REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE 31/3/2014 SIGNATURE

CASE NO:2014/04699

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LTD Applicant

and

THE CHAIRPERSON OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA AND 30 OTHERS Respondents

CASE NO: 2014/6710

And in the matter between:

VODACOM (PTY) LTD Applicant

and

THE CHAIRPERSON OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA AND 38 OTHERS

JUDGMENT

MAYAT J

INTRODUCTION

[1] On the 12th of February 2014, Mobile Telephone Networks (Pty) Ltd ("MTN") launched an urgent application challenging regulations made by the Independent Communications Authority of South Africa ("ICASA") on the 4th of February 2014 in terms of the Electronic Communications Act 36 of 2005 ("the ECA"). Thereafter, on the 25th of February 2014, Vodacom (Pty) Ltd ("Vodacom") launched a separate application, also challenging the said regulations. Pursuant to an order by this court consolidating the two applications, both matters are now before this court by way of urgency.

[2] The impugned regulations govern the wholesale termination rates, which mobile network operators charge other mobile network operators to receive calls on their respective mobile networks. In effect, the impugned regulations prescribe maximum wholesale termination rates for MTN and Vodacom, which are lower than the maximum wholesale termination rates, which can be charged by smaller operators, including Cell C (Pty) Ltd ("Cell C") and the mobile division of Telkom SA Ltd ("Telkom Mobile").

[3] Whilst the respondents in the consolidated applications include ICASA, Cell C and Telkom Mobile as well as some 38 interested and affected parties, the said consolidated applications are opposed in these proceedings by ICASA, Cell C and Telkom Mobile only.

RELIEF SOUGHT

[4] Both MTN and Vodacom initially sought certain interim relief set out in Part A of their respective notices of motion by way of urgency, pending the determination of applications for judicial review incorporated in Part B of their respective notices of motion.

[5] After ICASA filed an answering affidavit in response to both applications in this matter, MTN indicated in its replying affidavit and subsequently also argued at the hearing of this matter that it now sought, in the first instance, the final relief incorporated in Part B of its notice of motion. The said final relief was based upon an application for judicial review in terms of rule 53 of the Uniform Rules of Court. In these circumstances, the primary relief, which MTN now seeks, is a final order reviewing and setting aside regulations, which come into effect on the 1st of April 2014. In the alternative, MTN seeks the interim relief set out in Part A of its notice of motion, pending the determination of review proceedings in terms of rule 53 pertaining to the impugned regulations, as set out in Part B of its notice of motion.

[6] Similarly, Vodacom initially sought interim relief in terms of Part A of its notice of motion, pending the determination of an application in terms of rule 53 for judicial review set out in Part B of its notice of motion. However, during the course of the hearing of this matter, Vodacom was granted leave to amend its notice of motion. Vodacom accordingly also now seeks in the first instance, in the context of the present urgent hearing, an order reviewing and setting aside regulations enacted by ICASA. In the alternative, Vodacom also seeks interim relief pending the determination of review proceedings pertaining to the impugned regulations.

[7] For the reasons set out in this judgment and the chronology of certain events after the 4th of February 2012, also set out in this judgment, this matter was manifestly urgent and urgency was accordingly not in issue before me. I am also satisfied on the basis of the said chronology of events that each of the two consolidated applications warrants urgent adjudication before the 1st of April 2014, prior to the impugned regulations coming into effect. As such, I

advised the parties at the close of the hearing at approximately 13h00 on Thursday, the 27th of March 2014, that my judgment in this matter would be handed down at 15h00 on Monday, the 31st of March 2014.

RELEVANT STATUTORY AND REGULATORY FRAMEWORK

Independent Communications Authority Act 13 of 2000

[8] ICASA is a juristic entity established in terms of section 3 of the Independent Communications Authority Act 13 of 2000 ("the ICASA Act"), which must exercise the powers conferred upon it and perform the duties imposed upon it in terms of the ICASA Act, the underlying statutes and any other applicable law.[1] ICASA is also an organ of state as defined in section 239 of the Constitution.

Electronic Communications Act, 36 of 2005 and Regulations in terms thereof

[9] The stated primary object of the ECA is to provide for the regulation of electronic communications in the Republic of South Africa in the public interest.[2] For the purposes of the said primary object, the ECA also stipulates a number of ancillary objectives, premised upon the public interest. Thus, for example, the ancillary objectives include inter alia the promotion of the interests of consumers with respect to the "price, quality and the variety of electronic communication services"[3] as well as the promotion of the interests of consumers with respect to "price, quality and the variety of electronic communication services".[4]

[10] Section 4(1) of the ECA permits ICASA to make regulations with respect to any matter in terms of the ECA or related legislation. In terms of section 4(4) of the ECA, ICASA "must" not less than 30 days before any regulation is made, publish such regulation in the Government Gazette, together with a notice declaring ICASA's intention to make such regulation, and inviting interested parties to make written representations in this respect.

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[1] Section 4(1) (a)
[2] Section 2
[3] Section 2(m)
[4] Section 2(n)

However, section 4(7)(b) further provides that the provisions of subsection 4 do not apply in respect of any regulation, which the public interest requires should be made without delay.

[11] Chapter 7 of the ECA deals with "interconnection" and section 37 in that chapter deals with the obligations to interconnect imposed on licensed mobile operators in terms of the ECA. Specifically, subsection 37(1) envisages interconnection agreements between licensed operators and subsection 37(6) provides that any such interconnection agreement concluded by the licensee in terms of the ECA –

> "must unless otherwise requested by the party seeking interconnection, be non-discriminatory as among comparable types of interconnection and not be of a lower technical standard and quality than the technical standard and quality provided by such licensee to itself or to an affiliate."

[12] Section 67 of the ECA relates to competition matters and empowers ICASA inter alia to direct a licensee in terms of the ECA to refrain from engaging in any act, which is likely substantially to prevent or lessen competition.[5] Thus, ICASA is also empowered to prescribe regulations setting out actions, which prevent or lessen competition by giving undue preference or causing undue discrimination against another licensee providing the same service. [6] Subsection 67(4) of the ECA specifically provides that ICASA "must" prescribe regulations with a view to defining the relevant markets and market segments, as applicable, with a view to imposing pro-competitive conditions upon licensees having significant market power. To this end, it is further provided that the regulations in terms of subsection 67(4) must, amongst other things:

- define and identify the retail or wholesale markets or market segments in cases which it intends to impose pro-competitive measures on the basis that such markets or market segments have "ineffective competition"; [7] and

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[5] Section 67(1)
[6] Section 67(2)(a)
[7] Section 67(4)(a)

- set out the methodology to be used to determine the effectiveness of competition in such markets or market segments, subject to subsection 67(8), which applies when ICASA undertakes a review of market determinations on the basis of an earlier analysis. [8]

[13] Subsection 67(7) sets out a number of pro-competitive terms and conditions, which may be incorporated in regulations made by ICASA in terms of section 67. It is specifically provided in this respect that the stated terms and conditions are not exhaustive. These terms and conditions include inter alia an obligation to act fairly and reasonably by responding to requests for access, provisioning of services and interconnection [9]; an obligation to maintain separation for accounting purposes between different matters relating to access and interconnection [10]; a requirement relating to accounting methods to be used in maintaining separation of accounts [11]; and price controls relating inter alia to the provision of wholesale and retail interconnection rates. [12]

[14] As already indicated, subsection 67(8)(a) relates to the review of pro-competitive conditions by ICASA and provides that where ICASA undertakes a review of pro-competitive conditions imposed upon one or more licensees, then in such circumstances ICASA "must"

- review the determinations made on the basis of earlier analysis;[13] and
- decide whether to modify the pro-competitive conditions set by reference to an earlier market determination.[14]

Subsection 67(8)(c) further provides that pursuant to such review, if ICASA determines that the licensee to whom pro-competitive conditions apply continues to possess significant market power in that market or market segment, but that as a result of changes in the competitive nature of such market or market segment, the pro-competitive conditions are no longer

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[8] Section 67(4)(b)
[9] Section 67(7)(a)
[10] Section 67(7)(f)
[11] Section 67(7)(g)
[12] Section 67(7)(h)
[13] Section 67(8)(a)(i)
[14] Section 67(8)(a)(ii)

"proportional" in accordance with subsection (7), then ICASA "must" modify the applicable pro-competitive conditions applied to that licensee with a view to ensuring "proportionality".

[15] On the 29th of October 2010, ICASA published "Call Termination Regulations" in Government Notice 1015 of 2010 ("the 2010 Regulations"). The said 2010 Regulations were published on the basis of section 67(4) of the ECA, which empowered ICASA to prescribe regulations in this regard inter alia with a view to imposing pro-competitive conditions upon licensees such as MTN and Vodacom, which have significant market power.

[16] The 2010 Regulations, which applied price controls initially for the period from the 1st of March 2011 to the 1st of March 2014, identified four market failures: lack of access; the potential for discrimination between licensees offering similar services, a lack of transparency and inefficient pricing. Inefficient pricing was defined at the time to mean pricing, which is "at excessive levels above cost" or "significantly above cost". Thus, "cost-oriented prices" was the underlying basis of the 2010 Regulations.

[17] In terms of regulation 7(5)(b) of the 2010 Regulations, MTN and Vodacom were obliged to charge specified wholesale voice call termination rates, on the basis of a "glide path" comprising lower rates in each of three years governed by the said regulations than rates, which were prescribed for smaller operators. The applicable rates for MTN and Vodacom were stipulated in Table 1 of the 2010 Regulations as follows:

	Peak Calls	Off-Peak calls
1 March 2011	R0.73	R0.65
1 March 2012	R0.56	R0.52
1 March 2013	R0.40	R0.40

[18] The glide path, which applied to MTN and Vodacom in terms of the 2010 Regulations, did not apply to Cell C and Telkom Mobile. Thus, it was

specifically provided in terms of paragraph 1.3 of Appendix B of the 2010 Regulations that mobile operators other than MTN and Vodacom could charge higher mobile termination rates than those specified in Table 1, in the event that such other mobile operators satisfied "either or both" of the requirements stipulated in paragraph 1.3. Since the rates applicable to these less dominant mobile operators were higher than the stated rates in the glide path applicable to MTN and Vodacom, the applicable rates for these other operators were described as "asymmetric". The asymmetry arose by virtue of the fact that Cell C, for example, could charge MTN a higher rate to terminate calls on the Cell C network than MTN could charge Cell C to terminate calls on the MTN network.

[19] Paragraph 2 of the 2010 Regulations imposed a limit on the asymmetric rate that Telkom Mobile and Cell C Mobile (as entities which qualified for an asymmetric rate), could charge. Thus, the entities which qualified for the asymmetric rate could charge the following maximum rates above the rates stipulated in Table 1 :

- From 1 March 2011 : 20% (that is, R0,87,6).

- From 1 March 2012: 15% (that is R0, 64,4).

- From 1 March 2013 : 10% (that is, R0,44).

[20] As a result of the issues germane to the present proceedings, the 2010 Regulations were specifically extended by ICASA to apply until the 1st of April 2014.

[21] It appears from a draft to the 2010 Regulations that it was envisaged that for future review periods, ICASA would use information obtained as a result of a cost modeling exercise, derived through the imposition of the "Accounting Separation and Cost Accounting" obligations imposed upon licensees "arising from this market to inform the efficient charge". It was for this reason that regulation 7(5)(c) of the 2010 Regulations required licensees

identified in regulation 7(4) "to submit regulatory financial reports in line with the format prescribed in the Accounting Separation and Cost Accounting Regulations prescribed" by ICASA.

[22] ICASA also indicated in an explanatory note to the 2010 Regulations that it intended to conduct a review of the pro-competitive price control conditions it imposed in 2010 and indicated further that it would promulgate cost and accounting regulations, which would allow it to gather cost information on an ongoing basis and so enable it to review pro-competitive conditions it envisaged in three years time, in 2013. Thus, regulation 8 of the 2010 Regulations provided that a review of the call termination market was to take place after a minimum period of three years from the publication of the 2010 Regulations.

[23] Despite the provisions in the ECA and the provisions in the 2010 Regulations relating to accounting, ICASA never prescribed the accounting regulations envisaged by regulation 7(5)(c). Be that as it may, the review of the voice call termination markets (in respect of each licensee's prices) envisaged in regulation 8 of the 2010 Regulations was supposed to have taken place on or after the 29th of October 2013, at the earliest.

[24] In these circumstances, it appears that on the basis of the provisions of section 37 of the ECA, read together with the 2010 Regulations, that even though ICASA is empowered in terms of section 67 to make regulations relating to the maximum wholesale termination rate, which different operators can charge to other operators, the actual termination rate charged from time to time by each licensed operator of a mobile network to other networks, is actually governed by interconnection agreements between such operator and each of the other licensed operators of other mobile networks, as envisaged in subsection 37(1). As such, it may be mentioned that whilst the termination rate in such interconnection agreements can theoretically be less than the prescribed maximum, it appeared from these proceedings that each operator charged the prescribed maximum rate to each of the other operators.

[25] On the 11th of October 2013, ICASA published "Draft Call Termination Regulations" in terms of Government Notice 1018 of 2013 ("the Draft Regulations"). The said Draft Regulations incorporated a further glide path, for the period after March 2014. The proposed glide path in terms of the Draft Regulations required MTN and Vodacom to charge the following wholesale call termination rates to a mobile location:

1 March 2014	R0.20
1 March 2015	R0.15
1 March 2016	R0.10

[26] The Draft Regulations further provided that licensees other than MTN and Vodacom such as Cell C and Telkom Mobile would be entitled to charge the following asymmetric termination rates in certain circumstances:

1 March 2014	R0.39
1 March 2015	R0.33
1 March 2016	R0.26
1 March 2017	R0.20
1 March 2018	R0.14
1 March 2019	R0.10

[27] The explanatory note to the Draft Regulations stipulated inter alia that the cost of termination to a mobile location at the time was approximately 10c per minute based amongst other factors, upon the increase in traffic in licensee networks. The said explanatory note to the Draft Regulations further stipulated that the stated level of 10c per minute should be reached in three years, measured from the 1st of March 2014. Therefore, the explanatory note to the Draft Regulations proposed that the termination rate of 40c, which was applicable to MTN and Vodacom from the 1st of March 2013 to the 1st of March 2014 (subsequently the 1st of April 2014), be reduced to 20c per minute in 2014, 15c per minute in 2015 and 10c per minute in 2016. It was also indicated in the Draft Regulations at that stage that while the cost of

terminating a call to a mobile location was determined by ICASA to be approximately 10c per minute, the cost to a fixed location was for some reason determined to be higher at 12c to 19c per minute.

[28] On the 4th of February 2014, ICASA published Call Termination Regulations, 2014 in Government Notice 65 of 2014 ("the 2014 Regulations"). In an explanatory note to the 2014 Regulations ICASA states that its analysis of market conditions revealed "little change since 2010". ICASA accordingly further explained that it maintained the view "new entrants and small players require additional pro-competitive support.... ". In addition, it was also stated in the explanatory note to the 2014 Regulations that the ".. continued market failure indicates that the level of symmetry provided to smaller operators was insufficient to generate effective competition." It is accordingly further stated in the explanatory note at that stage that the markets in this respect "remain ineffectively competitive owing to inefficient pricing".

[29] Even though the 2014 Regulations made reference to section 67(4) of the ECA, it appeared that pursuant to the 2010 Regulations, the subsequent 2014 Regulations were published by ICASA in terms of section 67(8) of the ECA, which provided for a "review" of previous pro-competitive conditions imposed by ICASA on the basis of an "earlier analysis". Thus, ICASA acknowledged in these proceedings that the reference to section 67(4) in the 2014 Regulations was a "clear error".

[30] Regulation 7(4) (a) of the 2014 Regulations provided that for the period from the 1st of March 2014 to the 1st of March 2016, MTN and Vodacom are obliged to charge the following wholesale voice call termination rates:

1 March 2014	R0.20
1 March 2015	R0.15
1 March 2016	R0.10

[31] In effect, the prescribed rates in terms of the 2014 Regulations also incorporated the notional glide path in relation to MTN and Vodacom, as with the 2010 Regulations. The prescribed termination rates specified for MTN and Vodacom in the 2014 Regulations were the same as the rates, which were previously published in terms of the Draft Regulations.

[32] It was also stipulated in paragraph 1.1 of Appendix A of the 2014 Regulations that mobile operators other than MTN and Vodacom could charge higher asymmetrical termination fees than those specified in the above glide-path, subject to the following maximum amounts:

Current rate	R0.44
1 March 2014 -31 March 2015	R0.44
1 March 2015- 31 March 2016	R0.42
1 March 2016- 31 March 2017	R0.40
1 March 2017	R0.20

[33] Clause 2.1 of Appendix A to the 2014 Regulations provided that licensees qualified for a period of three years for the asymmetric rate based on economies of scale and scope if it had less than 20% of the share of total retail revenue generated in the relevant market as at December 2012.

[34] In these circumstances, the mobile termination rates, which MTN and Vodacom were permitted to charge in terms of the 2014 Regulations after the 1st of April 2014 were reduced from 20c to 10c over three years, whilst the higher termination rates, which Cell C and Telkom Mobile were entitled to charge were reduced from 44c to 40c in the same period. Counsel for MTN summarized the position in terms of the 2014 Regulations for the next three years as follows:

Column 1	Column 2	Column 3	Column 4	Column 5
Date of commencement	Termination rates charged by Cell C and Telkom Mobile	Termination rates charged by MTN and Vodacom	Asymmetry value (i.e. the difference between column 2 and 3)	Asymmetry % (i.e. column 4 as a percentage of column 3)
1 March 2014	R0.44	R0.20	R0.24	120%
1 March 2015	R0.44	R0.15	R0.27	180%
1 March 2016	R0.40	R0.10	R0.30	300%

[35] The 2014 Regulations were initially due to take effect from the 1st of March 2014. However, ICASA then extended the 2010 Regulations for a further month, and further resolved (apparently on the 19th of February 2014) that parts of the 2014 Regulations would be repealed. Thereafter, on or about the 12th of March 2014, ICASA annexed a resolution to its answering affidavit in the present proceedings indicating that it had resolved to "repeal the 2014 Regulations insofar as they set mobile termination rates beyond 31 March 2014." Subsequently, on the morning of the 27th of March 2014, prior to closing arguments by MTN and Vodacom in the present proceedings, ICASA's counsel handed up to the court a copy of "Second Call Termination Amendment Regulations" published in Government Gazette Notice 240 of 2014, on the 26th March 2014, which reflected that the 2014 Regulations had been amended as indicated in ICASA's answering affidavit. The said amended regulations, which commence on the 1st of April 2014, are referred to in this judgment as "the Amended 2014 Regulations".

[36] The effect of the Amended 2014 Regulations, together with the extension of the 2010 Regulations, was that the wholesale voice call termination rate for MTN and Vodacom specified in the 2014 Regulations for the period 1st of April 2014 to 31 March 2015 ("the first year") would now come into force for one year only on the 1st of April 2014. Thus, the wholesale voice call termination rate for MTN and Vodacom beyond the 31st of March 2015 in the 2014 Regulations for the period from the 1st of April 2015 to the 31st of March 2016 ("the second year") and the period from the1st of April 2016 to the 31st of March 2017 ("the third year") have now been repealed in terms of the Amended 2014 Regulations.

[37] In terms of the amended clause 2.1 of the Appendix A to the Amended 2014 Regulations, licensees accordingly qualified for a period of one year for the prescribed asymmetric rate "based on economies of scale and scope" if it had less than 20% of the share of total retail revenue generated in the relevant market "as of December 2012".

Promotion of Administrative Justice Act 3 of 2000

[38] The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") is premised upon the Constitutional right to administrative action, which is lawful, reasonable and procedurally fair, as contemplated in section 33 of the Constitution. It is accordingly specifically provided in section 3(1) of PAJA that administrative action, which materially and adversely affects the rights or legitimate expectations of any person, must be procedurally fair.

[39] Whilst section 3(2)(a) of PAJA provides that fair administrative procedure depends upon the circumstances of each case, it is also provided in section 3(2)(b) that procedurally fair administrative action incorporates inter alia adequate notice to the affected party of the nature and purpose of the proposed administrative action,[15] as well as a reasonable opportunity to make

[15] Section 3(2)(b)(i)

representations to the administrator.[16] This aspect of PAJA merely codifies the common law principle of *audi alterem partem* as a fundamental component of procedural fairness.[17]

[40] Administrative action is judicially reviewable in terms of PAJA inter alia if the administrator, who took the said action:

(i) was not authorised to do so by the empowering legislation;[18]

(ii) acted under a delegation of power, which was not authorized by the empowering legislation;[19]

(iii) the action was procedurally unfair;[20]

(iv) the action was materially influenced by an error of law;[21]

(iv) the action was taken -

- for a reason not authorised by the empowering legislation;[22]
- on the basis of irrelevant considerations or because relevant considerations were not considered; [23]or
- arbitrarily or capriciously;[24]

(v) the action itself -

- contravenes any legislation or is not authorised by the empowering provision of such legislation; [25] or

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[16] Section 3(2)(b)(ii). See also cases such as *Yuen v Minister of Home Affairs and Another* 1998 (1) SA 958 (C) at 965 B-C where the court held that the right to a hearing implies the right to be informed of facts which may be detrimental to the affected person.

[17] See, for example, the case of *Turner v Jockey Club of South Africa* 1974 (3) 633 (A) at 651C and 656A, which reflected the pre-Constitutional common law.

[18] Section 6(2)(a)(i)

[19] Section 6(2)(a)(ii)

[20] Section 6(2)

[21] Section 6(2)(d)

[22] Section 6(2)(e)(i)

[23] Section 6(2)(e)(iii)

[24] Section 6(2)(e)(vi)

- is not rationally connected to the purpose for which it was taken [26]; or the purpose of the empowering provision[27]; or the information before the administrator[28]; or the reasons given for it by the administrator [29].

[41] As already indicated, a fundamental component of procedural fairness in terms of PAJA (as well as the common law) constitutes "a reasonable opportunity to make representations" in relation to administrative acts, which adversely affect the party concerned.

[42] As regards appropriate remedies in the context of PAJA, section 8(1) of PAJA provides that in proceedings for judicial review, the court may grant an order which is "just and equitable",[30] including an order setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions,[31] or in exceptional cases, substituting or varying the administrative action,[32] or granting a temporary interdict or other temporary relief.[33]

RULE 53 OF THE UNIFORM RULES OF COURT

[43] To the extent that the final relief sought by MTN and Vodacom is now sought as the primary relief premised upon judicial review, it may be mentioned by way of background that rule 53(1)(b) envisages that an applicant in review proceedings is entitled to call upon a decision-maker to dispatch within 15 days of receiving a notice in this respect, the record of proceedings relating to the administrative decision, which the applicant seeks to set aside. In practice, when an applicant seeks interim relief, pending final

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[25] Section 6(2)(f)(i)
[26] Section 6(2)(f)(ii)(aa)
[27] Section 6(2)(f)(ii)(bb)
[28] Section 6(2)(f)(ii)(cc)
[29] Section 6(2)(f)(ii)(aa)
[30] A similarly wide remedial power exists in terms of section 172(1)(b) of the Constitution, which grants the court a power to grant any order that is "just and equitable" including "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."
[31] Section 8(1)(c)(i)
[32] Section 8(1)(c)(ii)
[33] Section 8(1)(e)

judicial review, such record is obviously always requested from the decision-maker concerned prior to the hearing of the review application. The applicant, who is granted interim relief in these circumstances, may then amend, add to or vary its notice of motion and supplement the founding affidavit in terms of rule 53 (4), prior to setting down the application for judicial review for hearing.

REQUIREMENTS FOR INTERIM AND FINAL RELIEF

[44] Leaving aside for the moment, the contentious aspect in the present proceedings relating to whether or not MTN and Vodacom can claim final relief in the present proceedings, the requirements for both a final interdict as well as an interim interdict are well established in our law.

[45] For the purposes of establishing a final interdict in terms of which a respondent is ordered either to refrain from committing a certain act or to refrain from performing a certain act, the applicant must establish three essential requirements namely, a clear right on the part of an applicant, [34] an injury actually committed or reasonably apprehended (evincing interference with the applicant's legal rights), and the absence of any other satisfactory legal remedy available to the applicant. [35]

[46] In contrast, the classic formulation of the requirements for an interim interdict, which were set out in the case of *Setlogelo v Setlogelo*, [36] one hundred years ago, are also well established in our law. These requirements are:

(i) Firstly, there must be a *prima facie* right on the part of the applicant; [37]

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[34] Whilst, Erasmus' commentary on *Superior Court Practice* at E8-6D and the authorities cited therein suggest that the phrase "clear right" has been so loosely used to the point that its meaning is not always clear, it is also indicated on the basis of the authorities cited that a "clear right" is generally accepted in legal terminology simply as a right which is "clearly established" or a "definite right". See, for example, the case of *Welkom Bottling Co (Pty) Ltd v Belfast Mineral Waters (OFS) (Pty) Ltd* 1967 (3) SA 45 (O) at 56F.

[35] See, for example, in this regard the cases of *Chapman's Peak Hotel (Pty) Ltd Jab and Annalene Restaurants CC t/a O'Hagans* [2001] 4 All SA 415 (C) and *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 (1) SA 252 (SCA) at 257F-258B.

[36] 1914 AD 221 at 227

[37] Clayden J in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 accepted that a prima facie right may be established though it is open to 'some doubt'.

(ii) Secondly, there must be a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief sought by the applicant is eventually granted; [38]

(iii) Thirdly, the balance of convenience must favour the granting of the interim relief; and

(iv) Fourthly, there must be no other ordinary remedy to give adequate redress to the applicant.

[47] In subsequent cases such as *Eriksen Motors Ltd v Protea Motors* [39] and *Radio Islam v Chairperson,* [40] the said requisites have been applied on a 'sliding scale' in the sense propounded in the case of *Olympic Passenger Service (Pty) Ltd v Ramlagan,* [41] in which it held that the stronger the applicant's *prima facie* case, the less need for balance of convenience in favour of the applicant and the weaker the applicant's *prima facie* case, the less the need for the balance of convenience to favour the applicant.

RELEVANT FACTUAL MATRIX AND PERTINENT AVERMENTS IN AFFIDAVITS

[48] As already stated, the 2014 Regulations were published on the 4th of February 2014. MTN launched the present application some eight days later on the 12th of February 2014. Vodacom subsequently launched its application on the 25th of February 2014. Thereafter, on or about the 12th of March 2014, ICASA annexed a copy of a resolution dated the 19th of February 2014 to its answering papers, reflecting its intention to repeal parts of the 2014 Regulations. On the basis of such resolution, MTN's attorneys advised ICASA on the 17th of March 2014 that MTN intended to seek final relief at the hearing

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[38] If the applicant can establish a clear right his apprehension of irreparable harm need not be established. The test for irreparable harm is an objective one as set out in cases such as *Minister of Law and Order v Nordien* 1987 (2) SA 894 (A) at 896G-I and *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at 347B-E.

[39] 1973 (3) SA 85 (A) at 691 F

[40] *IBA* 1999 (3) SA 897 (W) at 903G

[41] 1957 (2) SA 382 (D) at 383D-F

of this matter between the 25th to the 27th of March 2014. Thereafter, as already stated, both MTN and Vodacom sought in the first instance final relief.

[49] It is common cause on the papers that MTN and Vodacom have a much longer history in the mobile telephone market than more recent entrants, such as Cell C and Telkom Mobile. As already indicated, ICASA initially imposed pro-competitive conditions in terms of the 2010 Regulations, limiting mobile termination rates, which MTN and Vodacom could charge, thereby permitting Cell C and Telkom Mobile to charge relatively higher termination rates. In these circumstances, the maximum wholesale rates for terminating calls, which MTN and Vodacom have been permitted to charge in terms of the 2010 Regulations, are all lower than the asymmetrical rates, which Cell C and Telkom Mobile have been permitted to charge in terms of the 2010 Regulations.

[50] By way of historical background, ICASA also made reference to comparative research and statistics relating to the high mobile fixed retail prices in South Africa. Specifically, it appeared on the basis of a study by the Organisation of Economic Development that prior to the 2010 Regulations, MTN consistently had the highest price in South Africa for the cheapest prepaid products and Vodacom was marginally cheaper. It also appears from another comparative study that pursuant to the enactment of the 2010 Regulations, requiring MTN and Vodacom to reduce their termination rates, consumers felt the benefits of competitive pricing pressure from companies such as Cell C. However, prices for prepaid mobile services used by the majority of citizens and particularly the poor, still remain higher in South in comparison to all other African countries forming part of the research, including Sudan, Ghana, Kenya, Mauritius and Nigeria. The said comparative research and statistics was annexed to the answering affidavit of ICASA and was not disputed by MTN and Vodacom.

[51] To the extent that it is relevant in this context, it is not in dispute on the papers that prior to the institution of the applications in this matter, MTN and Vodacom had engaged with ICASA when the Draft Regulations were

published. It is also not in dispute that the attorneys of record of MTN had communicated with ICASA on the 10th of February 2014, setting out MTN's reasons for challenging the 2014 Regulations. MTN indicates in its founding papers that at that stage, Ms Batyi (the deponent to ICASA's answering affidavit) informed Parliament at the time that ICASA had instructed its lawyers "to write back to MTN and make it clear that the provisions would not be removed".

[52] After the institution of legal proceedings by MTN and Vodacom, ICASA initially made a "with prejudice" settlement offer in terms of which the 2014 Regulations, would only have operated for a period of six months, whilst ICASA gave further consideration to the rates, which would apply thereafter. MTN and Vodacom rejected this proposal.

[53] Against this background, MTN states in its founding papers that despite repeated requests, ICASA did not grant MTN access to underlying information, on which ICASA had relied for the proposed glide path and asymmetrical rates incorporated in the Draft Regulations published in 2014. MTN asserts that its request for information in this respect as well as a meeting with ICASA was not granted. ICASA explains in this regard in its answering affidavit that it took the view that "no further purpose would be served" by holding a further meeting in the light of "MTN's clear unwillingness to engage with ICASA in relation to termination costs".

[54] It is recorded in ICASA's answering affidavit in relation to both the applications by MTN as well as Vodacom that after consulting with legal representatives and expert economists, ICASA was no longer satisfied with "the robustness" of its conclusions on the appropriateness of the rates of 15c and 10c in the second and third years, and was also not satisfied with the "correctness of its decision to impose those rates". Be that as it may, it is further stated in the answering affidavit that ICASA did not have any concerns with the call termination rate of 20c set to commence on the 1st of April 2014 for the first year in terms of the Amended 2014 Regulations.

[55] The deponent to ICASA's answering affidavit states at a general level, that ICASA was alive to the fact that the 2014 Regulations had to be enacted without complete cost information having been supplied to ICASA by MTN and Vodacom. It is also stated in this context that MTN and Vodacom had declined to supply such information to ICASA. Be that as it may, it is stated in the answering affidavit that ICASA had resolved to repeal the 2014 Regulations insofar as they were determined beyond the 31st of March 2015, and to reconsider the correctness of the 15c and 10c rates, "preferably" on the basis of complete cost information to be requested by ICASA from MTN and Vodacom. It is stated in this respect that whilst both MTN and Vodacom dispute the "base rate" of 10c, when it was to be implemented in 2016, neither MTN nor Vodacom has disclosed their actual costs.

[56] It is also stated by way of background in the answering affidavit that since the promulgation of the 2010 Regulations, consumers have been benefitting from competitive pricing pressures from smaller operators such as Cell C. It appears to be common cause in this regard that the 2010 Regulations were premised upon the principle that licensed mobile operators should be obliged to charge wholesale termination rates, which are progressively cost-oriented over time. ICASA accordingly developed the notion of the "glide path", initially in terms of the 2010 Regulations. ICASA also determined rates in the glide path, which applied to MTN and Vodacom (as the two dominant operators) in terms of the 2010 Regulations. Concomitantly with the rates applicable to the two larger operators, ICASA further determined relatively higher asymmetrical rates, which could be charged by smaller mobile operators such as Cell C during the period of the glide path, which applied to the two dominant operators.

[57] It is not in dispute in the papers that the basis of the cost-oriented determinations in the 2010 Regulations were subsequently reiterated by ICASA prior to the Draft Regulations being published. ICASA indicates in its answering affidavit in this respect that on the 7th of June 2013 it held a meeting for stakeholders (including MTN and Vodacom) and presented to the said stakeholders a paper entitled "2014-2018 Cost to Communicate

Programme". Reference was also made at the said meeting to a questionnaire relating to termination rates sent by ICASA to operators. The presentation paper, which is annexed to ICASA's answering affidavit, included a copy of a slide, which presented as a solution to high termination costs -

"- Establish cost base for call termination

- Introduce a regulated glide-path towards the cost-base".

Another slide reflects that licensees could expect requests for information in the future as well as "one-to-one engagement between ICASA and the industry".

[58] Thereafter, in the explanatory note to the Draft Regulations in October 2013, the cost of termination was determined to be approximately 10c a minute and it was proposed that the said "level" of 10c per minute should be reached in three years. The explanatory note to the Draft Regulations further proposed at the time that the termination rate of 40c on the 1st of March 2013 be reduced to 20c per minute in 2014, 15c per minute in 2015 and 10c per minute in 2016.

[59] After ICASA received representations from MTN as well as Vodacom relating to the Draft Regulations, ICASA nevertheless proceeded with publishing the 2014 Regulations in February 2014. ICASA states in its answering affidavit that the 2014 Regulations prescribed termination rates "over a period of time", with the eventual goal that mobile operators charge a fee for termination that is oriented towards the actual cost of providing that service. As such, it is explained in its answering affidavit that the reduction of the call termination rate in a glide path "over time" was also referred to in the context of the 2014 Regulations.

[60] ICASA makes reference in the answering affidavits to a number of different methodologies for the purposes of determining that the prescribed termination rate after 2014 would be above the actual cost for efficient operators. It is also stated in the answering affidavit that the termination rate of 40c in the last year of the 2010 Regulations was, contrary to ICASA's previous determination, still "significantly above cost". ICASA goes on to

conclude in its answering affidavit that as mobile operators were setting termination rates at 40c per minute as permitted by the 2010 Regulations, there was no effective competition between mobile operators. It was suggested that this was particularly so as prices had not been driven down to cost. It is further stated in ICASA's answering affidavit that the finding in this respect is exactly the same in both the 2010 Regulations as well as the 2014 Regulations.

[61] In these circumstances, it is stated in the answering affidavit that the obvious remedy was to impose a new rate, which reflected the actual cost of termination "more accurately" and that is what ICASA "attempted" to do in the 2014 Regulations. For this purpose ICASA states that it determined the appropriate "base rate" to be 10c.

[62] ICASA makes much of the fact that whilst MTN and Vodacom dispute the base rate of 10c, neither MTN or Vodacom has indicated to ICASA its actual costs. It appears not to be in dispute on the papers that MTN and Vodacom have not submitted cost data to MTN since 2008, when the determination of 40c per minute was made in the context of the 2010 Regulations. Be that as it may, ICASA also indicates in its answering affidavit that pursuant to consultations with independent economic experts, ICASA was not satisfied with the so-called "LRIC" model, which apparently yielded the "robust" results of 15c and 10c in the context of the 2014 Regulations, which have since been repealed.

[63] As already indicated, the accounting regulations envisaged in the 2010 Regulations were never promulgated by ICASA. Be that as it may, Vodacom indicates in this context that it repeatedly requested ICASA to promulgate such regulations. In the absence of accounting regulations, and in the averred absence of disclosure and consultation on methodologies used by ICASA, it appears that for the purposes of the 2014 Regulations, ICASA simply relied on "audited financial statements and other information" provided pursuant to a "2013 questionnaire". Reference is also made in this context in ICASA's answering affidavit to the application of a "LRIC-based financial model".

Furthermore, ICASA states that it "cross-checked the results it obtained from this exercise by benchmarking against termination rates in other jurisdictions". In response to subsequent queries from Vodacom pertaining to how ICASA determined that competition in the wholesale market was ineffective, ICASA stated that:

> "Using the methodology in terms of section 67(6) of the ECA, the Authority retained the conclusions put forward in the Call Termination Regulations of 29 October 2010 that there is ineffective competition in the market for the provision of voice call termination services."

[64] In a similar vein, ICASA explained :

> "In the absence of any direct cost data received from MTN and Vodacom, it was not possible for ICASA to attempt to determine an appropriate termination rate using actual costs. Instead, it had to utilise a similar method that it had followed for the 2010 Regulations...In seeking to set a price based on the 2013 costs using available financial results, ICASA thus followed a financial modeling exercise using the cost structure for the provision of call termination services extracted from the earlier COA/CAM filings and forecast these expenses using information available to the operators' Annual Financial Statements (AFS) and information in response to the 2013 questionnaire. Apart from the more recent AFS and the information supplied in response to the 2013 questionnaire, the base source of information was the same as had been used in 2010."

[65] ICASA further annexes to its answering affidavit a press release from Vodacom dated the 26th of February 2014 in which it is stated inter alia that:

> "Vodacom said on Wednesday that it supported lower mobile rates 'The issue at hand is not whether these rates come down; it's about ensuring that the legislated fair and objective process is used to determine the final rates' ...
>
> The company stood by its previous proposal to the Regulator that an interim cut be implemented immediately."

[66] ICASA also annexes to its answering affidavit, a subsequent report by James Hodge *et al*, consultants from Genesis (Pty) Ltd ("Genesis") dated 8th March 2014 relating to mobile termination costs. The said consultants report that their best "rough estimation of likely termination costs" on the basis of the most recent annual financial statements was to the effect that MTN and Vodacom's 2012 costs are below the regulatory rate of 20c. It is further

reported by these consultants that a "bottom-up LRIC model" is likely to establish lower rates.

[67] ICASA accordingly submits in its answering affidavit that there will be a regulatory lacuna from the 1st of April 2014, if this court declares the Amended 2014 Regulations to be invalid. Thus, ICASA submits that it will be appropriate in the circumstances of this case for the court to suspend any declaration of invalidity for a period of six months in terms of section 8(1) of PAJA read with section 172(1)(b) of the Constitution, in the event that this court was inclined to declare the Amended 2014 Regulations invalid. MTN and Vodacom do not respond directly to this suggestion in their replying affidavits.

[68] Both Cell C and Telkom Mobile aver for different reasons in their respective answering affidavits on record that the regulatory framework enacted by ICASA is not judicially reviewable. The deponent to the answering affidavit of Cell C also states that for the purposes of its budget for 2014, Cell C will rely on the payments from MTN and Vodacom for calls terminated on the Cell C network at the rates prescribed by ICASA for 2014. Thus, Cell C annexes to its affidavit a copy of an extract of minutes of the board of directors of Cell C dated the 4th of December 2013, which reflects that the investment of further equity into Cell C is subject to Cell C's mobile termination rate being broadly similar to that stipulated in the Draft Regulations in October 2013. It is further indicated in the said extract that additional equity of US$ 100 million to Cell C was approved during the course of the year 2014, subject to the mobile termination rate for Cell C being gazetted and introduced on a broadly similar basis to the Draft Regulations. It is also noted in the said extract that no further equity investment would be made to Cell C prior to regulations, which were broadly similar to the Draft Regulations, being promulgated. In these circumstances, Cell C asserts in its answering affidavit that it faces dire financial consequences, if the regulatory scheme proposed by ICASA does not come into force

[69] In reply, both MTN and Vodacom reiterated that ICASA had not afforded them an opportunity to make representations pertaining to the assumptions made by ICASA relating to costs. MTN also made a report (with confidential aspects redacted) from independent expert advisors available to the court in this respect. Be that as it may, it appears not to be in dispute on the papers that from the time the 2010 Regulations were promulgated, all parties accepted that the determination of termination rates by ICASA had to be cost-based or cost-oriented. Vodacom also does not deny that the press release suggesting an interim cut in the termination rate be implemented "immediately" after the 26th of February 2014.

LEGAL ISSUES

[70] Against this background, as already stated, both MTN and Vodacom indicate in their respective replying papers, that even though they initially sought interim relief against ICASA, they now seek in the first instance, final relief in relation to the Amended 2014 Regulations, first disclosed by ICASA in answering papers. Furthermore, both MTN and Vodacom now only seek interim relief in the alternative, pending the determination of judicial review of the Amended 2014 Regulations.

Administrative Action in terms of PAJA

[71] Although there was some controversy in the past,[42] the Supreme Court of Appeal ("SCA") has now confirmed that the act of making regulations amounts to administrative action as contemplated in PAJA.[43] On this basis, counsel for MTN and Vodacom relied upon a number of interlinked grounds of review, which fall within the ambit of PAJA.

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[42] See *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) in which five Judges (Chaskalson CJ, Langa DCJ, Ngcobo, O'Regan and van der Westhuizen JJ) held that regulations do constitute administrative action, one Judge (Sachs J) held that they do not and five Judges held that it was not necessary to decide the question (Moseneke, Madlala, Mokgoro and Yacoob JJ)

[43] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) at para 10

Final or Interim Relief in terms of PAJA

[72] The more contentious aspect in the present proceedings is whether MTN and Vodacom are entitled to a final order reviewing and setting aside the Amended 2014 Regulations in the present urgent hearing, or whether they are constrained to claim the interim relief sought in Parts A of their respective notices of motion.

[73] It is trite that an applicant in motion proceedings is compelled to stand or fall by its notice of motion and the averments in its founding affidavit. [44] It is accordingly generally impermissible, as ICASA's counsel emphasized, for an applicant to make out a case in its replying affidavit for the first time.[45] This general rule is however, not an absolute rule as the court has a discretion to allow new matter in reply, after giving a respondent the opportunity to deal with such new matter in a second set of affidavits.[46]

[74] Generally in this regard, it is my view that a distinction must be drawn between a case in which new material is first brought out in reply, even though an applicant knew of such material when the founding affidavit was prepared, and a case where an applicant (such as the two applicants in the present case) relies on the existence or possible existence of a further basis of relief in reply to the answering affidavit.[47] In the latter type of case, the courts must be inclined more readily to permit an applicant to utilize and extend the applicant's averments premised upon the revelations of the

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[44] *Betlane v Shelley Court CC* 2011 (1) SA 388 (CC), citing *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) para 122; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 150; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* fn 38, *supra* paras 29-30 and *Pountas Trustee v Lahanas* 1924 WLD 67 at 68

[45] *Van der Merwe, supra,* fn 44 para 122; *SARFU, supra* fn 44 para 150; and *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636 A-B

[46] See for example, the cases of *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)* 1978 (1) SA 173 (W) at 178A; *Baek & Co SA (Pty) Ltd v Van Zummeren* 1982 (2) SA 112 (W) at 116A-E; *Skjelbreds Rederi A/S v Hartless (Pty) Ltd* 1982 (2) SA 739 (W) at 742D and *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) at 212B-C

[47] This is the also the view expressed by Erasmus in his commentary on rule 6(5) (e) relating to the necessary allegations in a replying affidavit, at B1-46 in line with the *dicta* of Miller J in the case of *Shakot Investments (Pty) Ltd v Town Council for the Borough of Stanger* 1976 (2) SA 701 (D) at 705A-B.

respondent in the answering affidavit.[48] Indeed, in certain circumstances additional grounds of relief may even arise from the belated revelations by the respondent.[49] Obviously, however, the court will generally not permit the introduction of new matter if such new matter is premised upon the abandonment of an existing claim and/or the substitution therefore of a fresh and completely different claim, premised upon a completely different cause of action[50], nor will the court permit an applicant to make out a case in reply when no such case was made out in the initial application by such applicant.[51]

[75] In the present matter, ICASA's unforeseen repeal of determinations was a significant new revelation in answering papers, which ICASA's counsel characterized as "changed circumstances". Both MTN and Vodacom could not have anticipated this fact when they were preparing their respective founding affidavits. As MTN's counsel correctly contended in this respect, the application by MTN was since inception been an application to review and to set aside the 2014 Regulations (subsequently the Amended 2014 Regulations). It was accordingly correctly averred that the said review was directed at all relevant times to ICASA's decision to enact regulations for 2014. Vodacom's counsel went even further and asserted in closing argument

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[48] Erasmus, *supra* and the authorities cited therein including *Driefontein Consolidated GM Ltd v Schlochauer* 1902 TS 33 at 38 and *Registrar of Insurance v Johannesburg Insurance Co Ltd (I)* 1962 (4) SA 546 (W).

[49] Erasmus, *supra* and the authorities cited in this context.

[50] Erasmus, *supra,* and the authorities cited in this context including *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2) SA 261 (W) at 270A and *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1962 (4) 546 (W) where there were no facts in dispute and the issues related purely to a matter of law; *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O) at 568F, where the court exercised its discretion relating to facts in a replying affidavit by virtue of "special circumstances"; *Cohen NO v Nel* 1975 (3) SA 963 (W) at 966F where the court referred to the exercise of the court's discretion in relation to an applicant's replying affidavit; *Shakot Investments, supra,* fn 47; *Cowburn v Nasopie (Edms) Bpk* 1980 (2) SA 547 (NC) at 565B-D ; *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205F where the full bench held that the general rule that an applicant has to make out its case in the founding affidavit is not an absolute rule; *Pienaar v Thusano Foundation* 1992 (2) SA 552 (B) at 578C-D, where the court dealing with the winding-up of a company held that in could not be held in the circumstances of that case that it could not be expected of the applicant to have all facts and information relating to "relevant" information subsequently put before the court; and more recently *Finishing Touch 163, supra,* fn 46 33, 212C-D, where the SCA quoted the *Shokot Investment case, supra,* fn 47 with approval.

[51] *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 (D) at 316 A

that for the purposes of the amended relief sought by Vodacom no reliance would be placed by Vodacom on the contents of its replying affidavit.

[76] Therefore, to the extent that both MTN and Vodacom simply utilized and extended the averments made by them, premised upon the disclosure of ICASA in reply, the additional averments and the amended final relief quite obviously arose directly from ICASA's reply. It is accordingly my view that the submissions by counsel for Cell C and Telkom Mobile in this regard were misdirected. MTN and Vodacom had not abandoned their existing claims for relief and they had also not substituted their initial claims for relief with a fresh and completely different claim for relief, premised upon a completely different cause of action.

[77] The further procedural submissions by Cell C's counsel pertaining to its averred right to the record of proceedings were in my view also misdirected. ICASA does not dispute the averment by MTN in the present proceedings that ICASA has in fact refused to disclose a record, as contemplated in rule 53(1)(b), and Vodacom's counsel confirmed during the course of proceedings that Vodacom had waived its rights to the said record. In the context of the procedure envisaged in rule 53, the record of proceedings is obviously filed for purposes of advancing the case of litigants, such as MTN and Vodacom, who are challenging the decision of a particular decision-maker. Cell C, as an interested respondent which benefits from the impugned decision, has no procedural right to the said record for possible future review applications, as suggested, nor does Cell C advance any arguments of prejudice in the context of the present proceedings, if the record is not filed by ICASA.

[78] In the final analysis, the final review claimed by MTN and Vodacom can be adjudicated upon on the basis of undisputed facts on the papers relating to the legal issues in dispute.[52] It is also my view that to the extent that neither

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[52] See *Bader v Weston* 1967 (1) SA 134 (C) at 138D; *Dickinson v South African General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 628F; *Cohen NO, supra,* fn 50, at 970; *Dawood v Mahomed* 1979(2) SA 361 (D) at 365H; *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C) at 892J-893A; *Dhladhla v Erasmus* 1999 (1) SA 1065 (LCC) at 1072D and *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 283A-H

MTN nor Vodacom (or for that matter ICASA) rely on the record of proceedings to advance their respective cases in their capacity as the decision-makers and the persons challenging the decision of the said decision-maker, this court can adjudicate this matter without the record. As already stated, Cell's C's right to the said record as an interested party, who is effectively a beneficiary of the impugned decision, is misdirected.[53]

[79] Therefore, in order to obtain the primary final relief claimed, premised upon a clear right, MTN and Vodacom must establish such a right in relation to the Amended 2014 Regulations on the basis of the facts relied upon by MTN and Vodacom, which are not disputed by ICASA on the papers. [54]My view in this regard is not affected by the fact that ICASA has not compiled a "record of proceedings" relating to the 2014 Amended Regulations as contemplated in rule 53(1)(b) of the rules of court.

[80] Having found in the very exceptional and unprecedented circumstances of the present proceedings that final relief can be claimed on the basis of the papers before me, I now turn to the submissions before me relating to the averred clear rights of MTN and Vodacom.

Averments with respect to MTN's Clear Rights

[81] On the basis of the provisions of PAJA, counsel for MTN summarized the position of MTN on the basis of six broad grounds of judicial review in terms of section 6(2) of PAJA. These grounds of review were as follows:

- Firstly, it was averred that the differing maximum rates prescribed by ICASA are unlawful, *ultra vires* and void to the extent that ICASA may not by regulation require or permit interconnection agreements, which are prohibited in terms of section 37(6) of the ECA. Thus, it was

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[53] This case is accordingly distinguishable from the case of *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) para 37 where the review was premised upon aspects of the record.

[54] On the basis of the well-known principles set out by Corbett JA in the case of *Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) 623 (AD) at 634E-635D.

contended that ICASA cannot, through subordinate legislation, permit agreements, which are prohibited by the empowering ECA.

- Secondly, it was averred that to the extent that the higher asymmetrical rate charged by Cell C and Telkom Mobile result in MTN effectively subsidizing these smaller operators, such a subsidy constitutes an impermissible consequence in terms of the ECA;

- Thirdly, it was averred that as the target rate of 10c per minute, as part of a composite glide path, was flawed on the basis of ICASA's own version, the remaining part of the said glide path (of 20c) was reviewable by virtue of a number of grounds stipulated in section 6(2) of PAJA.

- Fourthly, it was averred that ICASA did not comply with the provisions of section 67(4)(e) relating to periodic reviews of the relevant markets and market segments as well as section 67(8) relating to the review of market determinations on the basis of earlier analysis, also in contravention of section 6(2) of PAJA;

- Fifthly it was contended that the determined asymmetric rates were premised upon an ulterior purpose not empowered by the ECA.

- Sixthly, it was averred that MTN's right to procedural fairness was violated inter alia by virtue of the fact that MTN was not afforded an opportunity to make representation relating to the benchmarking study referred to by ICASA in its answering affidavit.

Averments by Vodacom

[82] Similarly, on the basis of the provisions of PAJA, counsel for Vodacom summarized the position of Vodacom on the basis of four broad grounds of judicial review in terms of PAJA. These grounds of review were as follows:

- Firstly, it was averred that as ICASA acted beyond the powers conferred on it by section 67 of the ECA, its decision was reviewable in terms of section 6(2)(a)(i) or 2 of PAJA.

- Secondly, it was averred that as ICASA acted beyond the powers conferred on it by section 67(8) of the ECA, its decision was reviewable in terms of section 6(2)(a)(i), 6(2)(e)(i) and 6(2)(f)(i) of PAJA.

- Thirdly, it was averred that as ICASA acted irrationally and arbitrarily, its decision reviewable in terms of section 6(2)(e)(iii) of PAJA.

- Fourthly, it was averred that as ICASA engaged in an unfair process, its decision was reviewable in terms of section 6(2) (c) of PAJA.

Is there a clear right to any ground of review?

[83] One of several areas that overlap between the averments of MTN and Vodacom relate to the averred arbitrary decision of ICASA regarding the determination of the termination rate of 20c for the first year. It was also averred in this respect that the said determination was reviewable by virtue of the fact that ICASA took into account irrelevant considerations and failed to take into account relevant considerations.

[84] It is not in dispute on the basis of ICASA's averments in its answering affidavit that the termination rates in terms of the 2010 Regulations were cost-oriented, and were premised upon the notion of a glide path over three years from 2011 to 2014 towards the "cost base". Thereafter, it is also not in dispute that ICASA identified the solution for high termination rates in June 2013 on the basis that a "cost base" for such rates had to established in the context of a further regulated glide path towards the said cost base.

[85] The explanatory note to the Draft Regulations published by ICASA in October 2013 stipulated inter alia that the cost of termination at the time was approximately 10c per minute to mobile locations, which was at the time incomprehensibly lower than the stated rate for terminating calls to fixed

locations in the sum of 12c to 19c. The said explanatory further stipulated that the stated level of 10c per minute should be reached in three years. In these circumstances, the explanatory note to the Draft Regulations proposed that the termination rate of 40c on 1 March 2013 be reduced to 20c per minute in 2014, 15c per minute in 2015 and 10c per minute in 2016.

[86] Against this background, counsel for both MTN and Vodacom correctly contended, certainly in the context of the repealed 2014 Regulations, that the prescribed termination rate of 20c per minute in 2014 was the first step in the glide path to the cost base target rate of 10c per minute in 2016. ICASA accordingly confirms in this regard in its answering affidavit that the 2014 Regulations were to be reduced "over time" with the ultimate goal that mobile operators charge a fee for termination which is oriented towards the actual cost of providing that service. ICASA further confirms in its answering affidavit that the reduction of the call termination rate "over time" constituted the notional "glide path".

[87] ICASA states in its answering affidavit that it had "attempted" to reflect the actual costs of termination in the 2014 Regulations by determining "the appropriate ultimate rate of termination" as the aforementioned base rate of 10c. However, it admits it was not "possible to determine an appropriate rate using actual costs", apparently because MTN and Vodacom had not disclosed accounting information. After the institution of the present applications by MTN and Vodacom, ICASA asserted that it was no longer satisfied with the "robustness" of the rates of 15c and 10c and it was also not satisfied that it was correct in the first place to impose the said two rates in the 2014 Regulations. As already stated, ICASA admits in this context that these rates were determined without any cost information from MTN and Vodacom pertaining to their actual costs since 2008, and apparently also without ICASA developing a cost model for information. ICASA accordingly repealed parts of the 2014 Regulations, which applied after the 31st of March 2015, and undertook to reconsider the correctness of the 15c and 10c rates, "preferably" on the basis of cost information from MTN and Vodacom.

[88] I agree with counsel for MTN and Vodacom in these circumstances that to the extent that the 15c rate as well as the 10c rate was incorrect, and were not premised on actual costs, the rate of 20c, also incorporated in the glide path of the 2014 Regulations could also not have been premised upon any consideration of actual costs of termination. In any event ICASA admits it was not possible for it to determine actual costs for 2014.

[89] The only inference in these circumstances is that the determination of the rate of 20c (retained in the Amended 2014 Regulations) was an arbitrary figure between the applicable rate of 40c per minute (in terms of the last year of the 2010 Regulations) and 10c per minute (in terms of the repealed 2014 Regulations), which ICASA now admits is incorrect. In effect, if it is accepted that the 10c figure is incorrect, then the only basis for determining 20c is that it is below 40c, without the benefit of a determined rate for actual costs. This is particularly so as ICASA fails to justify any basis for the determination of the 20c rate in in answering affidavit, despite the reference to "various methodologies", employed by ICASA in this regard, nor does ICASA disclose any internal documents pertaining to its decision in this respect for the purposes of a record of proceedings in the review application. Matters are exacerbated by the fact that ICASA tries to justify a change in termination rates, but also suggests that there was "little change" since 2010.

[90] It is also my view that ICASA cannot be heard to complain that MTN and Vodacom have failed to disclose information on costs. ICASA in fact failed to promulgate the accounting regulations envisaged in regulation 7 (c) of the 2010 Regulations, after apparently being urged to do so by both MTN and Vodacom at different stages.

[91] In these circumstances, I agree with counsel for MTN and Vodacom that to the extent that ICASA admits that the 2010 Regulations were not premised upon any accounting data or information on actual costs, the 2014 Regulations as well as the determination of 20c in the Amended 2014 Regulations could not have been "cost-based". Therefore, by its own admission, ICASA did not take into account any relevant cost and accounting

considerations for the purposes of the determination of all amounts in the 2014 Regulations as well as the Amended 2014 Regulations. Moreover, even though ICASA admits that it was not correct with respect to two out of three determinations in a glide path in the 2014 Regulations, it does not reasonably concede that it was incorrect with respect to the remaining determination of 20c in both the 2014 Regulations and the Amended 2014 Regulations, when the said determination of 20c was dependent on the "finding" of 10c as actual cost.

[92] Therefore, to the extent that ICASA admits that it had no information pertaining to costs in the context of three cost-based determinations, such determinations could not have been rationality connected to information before ICASA. It concedes as much for two out of three determinations. Furthermore, it is my view that the specific determination of the 20c per minute must have taken into account an irrelevant consideration in the form of the target cost of 10c (which ICASA admits was incorrect), and disregarded relevant considerations relating to the true cost of termination, as ICASA admits that it did not have information before it in this respect. The only inference in these circumstances is that such determination of 20c was completely arbitrary. This is obviously so as there was no rationally objective basis to make such a determination, based on the information before ICASA.

[93] It does not assist ICASA to assert that MTN and Vodacom have not disclosed the actual cost of termination in 2014. It is not in dispute in this regard on the papers that regulation 7(5)(c) of the 2010 Regulations contemplated that ICASA puts in place accounting regulations with a view to obtaining information, which would be necessary to calculate the costs of termination at the end of the lifespan of the 2010 Regulations. However, such regulations were not published. More importantly, in this context, ICASA accepted as far back as 2010 that the only objectively reasonable basis of determining future termination rates was on the basis of actual costs. If ICASA then admits it had no information on costs, the determination of 20c cannot be defended, either objectively or reasonably. This is particularly so as the only cost-based previous determination, which was accepted by all, was 40c.

[94] The subsequent report by Genesis does not assist ICASA in this respect as the "rough estimates" in the said report were not considered by ICASA when it made the determination in relation to 2014 Regulations of 20c (in the first year), 15c (in the second year) and 10c (in the third) as part of a composite glide path. Even if 20c is found to be above MTN's current cost of termination, as ICASA seems to suggest on the basis of the Genesis report, ICASA cannot be heard to defend its decision *ex post facto.* Thus, it can only defend the termination rate of 20c for year one on the basis of information or reasons before it at the time. [55] This is so by virtue of the fact that judicial review is concerned with the process followed when a decision is made, not whether an administrator happened to reach the correct decision by chance.[56]

[95] Therefore, as stated by the English courts in this respect, a decision-maker such as ICASA is generally barred from justifying or retrofitting any decision *ex post facto.* The Court of Appeal in the case of *R V Westminister City Council, ex parte Ermakov* [1996] 2 All ER 302 (CA) at 315-316 held as follows in this regard:

> "(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should....be very cautious about doing so....Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence – as in this case- which indicates that the real reasons were wholly different from the stated reasons....
> (3) .... The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to the purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but gives rise to practical difficulties. "

[96] The above *dicta* in the *Ermakov* case were quoted with approval in the case of *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 at paras 11 and 12, where Cleaver J held that a decision-maker "should

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[55] *Democratic Alliance* case, *supra,* paras 36-40
[56] *Democratic Alliance* case, *supra,* paras 36-40

not be allowed to supplement the reasons for its decision by reasons, which were clearly taken *ex post facto".*

[97] The above view is also supported in the case of *National Lotteries Board v SA Education and Environment,* where Cachalia JA stated as follows:

> "The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England, the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show the original decision may have been justified. For in truth the later reasons are not true reasons for the decision, but rather an *ex post facto* rationalization of a bad decision."[57]

[98] For the reasons given on the basis of the papers before me, MTN and Vodacom have established a clear right to review and to set aside the Amended 2014 Regulations (incorporating the 20c determination) for more than one ground of review specified in section 6(2) of PAJA. The Amended 2014 Regulations (or the denuded 2014 Regulations) are accordingly unlawful and invalid.

[99] It is not strictly necessary for me to consider the remaining grounds of review, save to state that I am of the view that to the extent that the said remaining grounds of review are directed at any future regulations, another court (not constrained by the limits of urgency) will be far better placed than this court to assess the sophisticated and complex submissions and counter-submissions by counsel from all sides. I mention as an aside that some of the remaining submissions by MTN and Vodacom appeared to me to have less weight than others and many of the remaining submissions by ICASA appeared very persuasive to me. However, my views in this regard are not relevant to this judgment.

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[57] 2012 (4) SA 504 (SCA) at para 27

The remaining requirements for final relief

[100] Having established a clear right to judicial review, it follows that the injury actually committed to MTN and Vodacom is obviously that their right to fair administrative action in terms of section 33 of the Constitution have obviously has been violated. As demonstrated in the papers, the lower termination rates in the Amended 2014 Regulations will also cause commercial prejudice to MTN and Vodacom. Finally, in this context, I am also satisfied that MTN and Vodacom cannot obtain adequate redress in some form of "ordinary" relief other than judicial review, nor was any other existing remedy suggested as appropriate. Thus, I am also satisfied that the third requirement of a final interdict has also been met. This is particularly so as the infringement of any constitutional right is generally a continuous violation of the said right.

The Separation of Powers Debate

[101] ICASA, Cell C and Telkom challenged all the grounds of review relied upon by MTN and Vodacom premised upon numerous cases calling for judicial deference in policy-laden matters, which fall within the domain of the executive. Thus, reference was made to the recent decisions of *International Trade Administration v SCAW South Africa*[58] ("*SCAW*") and *National Treasury v Opposition to Urban Tolling Alliance and others* ("*OUTA*").[59]

[102] Both the unanimous decision of the Constitutional Court in the case of *SCAW* as well as the majority decision of the Constitutional Court in the case of *OUTA,* dealt with the relevant considerations relating to attempts to interdict national government from exercising its executive powers in policy-laden matters. In the *SCAW* case, the Constitutional Court held that the High Court had improperly breached the doctrine of separation of powers by extending the life-span of an anti-dumping duty. Thus, the court held inter alia as follows:

- "A court should be slow to override mandatory legislative provisions... "[60]

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[58] 2012 (4) SA 618 (CC)
[59] 2012 (6) SA 223 (CC)
[60] at para 87

- "Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.....

  .... When a court is invited to intrude into the terrain of the executive, especially when the executive decision-making process is still uncompleted, it must do so only in the clearest of cases and only when irreparable harm is likely to ensue if interdictory relief is not granted. This is particularly true when the decision entails multiple considerations of national policy choices and specialist knowledge, in regard to which courts are ill-suited to judge. In *Bato Star* this court made the point that a court –

  > 'should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field.'" [61]

- " ....the setting, changing and removal of an anti-dumping duty in order to regulate exports and imports is a patently executive function that flows from the power to formulate and implement domestic and international trade policy. The power resides in the kraal of the national executive authority,"[62]
- "Courts may not without justification trench upon the polycentric policy terrain of international trade and its concomitant foreign relations or diplomatic considerations reserved by the Constitution for the national executive."[63]
- "It was inappropriate for the high court to grant an interim order which invaded the terrain of the national executive function without appropriate justification ". [64]

[103] In a similar vein, it was held in the *OUTA* case that

" ....the duty of determining how public resources are to be drawn upon and recorded lies in the heartland of executive-government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to

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[61] at paras 95-101
[62] at para 103
[63] at para 105
[64] at para 111

> finance public projects reside in the executive domain of the national executive subject to budgetary appropriations by parliament...
> ...the collection and ordering of public resources inevitably call for policy-laden and polycentric decision-making. Courts are not well-suited to make decisions of that order."[65]

[104] By virtue of the reasons already given by me, it is my view in the circumstances of this case, that the determination of 20c in the Amended 2014 Regulations is objectively irrational and unreasonable. I mention as an aside that, unlike the *OUTA* and *SCAW* cases (which dealt with cases involving the national purse and monies received or allocated by government) the extension of termination rates in 2014 *per se* by ICASA is not really comparable at a policy level. More importantly, the determination of termination rates by ICASA is not in issue in this matter. The primary issue relating to the above ground of review upheld by me is whether the determination of a cost-based termination rate for 2014 is objectively rational or reasonable. This court accordingly recognizes that ICASA is entrusted with certain powers and functions relating to the determination of termination rates, and does propose usurping that function.

Remedial Powers of Court

[105] Having found that the Amended 2014 Regulations are invalid and unlawful in terms of PAJA, this court nevertheless has a discretion not to set aside such regulations if it is "just and equitable" to do so in terms of section 8(1) of PAJA. A similarly wide power is granted in terms of section 172(1)(b) of the Constitution, which empowers this court to grant an order which is "just and equitable", including "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect".

[106] Therefore, even though I have found that the determination of the rate of 20c in the Amended 2014 Regulations (as well as that part of the 2014 Regulations, which has not been repealed) was irrational and arbitrary, it is

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[65] at paras 67and 68

significant that the previous cost-based determination of 40c in the 2010 Regulations is common cause. It is also significant that MTN and Vodacom do not in effect oppose ICASA's justification in answering papers for a further reduction from 40c, based upon the ICASA's authority to regulate pro-competitive conditions on the basis of cost-based wholesale termination rates. There is also nothing before me in the papers to suggest that the actual cost of termination is higher than the arbitrarily determined rate of 20c.

[107] As regards the court's discretion, the full bench of the SCA in the *Oudekraal* case held as follows:

> "...a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensible moderating tool for avoiding or minimising injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises when an administrative act is invalid." [66]

[108] The Constitutional Court has explained the discretion of the courts in this context in the case of *Bengwenyama* on the following basis:

> "The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic with experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think it s wise to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality, and if so, to what extent."[67]

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[66] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para 36

[67] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC)

[109] On the basis of these authorities, this court is empowered to leave the Amended 2014 Regulations in place, with full legal effect, for a limited period with a view to permitting ICASA to amend the said regulations. As Cameron J recently held in this regard in the case of *Estate Agency Board*[68]

> "Suspension is not an ordinary remedy. It is an obvious use of this Court's remedial powers under the Constitution to ensure that just and equitable constitutional relief is afforded to litigants, while ensuring that there is no disruption of the regulatory aspects of the statutory provision that is invalidated. This was explained in J:
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> > 'The suspension of an order is appropriate in cases where the striking down of the statute would, in the absence of a suspension order, leave a lacuna. In such cases, the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other hand, the potential disruption of the administration of justice that would be caused by the lacuna' "

[110] In considering justice and equity in the arena of administrative rights, our courts have often weighed the interests of successful litigants, who seek to set aside invalid administrative action, against competing interests such as for example, pragmatic considerations in relation to the retention of the *status quo ante*, or overwhelming considerations of social justice. So, for example, in the recent case of *Allpay*, the SCA and the Constitutional Court weighed the competing interests of constitutional rights relating to an irregular tender and the compelling necessity to continue paying millions of individuals, who receive social grants.[69]

[111] Other cases in this sphere include the case instituted by Mr Fraser[70], relating to unconstitutional common law provisions, which permitted children born out of wedlock to be adopted without their natural father's consent. Even though Mr Fraser successfully challenged the statutory provisions in this regard, he was not granted any substantive relief, as the Constitutional Court

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[68] *Estate Agency Board v Auction Alliance (Pty) Ltd and Others* (CCT 94/13) [2014 ZACC 3 (27 February 2014) at paras 55-57

[69] *Allpay Consolidates Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC)

[70] *Fraser v Children's Court, Pretoria North and Others* 1997 (2) SA 261 (CC) at para 50

suspended the declaration of invalidity of the relevant statutory provisions for a period of two years. Thus, Mohamed DP accepted that this case was a proper case for the Constitutional Court to exercise its jurisdiction in circumstances where Mr Fraser was not the only person affected by the impugned statutory provisions. The court accordingly found in the circumstances of that case that it was in the interests of justice and good government that proper legislation to regulate the rights of fathers of children born out of a relationship, which was not formalized by marriage, should be promulgated during the period of suspension of the declaration of invalidity of the common law.

[112] To similar effect in the *Mvumvu* case, [71] the Constitutional Court suspended a declaration of invalidity in respect of a provision of the Road Accident Act 56 of 1996, which discriminated against largely poor, black claimants. The said decision was premised upon Parliament being "best-suited" to determine the extent of compensation, which the applicants in that case could claim from the Road Accident Fund.

[113] ICASA averred in the circumstances of the present case that if this court declared the Amended 2014 Regulations invalid and did not contemporaneously suspend any declaratory order of invalidity, then the wholesale termination rate market would be unregulated from the 1st of April 2014, and this would create an unwarranted regulatory lacuna[72] or vacuum[73]. Counsel for MTN averred that the present case was distinguishable from cases such as *Fraser,* as the Amended 2014 Regulations were still not in force and there was accordingly no entrenched *status quo ante*. Thus, they averred that the effect of a court order setting aside the invalid regulations in the present case would merely take the form of preventing a *new* regulatory regime from coming into force on the 1st of April.

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[71] *Mvumvu and Others v Minister of Transport and Another* 2011 (2) SA 473 (CC)

[72] See also *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC) at para 21

[73] See also *Doctors For Life Intl v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 214 and *Sex Workers Education and Advocacy Task Force and Others as Amici Curiae* 2002 (6) SA 642 (CC) at paras 123-126

[114] My difficulty with the line of argument adopted by counsel for MTN is that the Amended 2014 Regulations are in my view not as much a new regime as a natural continuation of a previous regulatory regime, which was accepted by all parties concerned from the 1st of March 2011 to the 31st of March 2014. Indeed, notwithstanding articulate submissions to this court on aspects such as the effect of section 37(6) in the context of the Amended 2014 Regulations, it is significant that both MTN and Vodacom have been living with and have accepted the 2010 Regulations for three years, after reaping the benefits of an unregulated pre-2011 market conditions (with no effective competition) for many years. Thus, as indicated in ICASA's answering affidavit, MTN and Vodacom have handsomely profited from an unregulated market before 2011 and they did not dispute the underlying basis of cost-oriented determinations in 2010. Furthermore, in a press release as late as the 26th of February 2014, Vodacom even accepted that an "immediate" reduction of termination costs was warranted after the 2010 Regulations would no longer be in force.

[115] It is also significant that MTN and Vodacom could not and did not dispute the research, statistics and studies referred to by ICASA in its answering affidavit relating to prices prior to 2010. Moreover, the necessity for continued cost-oriented termination rates, where there were market failures in the form of inefficient pricing and high costs for prepaid phones as explained in the answering affidavit, were effectively common cause on the papers. Furthermore, on the basis of the factual averments in the answering affidavit, it was effectively explained by ICASA that the implementation of the 2010 Regulations promoted competition, lowered costs and facilitated access to affordable telephony for the majority of the population in all spheres of their lives including of course, economic activity, education, access to essential services such as health emergencies, social grants and the like. The importance of such affordable access to telephony to indigent members of our population, particularly in remote rural areas, can hardly be disputed.

[116] A further consideration favouring suspension on the basis of my discretion is the fact that MTN and Vodacom are both very profitable

companies, motivated in these proceedings primarily, if not exclusively, by commercial considerations. Thus, the nature and extent of competing considerations are not as pressing as they were in the *Allpay* case or for that matter the *Fraser* or *Mvumbu* cases or cases such as *Fourie,* [74] where the court dealt with invalid common law legislation preventing same sex couples from getting married. In contrast, in the present case, the only prejudice, which flows from an infringement to the right to fair administrative action, appears to be a loss of revenue for MTN and Vodacom. This potential loss of revenue has to be weighed against the likelihood of a price war triggered by Cell C and Telkom Mobile, which will benefit the public if the Amended 2014 Regulations come into force, even for a limited period.

[117] It is also my view that there are pragmatic considerations, which warrant suspension of my declaration of invalidity. I appreciate in this regard that ICASA is burdened with the difficult task of promoting competition in the market relating to termination rates on the basis of a "multifarous and nuanced" [75]regulatory regime. This is particularly so as the economic debate as well as the complex methodologies debated before this court demonstrated that there are different regulatory pathways open to ICASA and they require a reasonable period to assess the market and to make appropriate determinations.

[118] Furthermore, ICASA as well as Telkom's counsel correctly emphasized in this context that the application of the 20c figure during the proposed suspended period is also not likely to be prejudicial to MTN and Vodacom, given the fact that there is effectively no evidence to challenge the contention by ICASA that the said figure in fact exceeded actual costs. This is so despite the fact that I have found that the determination of that figure by ICASA was irrational and arbitrary. It appears to me in this regard that both MTN and Vodacom have effectively shielded behind the armour of fair administrative rights with as much vigour as shielding behind the armour of

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[74] *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae)* 2006 (1) SA 524 (CC)

[75] As stated by Mahomed DP in the case of *Fraser* at para 50

non-disclosure (in the absence of accounting regulations). Therefore, even though ICASA has not promulgated regulations relating to accounting (as envisaged by the ECA as well as the 2010 Regulations), it seems only logical that the best way of demonstrating the non-efficacy of the 20c figure, is to disclose the cost-base relating to that figure. Be that as it may, on the basis of ICASA's answering affidavit, I accept for the purposes of exercising my discretion that 20c exceeded the actual cost of terminating calls as at the 1st of April 2014.

[119] It may also be mentioned in this regard that Cell C's counsel, relied on the *dicta* by the Constitutional Court in the *Allpay* case, [76] and submitted that if this court was inclined to exercise its judicial discretion in this case, then it would be appropriate to file further affidavits on factual issues. It was contended that this was so despite the fact that this court already has a record exceeding 2000 pages. It is significant that counsel for the decision maker, ICASA made submissions on all the relevant factual considerations, particularly the effects of an unregulated regime, on the basis of factual averments incorporated in ICASA's answering affidavit. In my view, no further factual averments by Cell C are necessary in this regard other than those already on record in the context of the present proceedings. This is also so by virtue of the fact that Cell C was cited in these proceedings only as an interested and affected party, and was accordingly not challenging the decision of ICASA in the present proceedings. In any event, Cell C's team of three counsel was not precluded from making submissions in this regard to this court.

[120] For all the reasons given, I am of the view that this is a proper case, which warrants this court exercising its discretion to promote the purposes of the ECA, premised upon the public interest. As already indicated, all the information necessary for this court to exercise its discretion was incorporated in the affidavits, particularly the undisputed aspects of the answering affidavit of ICASA. As suggested by ICASA, I am of the view that it is just and

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[76] at paragraph 96

equitable in the circumstances to suspend the invalidity of the Amended 2014 Regulations for a period of 6 months from the 1st of April 2014.

CONCLUSION

[121] For all the reasons given, MTN and Vodacom succeed with their applications for final judicial review. However, in the interests of justice and equity, it is appropriate for this court to suspend the impugned regulations for a period of six months.

[122] In the interests of completeness, I also propose incorporating my interlocutory order pertaining to the consolidation of the two applications in this matter in my final order. In addition, I propose making an order pertaining to the urgent hearing of the consolidated applications.

COSTS

[123] Even though MTN and Vodacom have been successful with one ground of final review, it is not appropriate in the circumstances of this case for this court to make an adverse costs award against ICASA, as a statutory body vested with the responsibility of carrying out certain functions in the public interest. I accordingly propose making an order that each party pays its own costs, also on the basis that it is just and equitable to do so.

ORDER

[124] Based on the aforegoing, the following order is made:

(i) The urgent applications under case numbers 04699/2014 and 6701/2014 are hereby consolidated;

(ii) The forms and services provided for in the rules of court are hereby dispensed with and it is directed that the consolidated applications be heard as urgent applications in terms of rule 6(12) of the Uniform Rules of Court;

(iii) The "SECOND CALL TERMINATION AMENDMENT REGULATIONS, 2014" published in Government Gazette number 37471 on the 26th of March 2014 as notice 240 of 2014, are declared to be invalid and unlawful;

(iv) The declaration of invalidity in terms paragraph (iii) above, is suspended for a period of 6 (six) months from the 1st of April 2014; and

(v) Each party is to bear its own costs.

DATED AT JOHANNESBURG THIS 31st DAY OF MARCH 2014

MAYAT J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

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