectrum; the fiscus will immediately collect billions of rands in revenue from the spectrum auction; and, increased competition from the WOAN, together with lower operating costs (due to, as the MNOs have argued, the increased availability of spectrum), will result in lower data prices for consumers.

Regarding promoting stability in the ICT sector, the permanent licensing of high-demand spectrum

will put an end to over 10 years of delays and uncertainty regarding the licensing of this spectrum. With certainty regarding such licensing, more investment in the ICT sector is likely to occur, with obvious benefits to consumers.[27]

Insofar as a large amount of information was placed before ICASA during the April 2021 consultation process. It is evident that ICASA considered all submissions that were made and that it came to its decisions after having considered the submissions and other information such as legal advice it obtained from its legal advisors.[28]

Telkom raises other arguments which it says make ICASA's decision unreasonable. One of these is that ICASA's Decision is contrary to and violates the Minister's Directions. Telkom paraphrases the Directions, but fails to address two important aspects of the Directions:

- The Directions say, "*To the extent possible, the Authority must relax spectrum regulations to enable the temporary licensing of all available spectrum bands including the unassigned high demand spectrum for [the] duration of the COVID19 national disaster.*"[29] Telkom focusses on the last phrase "*for [the] duration of the COVID19 national disaster,*" but neglects to acknowledge that ICASA is only required to do so to "*the extent possible*." This means that if ICASA considers that there are circumstances that make it difficult to assign the high demand spectrum, then it need not do so. Therefore, assigning high demand spectrum in circumstances which may jeopardise its permanent licencing (i.e., that it may not be available for licensees to use after the auction), is a reasonable and rational basis for doing so.
- More importantly, ICASA is simply not compelled to follow the Directions. ICASA must consider the Directions, but need not follow them. This issue was settled by the Courts in litigation between the Minister of Communications, Telkom and ICASA in 2016. In that case, the Court said:

There is no room to doubt that pursuant to these provisions ICASA must 'consider' whatever [the Minister of Communications] puts up whether in the form of national policy or a policy direction, an obligation repeated in section 4(3A) of the ICASA ACT. …

Nonetheless, [the Minister of Communication's] substantive ideas in such a policy plainly do not bind ICASA, who owes them no deference.

In addition to [the Minister of Communications] formulating national policy it may also issue policy directions in terms of section 3(2) … in which ICASA 'may' (not must, in this example) conduct enquiries consistent with the statute. In such instances too, ICASA is not bound to act on the direction but must merely consider it." ***[30]***

In essence, as much as ICASA must consider the Directions, it is ultimately the ICT Regulations that prevail and which constitute the applicable law in this instance. If ICASA decides that issuing Temporary Licences for the duration of the Lockdown is too long, and it has a rational basis for such a Regulation, then that is the law and it must be followed.

Telkom has also argued that there is a need for a stable ICT sector and no undue influence on its commercial activities. A stable ICT sector is indeed critical for South Africa's economy: such stability will be achieved and greatly enhanced by the permanent licensing of high demand frequency spectrum: the continued uncertainty that comes with Temporary Licences, possibly until 2023, simply perpetuates the existing uncertainty and prevents South Africa from unleashing the full potential that can be achieved with permanently licenced high-demand frequency spectrum.

Telkom also argues that ICASA is exercising undue influence on its economic activities. This

argument has no merit, as Telkom has not presented any evidence that supports this allegation. In this regard:

- Telkom was always aware, or should have been aware, that Temporary Licences would only be available for whatever period was stipulated in the ICT Regulations. For example, when the ICT Regulations were first published, and the Temporary Licences first issued, Telkom was aware that the Temporary Licences were not going to extend beyond 30 November 2020. There was never any doubt about this, and Telkom should have planned around this.
- Telkom's Temporary Licence stipulates that ICASA "*reserves the right to amend, suspend, revoke, or withdraw its authorisation as it sees fit.*" Telkom was aware that its licence was only temporary and to undertake activities, such as major investments in infrastructure in the knowledge that its Temporary Licence was short-term, would have been reckless.
- ICASA has cautioned Temporary Licence holders against further investment in infrastructure based on Temporary Licences.
- Telkom has not outlined the economic impact, on its business, of the Temporary Licence being revoked. The Court is not told what the extent of the harm will be on its business and has also failed to demonstrate that a catastrophic failure will occur: there is simply no evidence of this.

It is very important to remember that, when trying to interdict a statutory authority like ICASA, the approach of our Courts has been "*to require a higher threshold of a strong case and exceptional circumstances to be shown where the exercise of powers sought to be interdicted is not alleged to have been exercised in bad faith.*"[31] There is simply not enough evidence to support Telkom's claims.

The Irreversible Consequences Argument

Telkom argues that irreversible adverse consequences will result from the suspension or revocation of the Temporary Licences.[32] What are these "irreversible consequences"? The only irreversible consequence appears to be the possibility of "digital loadshedding". In this regard, other than setting out what its peak data traffic was (it does not say whether such increased traffic placed strain on its network) at certain points, it does not explain whether it was close to experiencing such digital load shedding.

It mentions that the lockdown placed pressure on its network, but does not explain how. Considering that to succeed in its interdict, it must overcome a higher threshold of a strong case and exceptional circumstances, Telkom should have demonstrated how its networks were under strain: it has not done so.

There does not appear to be any evidence of irreparable consequences.

The Status Quo Argument

Telkom argues that there is no harm in allowing Temporary Licence holders to retain the Emergency Spectrum until the high demand spectrum is permanently licenced. There are a few dangers and consequences that stem from this argument:

- As has been argued by various parties in previous litigation against ICASA, the spectrum needs to be available for it to be licensed. If it is in a Temporary Licence holder's hands, it is not available.
- Given that holding Emergency Spectrum is so profitable (as demonstrated below), Temporary

Licence holders are likely to try to delay handing back the Emergency Spectrum, including using further litigation closer to the date that the spectrum is due to be handed over, to permanent licensees e.g., after a spectrum auction has occurred.
- Telkom has, itself, said that the processes of winding down the use of the Emergency Spectrum could take at least three months. There is a chance that this winding down process could take much longer than three months and, there are risks that other "delays" may arise. This will result in further delays in the permanent assignment of the high demand spectrum.

There are simply too many risks in leaving the Emergency Spectrum in the Temporary Licence holders' hands, until the very last minute. The reasonable and rational approach is to begin the unwinding process now, to allow the Temporary Licence holders sufficient time to systematically wind down their use.

The Digital Load-shedding Argument

There is simply no evidence whatsoever of digital load-shedding occurring, if Emergency Spectrum is revoked.

The only evidence before the Court is – Telkom's deponent – Dr Mahlangu's statement that "*if ICASA proceeds with its plan to "take back the spectrum" it would be tantamount to creating "digital load-shedding";...*"[33] Dr Mahlangu is an eminent, highly-experienced and very respected telecommunications lawyer but, he is a lawyer and not an expert on network loads and pressure.

Telkom called on the testimony of Hugo van Zyl ("Mr van Zyl"), its managing executive for its mobile network. A review of Mr van Zyl's professional profile confirms that he is a highly qualified and experienced engineer, with a master's degree, in electrical and electronic engineering. He has worked in the telecommunications sector for about 20 years.

The only evidence Mr van Zyl gives in support of Telkom's interdict application, relates to how long it will take for Telkom to wind-down its use of the Emergency Spectrum. His confirmatory affidavit relates to specific evidence and says "*...I confirm the truth and correctness of the contents thereof insofar as same relate to annexure FA 10 in the founding affidavit.*"[34]

He does not discuss digital load-shedding and neither does he discuss how critical Telkom's network may have been during the period 26 March 2020 to 20 April 2020, when Telkom received its Temporary Licence. He does not confirm either that Telkom's network was under pressure at that time or that it will be under pressure after the Emergency Spectrum is revoked.

For the Court to be convinced, and for a case to be made based on the prospect of digital load shedding, Telkom must produce more credible evidence than assertions that there could or may be digital loadshedding.

Why has Telkom not presented evidence demonstrating that its network was, during the period 26 March 2020 to 20 April 2020, or at any other time during the Lockdown, at critical capacity? Why have we not seen network status updates and warnings akin to those that Eskom publishes during its electricity loadshedding periods?

Figure 3: Example of Eskom's load-shedding network status update

It would be reasonable to expect that, if any MNO was approaching a critical point in its network

capacity, its customers or the public would have been notified.

Unless the Court is presented with reasonable evidence of actual or possible "digital load shedding" Telkom has not made out a sufficient case to prove that it or its customers will suffer harm.

Interestingly, Telkom asserts that zero-rated access to educational sites for all public universities, technical and vocational training colleges and all public schools across South Africa may suffer interruptions to this access if Emergency Spectrum is revoked.[35] The reality is that, when Telkom and other Temporary Licence holders were granted Temporary Licences, the access to Emergency Spectrum was subject to them continuing to provide services to these institutions for between 14 and 17 months, even after their Temporary Licences had expired or been revoked. What is noteworthy, is that in accepting this, they accepted that they would need to do so on their pre-Lockdown network infrastructure and the pre-Lockdown permanent frequency spectrum. It is therefore strange that Telkom and others now contend that this may not be possible.

Therefore, without Telkom or any of the other Temporary Licensees having presented evidence of actual or potential digital load shedding, because of Emergency Spectrum being revoked, this argument has no merit.

The Dormant Spectrum Argument

Telkom argues that it is irrational to revoke the Emergency Spectrum in November 2021 because there will be catastrophic consequences for Telkom, individuals and businesses.[36] It argues that there will be no prejudice whatsoever if the Emergency Spectrum remains with Temporary Licensees until it is permanently licenced. At face value, this may appear to be a reasonable and rational suggestion, but the reality is that it is not. This is because:

- On Telkom's own version, it will require more than three months to switch-off the use of the Emergency Spectrum.[37] It also says that seven or more months would be required after the switch-off to further optimise the network. Assuming that the Emergency Spectrum is auctioned in March 2022, a successful bidder, who may have paid many hundreds of millions of rand for a permanent licence to use the high demand spectrum, will, at best, only be able to start using the spectrum in June 2022. However, if Telkom and other MNOs take longer to wind down (let us assume that the additional seven months are also needed for winding down purposes) a successful bidder could only begin using its permanent spectrum in early 2023. This would not be fair.
- Spectrum licensees, such as MNOs, pay their spectrum licence fees based on a complex formula. The components of this formula include the geographic area of South Africa covered by a frequency spectrum assignment and the amount of congestion that is experienced by the licensee using the frequency spectrum.[38] Without ICASA being able to provide certainty to successful bidders on whether high demand spectrum will be available after a contemplated spectrum auction, it opens itself up to challenges from both successful bidders (because Temporary Licence holders may still hold the spectrum) and from Temporary Licence holders, because they may be able to raise arguments that some of the spectrum they hold, cannot be used and therefore they should not be required to pay licence fees (e.g. Telkom could and has raised the issue of not being able to fully use sub-1 GHz spectrum). There would be just too much uncertainty and instability (contrary to what the EC Act's objectives seek to achieve).
- If Temporary Licence holders, or any other interested parties, initiate litigation at that point to challenge the contemplated spectrum auction, the fiscus i.e., the South African public, will not receive at least R2,637,004,557,34 from such an auction.[39] This amount could immediately be put to use in providing more fibre connections to underserviced areas through initiatives

such as SA Connect -Phase 2.[40] Fibre is generally regarded as a more long-term solution to providing better broadband in underserviced areas. The longer it takes for fibre to roll out in underserviced areas, the longer South Africa's digital inequality will persist.

The most important take-away, arising from the points above, is that it is much more in the public interest that the fiscus receives at least R2,637,004,557,34 from a spectrum auction that could be held in March 2022 and immediately be entitled to receive spectrum licence fees from successful bidders.[41] It is more in the interests of the public (whom ICASA represents) to ensure that the spectrum auction can occur without any disruption, than to grant Telkom an interdict to protect rights it has failed to prove. As the Americans say: it's a no-brainer.

There is another, perhaps more cynical, argument as to why those MNOs who are challenging the return of the Emergency Spectrum, have joined the fray:

- Based on reliable estimates of spectrum licence fees that Temporary Licensees have paid ICASA for the period November 2020 to May 2021, it can conservatively be estimated what Temporary Licensees cumulatively have earned before company tax. This amounts to a total of R93,333,333.33.[42]
- If the MNOs which are challenging ICASA manage to convince a court to extend the Temporary Licences until the end of March 2022, then they will be able to earn R74,666,666.67.[43] If they manage to use the Courts to delay the proposed spectrum auction until December 2022, then they stand to earn R242,666,666,70.
- If only Telkom, MTN and Vodacom take part in the litigation against ICASA, each spending R5,000,000.00 on legal fees, and they are successful, they could secure R242,666,666,70 to be split between the Temporary Licensees.[44] Spending R15,000,000.00 between them to get the lion's share of R242,666,666,70 is, again, a no brainer. This is what is referred to as "strategic litigation".

Finally, Telkom's Dormant Spectrum Argument is diametrically opposed to one of the arguments it used to successfully interdict the most recent spectrum auction Invitation to Apply ("ITA"). In its affidavit supporting that interdict, Telkom's primary reason for opposing the ITA was that the "700 MHz and 800 MHz frequency bands are not available for use". It said:

The first fundamental flaw made by [ICASA] is that the Auction ITA involves the auction of portions of spectrum in the 703-733 MHz paired 758-788 MHz (the 700 MHz) and the 791-821 MHz paired with 832-862 MHz (the 800 MHz) frequency bands. The portions of spectrum sought to be auctioned are not immediately available for use on a national basis by a licensee who may ultimately succeed in its bid during the auction process contemplated in the Auction ITA.

The reality is that if ICASA agrees to extend the Temporary Licences until the proposed spectrum auction occurs in March 2022, then any successful bidder at that auction will not be able to immediately use the spectrum either. Given that this argument persuaded a Court once before, it is possible that another interested party could use it to persuade the Court again. For ICASA, it seems that it may be damned if it does (grant the extension) and damned if it doesn't.

CONCLUSION

If Telkom is successful in interdicting the return of the Emergency Spectrum, there is a strong likelihood that there will be many other consequences that result in the proposed spectrum auction being delayed further, possibly to 2023.

Telkom has not put any evidence whatsoever, before the Court, of its network having suffered or being likely to suffer a catastrophic failure. There is no evidence that digital load-shedding is likely to occur, if the Emergency Spectrum is returned.

Telkom has not demonstrated what irreparable harm, financial, reputational or otherwise, it will suffer, if the Emergency Spectrum is returned to ICASA.

It is clearly in the public interest that the proposed spectrum auction occurs. This is because it will, after more than 10 years of attempting to distribute the high-demand spectrum, bring some stability and certainty to the ICT sector. It will also promote competition and result in lower data costs, because spectrum will also be made available for the contemplated WOAN.

Telkom has not demonstrated a *prima facie* right that will be infringed, it has not demonstrated what irreparable harm it will suffer if the Court does not interdict ICASA, that it has no other option besides an interdict and that the balance of convenience is in its favour. There is simply no merit in Telkom's interdict application.

[1] Electronic Communications, Postal and Broadcasting Directions issued under regulation 10 (8) of the Disaster Management Act, published in Government Notice 417 of 26 March 2020 in Government Gazette No. 43164.

[2] Published in Government Notice 238 of 6 April in Government Gazette No. 43207.

[3] Temporary radio frequency spectrum issued to qualifying applicants in an effort to deal with COVID-19 communication challenges — Independent Communications Authority of South Africa (icasa.org.za)

[4] https://www.icasa.org.za/news/2020/plans-for-the-licensing-of-high-demand-spectrum-and-the-woan

[5] https://www.icasa.org.za/uploads/files/Draft-ICT-COVID-19-National-Disaster-Regulations.pdf

[6] Some parties are not in favour of an auction. ICASA has selected this process, so it is assumed that this is the process that will be followed.

[7] Telkom's founding affidavit can be downloaded here.

[8] Paragraphs 33 and 45.1

[9] Paragraph 55

[10] Paragraph 59

[11] Paragraph 74

[12] Paragraph 75

[13] Paragraph 32

[14] Paragraph 33

[15] Check out the DPWI's draft National Infrastructure Plan 2050 from page 37 to 43.

[16] Paragraph 31.

[17] See page 7 of Telkom's submission of 7 May 2021.

[18] See page 7 of Telkom's submission of 7 May 2021.

[19] See page 18 of the last spectrum auction invitation to apply.

[20] Data Services Market Inquiry – Final Report, Competition Commission South Africa, 2 December 2019
– http://www.compcom.co.za/wp-content/uploads/2019/12/DSMI-Non-Confidential-Report-002.pdf

[21] South African Telecommunications Sentiment Index 2020, Brandseye & Deloitte, at page 27

[22] https://www.judiciary.uk/wp-content/uploads/2017/12/h3g-v-ofcom-full-judgment2.pdf

[23] Paragraphs 110 to 112

[24] Section 2(d) of the EC Act.

[25] Section 2(e) of the EC Act.

[26] https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/when-will-the-covid-19-pandemic-end

[27] https://www.gsma.com/spectrum/wp-content/uploads/2013/04/GSMA-Policy-Position-on-Spectrum-Licensing.pdf at page 5.

[28] https://www.icasa.org.za/uploads/files/Council-decision-20-May-2021.pdf

[29] See Regulation 6.10 of the Directions

[30] Minister of Telecommunications and Postal Services and Acting Chair, Independent Communications Authority of South Africa and Others, Case No.: 2016/68096 at paragraph 32
– http://www.saflii.org/za/cases/ZAGPPHC/2016/883.html

[31] See paragraph 7 of the 2016 judgment referred to at footnote 27 above.

[32] See Paragraphs 66 and 83.

[33] Paragraph 74.1

[34] Mr van Zyl's affidavit is annexure FA11. FA10 deals solely with the time it will take for Telkom to wind down its Emergency Spectrum use.

[35] Paragraph 71

[36] Paragraphs 67 and 84.

[37] Paragraphs 110 and 111.

[38] Regulation 5 of the Radio Frequency Spectrum Regulations, 2010. Fee = (UNIT * FREQ * BW * CG * GEO * SHR * ASTER * UNIBI * SEC). The fee is the multiplication of the unit price (UNIT) by the frequency factor (FREQ), the bandwidth in MHz, the congestion factor (CG), the geographic factor (GEO) the sharing factor (SHR), the area sterilised factor (ASTER), the unidirectional factor (UNIBI) where this is applicable for point-to-area and the security factor (SEC)

[39] Based on the reserve prices of all the spectrum lots reflected in the 2020 ITA: https://www.icasa.org.za/uploads/files/ita-for-the-radio-frequency-spectrum-licences-for-imt-spectrum-bands.pdf

[40] https://www.itweb.co.za/content/KPNG878KZjAv4mwD

[41] This is especially since Temporary Licensees have demonstrated that they are speedily capable of putting the Emergency Spectrum to use.

[42] MTN's submission to ICASA, of 7 May 2021, estimates that ICASA has earned spectrum licence fees of about R100,000,000.00 for the period November 2020 to May 2021. Assuming that ICASA's fees are 30% of the Temporary Licensee's revenue from using the Temporary Spectrum, then their revenue for the same period would have been R333,333,333.33. After deducting ICASA's licence fee of R100,000,000, they are left with R233,333,333.33. Assuming 60% of this is attributed to operating costs, they would be left with an amount of R 93,333,333.33 before company tax. These calculations could be completely wrong because, after all, they were done by a lawyer and not an accountant.

[43] This would be an amount based on 4 months: December 2021 to end of March 2022.

[44] We assume that the split will be based on the amount of spectrum ICASA has licenced to each.

[45] ICASA's, MTN's and Vodacom's court papers could not be obtained in time, and were therefore not considered when this article was written.