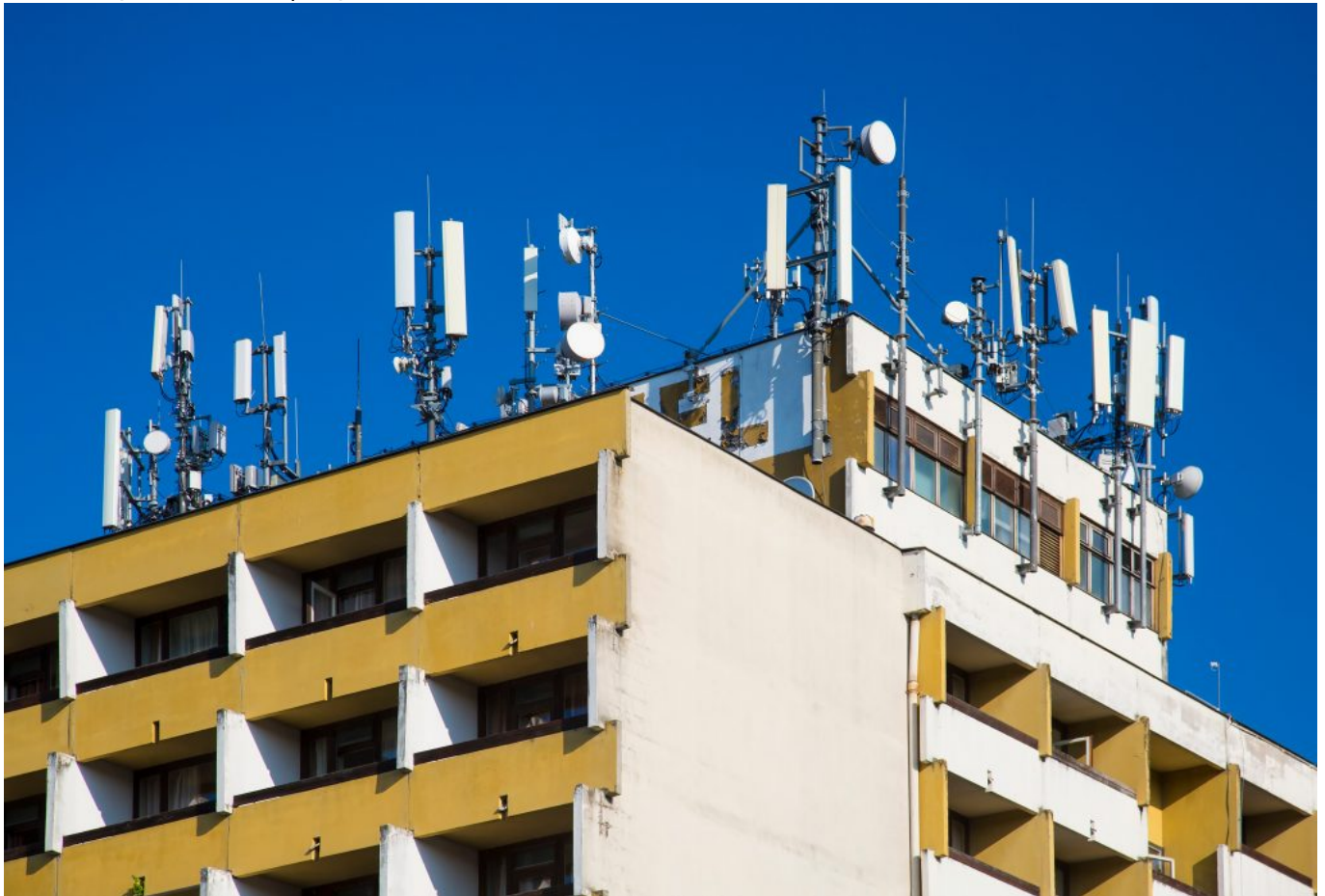


THE ICASA SPECTRUM AUCTION: ONGOING LITIGATION

Category: Commercial Law, Dispute Resolution, Infrastructure and Telecommunications, Technology Law

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For the first time in 16 years, when it seemed like South Africa would finally get new spectrum licensed, legal battles brought the spectrum auction to a standstill. Earlier this year, major telecommunications companies like MTN and Telkom sued the Independent Communications Authority of South Africa (“**ICASA**”), citing various issues to halt the auction. This setback means that spectrum is unlikely to be allocated anytime soon.

Mobile operators such as MTN and Telkom are uniquely positioned to take advantage of 5G. 5G allows telecommunications companies to offer better and faster services at lower prices. Thus, the spectrum auction plays an important role in boosting the local economy and attracting investment.

Telkom, the third-largest operator, has also alleged in its founding papers that the auction rules favour the two biggest players in the telecommunications industry, namely MTN and Vodacom.

The main focus of the decision to halt the auction was because of the contentious “anchor band”. This band was assigned to MTN and Vodacom as a result of an administrative decision many years ago. Telkom requires an allocation of the anchor band in order to compete with MTN and Vodacom. The problem with this low frequency band is that it is currently being used by television broadcasting. Sharing this band would disrupt mobile operations and television broadcasting and cause signal interference on both sides. e.tv joined the action at this point in an effort to protect its frequencies.

South Africa was supposed to migrate from analogue to digital transmission, however, this process has slowed down drastically. South Africa had failed to meet the deadline of June 2015 as agreed with the International Telecommunication Union (ITU) to migrate to digital broadcasting, and the process is only expected to be completed in March 2022.

Judge Selby Baqwa ruled that ICASA's process was unlawful and irrational because ICASA had amended its rules after it began the auction process. ICASA was thereafter prohibited from proceeding with the auction. It should be noted that Judge Baqwa's ruling was made on procedural grounds only and did not deal with the merits of Telkom's application.

MTN instituted legal proceedings against ICASA, alleging that the auction would deny it access to the crucial 3.5GHz range.

MTN's legal submission deals with issues of competition in relation to the spectrum auction. MTN believes that the auction disadvantages the bigger players and creates an uneven playing field. It argues that ICASA's auction format ensures that *"the least efficient users of spectrum and licensees with fewer number of customers will be privileged over the most efficient (and needy) licensees in the acquisition spectrum"*. ICASA intends on opposing MTN's application.

As a result of the ongoing litigation, the spectrum auction is likely to be delayed until the conclusion of the process or might be scrapped altogether. Apart from the emergency allocation of spectrum during the Covid-19 pandemic, it has been over a decade since South Africa released new bandwidth. This can be attributed to a number of factors, including state capture, corruption, the backward thinking of ministers in the telecommunications sector, and anti-competitive regulation. However, if South Africa is to make significant advancements in the economy, the rollout of 5G and digital migration needs to happen to drive investment in our country. Government and ICASA must work together to realise the needs of South Africans and push for change and growth. After all, what are we to do with 5G phones, when there is no 5G?