**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

Case No.: \_\_\_\_\_\_

In the matter between:

**MOBILE TELEPHONE NETWORKS (PTY) LTD** Applicant

and

**INDEPENDENT COMMUNICATIONS AUTHORITY**

**OF SOUTH AFRICA** First Respondent

**MINISTER OF COMMUNICATIONS AND**

**DIGITAL TECHNOLOGIES** Second Respondent

**TELKOM SA SOC LIMITED** Third Respondent

**VODACOM (PTY) LTD** Fourth Respondent

**CELL C (PTY) LTD** Fifth Respondent

**LIQUID TELECOMMUNICATIONS SOUTH**

**AFRICA (PTY) LTD** Sixth Respondent

**WIRELESS BUSINESS SOLUTIONS (PTY) LTD** Seventh Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**MOSES MUXE MASHISANE**

do hereby make oath and say:

1. I am the General Manager: Legal and Regulatory of the applicant, Mobile Telephone Networks (Pty) Ltd.
2. The contents of this affidavit are within my personal knowledge, unless the context indicates otherwise, and are to the best of my belief true.
3. I am duly authorised to bring this application and to depose to this affidavit on MTN’s behalf.

# PARTIES

1. The applicant is **MOBILE TELEPHONE NETWORKS (PTY) LTD** (“**MTN**”). MTN is a company incorporated in terms of the company laws of South Africa with its principal place of business at 216 14th Avenue, Fairland, Roodepoort.
2. The first respondent is **THE** **INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA** (“**ICASA**”):
   1. ICASA is a juristic person, established as such in terms of section 3 of the Independent Communications Authority of South Africa Act 13 of 2000.
   2. ICASA’s registered offices are at 350 Witch-Hazel Avenue, Eco-Park Estate, Centurion.
   3. ICASA made the decisions that form the subject matter of the present review application.
3. The second respondent is the **MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES** (“**the Minister**”). The Minister is cited in her capacity as the responsible Minister under the Electronic Communications Act. The Minister’s offices are at iParioli Office Park, 1166, Park Street, Hatfield, Pretoria. The application will also be served on the Office of the State Attorney, Pretoria, Ground Floor, SALU Building, 316 Thabo Sehume Street, Gauteng.
4. The third respondent is **TELKOM SOC LTD** (“**Telkom**”), a company duly incorporated in terms of the company laws of South Africa with its registered address at Highveld Techno Park, 61 Oak Avenue, Centurion Gauteng**.**
5. The fourth respondent is **VODACOM (PTY) LTD** (“**Vodacom**”), a company duly incorporated in terms of the company laws of South Africa with its principal place of business at Vodacom Corporate Park, 082 Vodacom Boulevard, Vodavalley, Midrand, Gauteng.
6. The fifth respondent is **CELL C (PTY) LTD** (“**Cell C**”), a company duly incorporated in terms of the company laws of South Africa with its registered head office at Waterfall Campus, Cnr of Maxwell Drive and Pretoria Main Road, Buccleuch, Ext 10.
7. The sixth respondent is **LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LTD** (“**Liquid**”), a company duly incorporated in terms of the company laws of South Africa with its registered head office at 401 Old Pretoria Main Road, Halfway House, Midrand, Gauteng.
8. The seventh respondent is **WIRELESS BUSINESS SOLUTION (PTY) LTD T/A RAIN** (“**Rain**”), a company duly incorporated in terms of the company laws of South Africa with its registered address at The Main Straight, 392 Main Road Block D, Bryanston, Gauteng.
9. I understand from a media statement of ICASA that ICASA received and accepted bids from the third to seventh respondents in response to the ITA that I describe in the next paragraph. As prospective bidders under the ITA, the third to seventh respondents are parties who may have interest in the relief sought in this application. No relief is sought against the third to seventh respondents, save for a costs order in the event of opposition.

# overview of this application

1. On 2 October 2020, ICASA published an invitation to apply for the Licensing Process for International Mobile Telecommunications in respect of the provision of Mobile Broadband Wireless Access Services for Urban and Rural areas using the complimentary bands, IMT700, IMT800, IMT2600 and IMT3500 (“**the** **ITA**”)**.** Annexure **MMM1** is a copy of the ITA.
2. The licensing process prescribed in the ITA will take the form of a spectrum auction. Qualifying bidders will be able to bid for 38 pre-packaged lots of spectrum over four frequency bands. In total, ICASA will make available 326 MHz of additional spectrum to bidders (“**the ITA auction**”).
3. Mobile network operators (“**MNOs or operators**”) in South Africa have been waiting for more than a decade for ICASA to release new spectrum. The full history of ICASA’s steps towards the licensing of additional spectrum is set out in paragraph 1 of the ITA, and I do not repeat it here. During this period, operators were forced to re-farm their existing allocations of 2G and 3G spectrum in order to deploy new 4G technology, as the country experienced unprecedented growth in data demand.
4. Additional spectrum is urgently required to expand 4G capacity and to deploy the next generation of technology – i.e. 5G – in South Africa.
5. MTN welcomes the fact that new spectrum is finally being made available by ICASA. However, MTN submits that two aspects of the ITA are unlawful and should be set aside on review. They are ICASA’s decisions to adopt and to implement an auction structure that involves (*i*) the categorisation of operators as Tier-1 or Tier-2 operators (“**the Operator Categorisation**”); and (*ii*) the use of an Opt-In Auction Round from which Tier-1 operators will be excluded (“**the Opt-In Scheme**”). As I shall explain in more detail below:
   1. Both the Operator Categorisation and the Opt-In Scheme, as described in the ITA, are impermissibly vague. It is impossible for prospective bidders to understand the basis for these interventions or to anticipate their outcome.
   2. The Operator Categorisation is based on an arbitrary number of municipalities, and incorrectly relies on retail market share. The definitions have also been imported from the incomplete Mobile Broadband Inquiry without proper consideration or consultation.
   3. The Opt-In Scheme is irrational and inconsistent with the objectives of the ITA and the Electronic Communications Act 36 of 2005 (“**the ECA**”). It creates an auction structure that prevents Tier-1 operators from bidding for the spectrum that is necessary to implement 5G technology.
6. I am advised that ICASA’s decisions constitute administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (“**PAJA**”). They are decisions taken by ICASA exercising a public power or performing a public function in terms of legislation. As I explain below, the decisions have a direct, external legal effect and have the capacity to adversely affect the rights of MTN and the other prospective bidders. Alternatively, the decisions are subject to the principle of legality established in terms of section 1(c) of the Constitution.
7. In this affidavit, I shall deal with the following topics in turn:
   1. I provide an overview of the role of spectrum for mobile operators.
   2. I set out the ITA process to date.
   3. I explain the auction structure prescribed by the ITA and supplemented by ICASA’s Response Document and Reasons Document.
   4. I illustrate the potential outcomes of the current auction structure.
   5. I set out each of the grounds of review and explain why the Operator Categorisation and the Opt-In Scheme are unlawful.
   6. Finally, I deal with urgency and the relief sought by MTN in this application.

# THE ROLE OF SPECTRUM IN MOBILE TELEPHONY

1. Radio Frequency Spectrum (“**spectrum**”) is defined in the ECA as “the portion of the electromagnetic spectrum used as a transmission medium for electronic communications and broadcasting.” Radio spectrum is the lowest portion of the electromagnetic spectrum, having a frequency below 3000 GHz. These are the radio waves by which services such as broadcasting and mobile telecommunications can be transmitted. Our everyday experience of mobile telecommunications is made possible by the use of a portion of the spectrum, which is used to transmit and receive electronic signals.
2. Apart from the heightened demand for particular bands, spectrum in general is a natural and limited resource. This is particularly significant given the sustained and rapid increase in mobile data consumption. In the result, there is an ever-increasing need for additional spectrum to ensure that electronic communications networks can provide the services demanded by consumers. However, meeting such demand is limited by the availability of spectrum.
3. In light of both the limited nature of spectrum and its crucial role in determining the competitive market position of MNO’s, ICASA is tasked with regulating the allocation and use of spectrum in the public interest.
4. The ECA empowers ICASA to allocate certain radio frequency bands to different radio communication services. In South Africa, radio frequencies in the bands 700, 800, 900, 1800, 2100, 2300, 2600 and 3500MHz are currently allocated for use relating to International Mobile Telephony (“**IMT**”). Some of the available frequencies in all the bands have already been licensed for use by operators. It is the balance of these frequencies that is available for licensing and that forms the subject matter of the ITA.
5. Each operator uses the spectrum assigned to it by way of spectrum licences to provide connectivity and mobile communication services to its customers. The extent of an operator’s access to specific spectrum determines both its capacity to process telecommunication transactions (such as a call or a text message) and also the quality of the telecommunication services it is able to offer to consumers. There are two aspects to this:
   1. *Coverage*: Spectrum access determines the “coverage” or the geographic availability of the services that an operator is able to offer.
   2. *Capacity*: Spectrum access also determines the “speed” of data transactions. The quality of a data connection depends strongly on the amount of available capacity that can be dedicated to each connected user. The more capacity per user (in the cell that the user is connected to), the higher the throughput that each user will see and thus the better quality of service. With greater access to certain bands on the spectrum, an operator can offer faster download and upload speeds at a more consistent rate.
6. Different types of spectrum have different propagation and information- carrying characteristics depending on where they are situated in the spectrum band. The particular characteristics of the spectrum will determine the range of applications for which it is suitable, and thereby an operator’s coverage and capacity:
   1. In general, low-frequency transmissions can travel greater distances before losing their integrity, and they can pass through dense objects more easily. However, less data can be transmitted over these radio waves. Spectrum in the lower frequency, or sub-1GHz bands, will therefore be more suitable to cover larger distances and consequently will increase an operator’s ability to provide coverage, including coverage in rural areas.
   2. Higher-frequency transmissions can carry more data, but are poorer at penetrating various forms of clutter and obstacles and they travel shorter distances. Such higher-frequency transmissions are therefore more suitable to provide coverage and capacity in dense urban areas where there are more users and hence more capacity needed to carry the data traffic generated by such users.
7. This means that some spectrum bands are more valuable to operators than others. Certain spectrum that is suitable for a wide variety of services will be in greater demand than spectrum with more limited application. Operators can also aggregate their capacity by using multiple spectrum bands to support higher customer data capacity demands of the service and achieve better performance.
8. As a member state of the International Telecommunications Union (an agency of the United Nations), South Africa is gearing itself for full participation in the Fourth Industrial Revolution. This distinct phase will be characterised by fast-paced developments in smart technology, cloud computing, internet of things, energy storage, 3D printing and artificial intelligence. Central to South Africa’s transition into this new chapter is the roll-out of fifth generation (“**5G**”) wireless technology.
9. The 5G standard supports significantly faster mobile broadband speeds and lower latencies (i.e. the delay between the sending and receiving information) than the previous mobile generations. This enables peak download speeds of at least 20 Gbps and a reliable 100 Mbps user experience data rate in urban areas.
10. These improvements in speed and performance will enable and support increased consumption of video as well as the real-time interactivity required for emerging services like virtual and augmented reality.
11. The Global System for Mobile Communications ("**GSMA**") explains in its report “5G Spectrum Positions”, published in March 2020, that 5G offers a far greater range of capabilities than any previous mobile technology generation and comments that 5G will be at “the heart of the future of communications” (p1 and p3). The GSMA describes the key features of 5G technology as including:
    1. Ultra-reliable and low latency communications use cases and very high availability, reliability and security to support services such as autonomous vehicles and mobile healthcare;
    2. Massive machine-type communication use cases, including the ability to support at least one million Internet of Things connections per square kilometre1 with very long battery life and wide coverage including inside buildings;
    3. Fixed wireless access use case, including the ability to offer fibre type speeds to homes and businesses in both developed and developing markets using new wider frequency bands, massive MIMO (multiple input, multiple output) and 3D beamforming technologies.
12. I attach the GSMA Report, “5G Spectrum Positions” published in March 2020 as Annexure **MMM2**.
13. The Global Mobile Suppliers Association ("**GSA**") has noted that as at November 2020, 409 operators in 129 countries were investing in 5G mobile or 5G home broadband networks. GSA has identified 148 operators in 66 countries that have stated that they have activated one or more 5G sites within their live commercial network. I attach the GSA Report “Evolution from LTE to 5G” published in November 2020 as Annexure **MMM3**.
14. 5G as a technology requires spectrum in all bands. The GSMA explains in its Report “5G Spectrum Positions” at p2:

“5G needs spectrum across low, mid and high spectrum ranges to deliver widespread coverage and support all use cases. All three have important roles to play:

- Low-bands (e.g. sub-1 GHz) support widespread coverage across urban, suburban and rural areas and help support Internet of Things (IoT) services.

- Mid-bands typically offer a good mixture of coverage and capacity benefits. The majority of commercial 5G networks are relying on spectrum within the 3.3-3.8 GHz range. Other bands which may be assigned to, or refarmed by, operators for 5G include 1800 MHz, 2.3 GHz and 2.6 GHz. In the long term, more spectrum is needed to maintain 5G quality of service and growing demand, in bands between 3 and 24 GHz.

- High-bands are needed to meet the ultra-high broadband speeds envisioned for 5G. Currently, 26 GHz, 28 GHz and 40 GHz have the most international support and momentum.”

1. The GSMA notes that the 3500MHz band has emerged as the primary spectrum band to support the roll out of 5G technology. It is often referred to as the “anchor band” for 5G.
2. Indeed, the International Telecommunications Union has determined that for countries in Region 1 -- which includes South Africa -- the roll-out of 5G technology requires 3400MHz to 3600MHz mid-frequency bands.
3. Spectrum in the 3000MHz range (from 3300MHz to 3800MHz and up to 4200MHz) provides a good balance of coverage and capacity. This spectrum band is already being used for commercial 5G services in a number of countries.
4. One hundred and ninety-five operators around the world are known to have been investing in 5G (in the form of trials, payments for licences, deployments or launches) using the 3500MHz spectrum, and at least 93 operators are deploying or have launched 5G in this spectrum range.
5. In anticipation of the full roll-out of 5G networks, and with the knowledge that almost half of all operators investing in 5G technology across the world are relying on spectrum in the 3000MHz range, mobile telephone manufacturers have begun building 3500MHz capability into newly released handsets and devices. In the result, the 3500MHz frequency band has the biggest device eco-system for 5G at this moment in time.
6. The roll-out of 5G technology also requires a minimum quantity of appropriate spectrum. The GSMA notes that: "*It is vital that regulators assign as much contiguous spectrum as possible in the 3.5 GHz range (3.3 GHz-4.2 GHz)*.” It suggests 80-100MHz per operator. (5G Spectrum Positions; p6)
7. I explain below the current spectrum allocations of the major operators in South Africa. I pause, however, at this point to note that neither MTN, Vodacom nor Cell C currently hold spectrum in the 3500MHz range.
8. To date, ICASA has assigned spectrum in the 3500MHz frequency band to Telkom (28MHz) and Liquid (56MHz). It has also assigned 80MHz of spectrum in the 3700MHz frequency band to Rain.

# THE ITA PROCESS TO DATE

1. Shortly after the publication of the ITA on 2 October 2020, ICASA invited stakeholders and the public to submit clarity-seeking enquiries on the provisions of the ITA and undertook to respond to those enquiries.
2. On 22 October 2020, MTN, along with a number of other stakeholders, submitted clarification questions, requesting further information and clarity on particular provisions of the ITA. Copies of the queries letter together with its annexure A are attached hereto marked annexures **MMM4 and MMM5.**
3. On 11 November 2020, ICASA published a general response document in which it responded to queries raised by persons who had submitted clarification questions by 22 October 2020 (“**the Response Document**”). The Response Document is attached as annexure **MMM6.**
4. I shall deal later in this affidavit with the specific queries raised by MTN and ICASA’s responses to those queries. I note, however, at this stage that it is apparent that MTN raised a number of queries regarding the Opt-In Scheme and the Operator Categorisation but that these queries went largely unanswered by ICASA. The Response Document repeatedly referred bidders to the “Reasons Document” that ICASA would publish in due course.
5. On 25 November 2020, MTN wrote a letter to ICASA because ICASA had not indicated the date when the reasons document would be published, and the application submission deadline was fast approaching. In the letter, MTN sought confirmation of when the reasons document would be published and further clarity on issues ICASA had failed to clarify or answer at all. A copy of the letter is attached hereto marked annexure **MMM7.** It is apparent from the letter that MTN had not received answers or clarifications regarding many of its questions.
6. On 27 November 2020, ICASA announced that it would publish the reasons document on 4 December 2020.
7. On 4 December 2020, ICASA published its much-anticipated reasons document (“**the Reasons Document**”). A copy of the Reasons Document is attached as annexure **MMM8.**
8. On 18 December 2020, MTN once again wrote a letter to ICASA expressing its concerns regarding the Operator Categorisation and the Opt-In Scheme and demanding that ICASA should excise them from the auction process. A copy of the letter is attached hereto marked annexure **MMM9**.
9. On 23 December 2020, ICASA responded to the MTN letter of 18 December 2020 through its attorneys of record, Kunene Ramapala. A copy of the letter is attached hereto marked annexure **MMM10**. ICASA provided no new information or explanation as to the rationale and operation of the Opt-In Scheme and the Operator Categorisation.
10. On 30 December 2020, MTN wrote another letter to ICASA repeating its concern regarding the confusion surrounding the 3500MHz spectrum band. This confusion was especially important in the context of the Operator Categorisation and the Opt-In Scheme in their current form. A copy of the letter is attached hereto marked annexure **MMM11**.
11. On 5 January 2021, ICASA’s attorneys delivered a response to MTN’s letter of 30 December 2020. A copy of the letter is attached hereto marked annexure **MMM12**.The letter provides that “all the assignments of all IMT spectrum bands are to be considered in determining those potential bidders who may qualify for the Opt-In round”.
12. MTN’s concerns regarding the Opt-In Scheme and Operator Categorisation remained entirely unanswered. As I shall explain below, ICASA suggested that bidders should refer to the ITA, and that to the extent that clarification is necessary, it would clarify these issues before the auction rounds in the ITA process.
13. MTN lodged its bid in the ITA Auction on 28 December 2020 amidst this uncertainty and confusion. MTN did so under a strict reservation of rights, and in order to avoid derailing the ITA process. Specifically, MTN stated in its letter of 28 December 2020 that "it reserves its rights in relation to those aspects of the ITA that are in our view legally flawed, including, inter alia, the provisions relating to the classification of Tier 1 and Tier 2 operators as contained in the definition clauses as well as the inclusion of an Opt-in round of bidding as contained in paragraph 6 of the ITA". A copy of the letter is attached hereto marked annexure **MMM13**.
14. MTN cannot allow the ITA process to proceed to the auction round while the uncertainty and potential risks remain. Without clarity on the Opt-In Scheme and the Operator Categorisation, MTN will be prejudiced in its preparation for and participation in the ITA Auction. MTN accordingly approaches this Honourable Court for relief.

# THE SPECTRUM AUCTION ENVISAGED IN THE ITA

1. The ITA provides that the award process will consist of three stages: the qualification stage where prospective bidders are assessed to ensure they meet the threshold requirements set out in the ITA; the auction stage which consists of multiple rounds in which bidders have an opportunity to place bids on the available spectrum lots; and a final licensing stage.
2. The format selected for the Auction is the Simultaneous Multiple Round Ascending Auction. ICASA states that it is of the view that this “*is the most efficient auction format in order for the true value of the spectrum to be discovered and achieve the set objectives of the licensing process*.” (Reasons Document, p59)
3. I do not deal with the entire ITA process but rather focus on the aspects of the ITA that are relevant to MTN’s application. This should not be seen as a waiver of MTN’s right to object to any other aspect of the ITA at the appropriate time and in the appropriate forum.

## Current spectrum holdings and spectrum available for auction

1. There is currently 609MHz of spectrum assigned to the six operators in South Africa. ICASA has decided to make an additional 326 MHz across four bands available for auction through the ITA process. The following spectrum is available for assignment in the ITA process:

* 40MHz in the 700MHz band;
* 60MHz in the 800MHz band;
* 140MHz in the 2600MHz band; and
* 86MHz in the 3500MHz band.

1. In its Reasons Document, ICASA provided the following table setting out the current spectrum holding of each operator, alongside the new spectrum that is available for auction in the ITA process. The table confirms the current spectrum allocation in the 3500MHz band and records that only an additional 86MHz in the 3500MHz band will be available for assignment at the ITA auction.

Table

Description automatically generated

1. The spectrum available for auction has been divided into a number of lots. Lots are described in the Definitions section of the ITA as “*pre-packaged amounts of spectrum available for award*.” The 86MHz of spectrum in the 3500MHz band has been packaged into ten Lots (numbers 25 to 34). There are eight Lots with 10MHz each, one lot of 2MHz and one lot of 4MHz. (ITA, Definitions and paragraph 5.4).

## Spectrum caps and spectrum set-asides

1. Regulators sometimes take the view that spectrum holdings may have an impact on the competitive dynamics of the mobile market, and set about designing spectrum auctions in an effort to prevent anti-competitive outcomes. The most common methods to address these concerns involves the use of spectrum caps and spectrum set-asides:
   1. A **spectrum cap is** a limit placed on the amount of spectrum a bidder can bid for in an action. Spectrum caps ensure that no single operator can have excessive amounts of spectrum post-auction.
   2. A **spectrum set-aside** reserves spectrum for a specific class of operators. In most cases, spectrum is set aside for new entrants or small incumbents.
2. In 2013, the United Kingdom communications regulator, Ofcom, imposed a novel intervention in the form of “**spectrum floors**” for its auction of 205MHz of spectrum in the 800MHz and 2600MHz spectrum bands (“**the 4G Auction**”). Ofcom designed the 4G Auction so that:
   1. A number of “minimum portfolios” were created and reserved for a subset of eligible bidders.
   2. An opt-in stage took place prior to any of the other auction rounds. Bidders could signal their interest in the spectrum reserved for the smallest operator (known as “Three”) or new entrants to the market.
   3. The rationale behind spectrum floors was to ensure that all auction winners emerged with portfolios that Ofcom considered would be sufficient to ensure their medium-term viability.
3. In March 2014, the UK’s National Audit Office produced a report examining whether the 4G Auction had achieved Ofcom’s two main objectives of maintaining a competitive market and efficient allocation of the spectrum. I attach as Annexure **MMM14** the “4G radio spectrum auction: lessons learned” Report published by the Controller and Auditor General, National Audit Office, on 12 March 2014.
4. The Report explained the auction design, and the imposition of the spectrum caps and spectrum floors:

“Ofcom put in place spectrum floors which would ensure that the auction resulted in at least four operators, each with a minimum portfolio of spectrum. Pre-auction spectrum holdings counted as well as spectrum acquired in the auction. In effect, spectrum was reserved for an operator, either Three or new entrants that did not already have a minimum portfolio. To prevent the larger mobile operators acquiring large amounts of unreserved spectrum, the auction also included caps on the total amount of spectrum each operator could hold.”

(National Audit Office Report, Appendix One, p25, para 2)

1. The Report found that Ofcom achieved its objective of maintaining at least four competing national wholesalers and gaining a new entrant to the market. (National Audit Office Report, p20, para 2.17) However, it found that the use of spectrum floors and the opt-in round made the auction unnecessarily complex, and had a number of serious consequences:
   1. The smaller operator, Three, was the only bidder in the opt-in round. It was therefore guaranteed to win one of the reserved packages of spectrum and to pay only the reserve price for it.
   2. The Auditor General stated that in their opinion, “*it is very unlikely that the reserve price was equal to [the spectrum’s] true value to Three’s business*.” (National Audit Office Report, p 6; para 5). Three ultimately under-paid for the valuable spectrum it won through the opt-in round.
   3. In respect of the proceeds earned from the auction, the Auditor General stated:

“After adjusting for population sizes, proceeds were within the range achieved in other European auctions. Ofcom’s consultants, The Smith Institute, calculated that the proceeds were £159 million lower than they would have been had the radio spectrum won by Three not been reserved for a particular type of bidder.”

* 1. The Auditor General also criticised the auction design for being overly-complex relative to its real-world policy achievements. In the light of this, it recommended:

“Ofcom should also try to make the design no more complex than is necessary to meet its objectives. Ofcom should also give bidders reasonable certainty on how the likely outcomes of the auction would relate to their individual bidding strategies.

(National Audit Office Report, page 7; Recommendation 11)

1. Ofcom did not re-introduce the spectrum floors or an opt-in stage in its subsequent spectrum auctions. As far as MTN is able to ascertain, the concept has not been used in any other jurisdiction in the world.
2. ICASA has employed all three of these forms of interventions in the ITA:
   1. **Spectrum set-aside:** ICASA has set aside 80MHz across the various frequencies for the Wireless Open Access Network (**WOAN**). The details of this set-aside are found in the Composite Invitation to Apply for an Individual Electronic Communications Network service Licence and Radio Frequency Licence for the Wireless Open Access Network published on 2 October 2020 in Government Gazette 43767, Notice 534 of 2020. I have not annexed a copy of the WOAN ITA to my affidavit since it is not directly relevant to this application.
   2. **Spectrum caps:** Paragraph 7 of the ITA imposes two spectrum caps on bidders:
      1. There is an overall spectrum cap of 184MHz. This includes the bidders’ existing spectrum holdings. ICASA notes at paragraph 7.3 of the ITA that this is to ensure “that any individual licensee must not acquire more than approximately 18% of the 1015MHz of High demand spectrum that will be assigned at the auction stage.”
      2. No party may bid for more than 2 x 21MHz in the sub-1GHz bands. This includes the bidders’ existing spectrum holdings. ICASA notes that this is to ensure that licensees that have no sub-1GHz spectrum can acquire spectrum in this range.
   3. ICASA explained in the Reasons Document that the spectrum caps have “*been implemented to ensure equitable access to spectrum by all players, strike an appropriate balance for competition in the market and to ensure that the spectrum is not assigned to one entity. The ultimate objective being to ensure a market structure that can sustain at least five credible wholesale players post the Auction*.” (Reasons Document; p32)
   4. **Spectrum floors:** Paragraph 6 of the ITA deals with spectrum floors as part of the Opt-In Scheme. I describe this in the next section.
   5. ICASA states that the spectrum caps and floors together with the obligations imposed on successful bidders - included in paragraph 12 of the ITA - are “*the minimum interventions necessary to resolve competition concerns*.” (ITA, para 12.3.3.1).

## The Opt-In Scheme

1. Paragraph 6 along with paragraph 17.2 of the ITA deals with the Opt-In Scheme. ICASA has supplemented the criteria and scope of the Opt-In Auction Round through its responses to the inquiries. Some additional detail was also provided to MTN through the correspondence with ICASA that I have explained above.
2. Clause 6.1 of the ITA provides as follows:

“The Authority has decided on the following attractive portfolios for the third and fourth national wholesale (Tier-2) operators to meet one of the minimum spectrum portfolios (MSPs) following the auction. Note that the opt-in bidders need not have any spectrum holdings currently and bidding for the opt-in lots is open to any bidders other than Tier-1 operators. There may be more than one bidder for each opt-in lot.”

1. This is followed by a table:

|  |  |  |
| --- | --- | --- |
|  | Sub-1GHz (minimum, including existing assignments) | 1800MHz / 2100MHz and/or 2600MHz (minimum, including existing assignments) |
| Portfolio 1 | 2 x 10 MHz | 60 MHz |
| Portfolio 2 | 2 x 15 MHz | 40 MHz |

1. I emphasise that the columns in this table refer in each case to “minimum, including existing assignments”. This means that the successful bidder must, after the Opt-In Round, have available to it at least the spectrum listed in the relevant column (including any assignments that it had before the auction).
2. Paragraph 6.2 explains:

“Portfolio 1 and portfolio 2 are spectrum floors designed to ensure that South Africa is left with at least five (5) credible wholesale national operators after the spectrum assignment process (including the WOAN). This is to ensure that the third and fourth national wholesale operators have enough spectrum to be credible competitors. These portfolios do not preclude any licensee from bidding for spectrum on any other Lots made available by the Authority for auction.”

1. Paragraph 6.3 provides that “those eligible to bid for spectrum reserved through the floors … will be offered the opportunity to opt-in during the course of an Opt-in Round.”
2. The Opt-In Round will take place prior to any of the other auction rounds. The Opt-In spectrum lots that are not awarded during the Opt-In Round will become available in subsequent auction rounds.
3. Paragraph 17.2 of the ITA describes the procedural mechanism for the Opt-In Auction Round.
4. Paragraph 6 gives rise to a multitude of questions about the operation and implementation of the Opt-In Scheme. However, ICASA has clarified only one aspect. In its Response Document, ICASA confirmed that despite the fact that the column in table section 6.1 reads “1800MHz/2100MHz and/or 2600MHz”, the Portfolios include “*all the spectrum bands to be licensed in this process*”. (Ques 167, Response Document, p54). This means that 3500MHz is included in the minimum spectrum portfolios and is potentially one of the bands from which spectrum for opt-in lots will be drawn.
5. I elaborate below on some aspects of the ongoing uncertainty regarding how the Opt-In Scheme will work in practice.

*What will be the object of the bid?*

1. It is unclear what it is that eligible participants are expected to place bids on during the opt-in round.
2. The heading to paragraph 6 refers to “Opt-In lots” but there is nothing that explains what these will be. In particular, it is not clear whether the Opt-In lots will be individual lots selected from the total Lots available (as set out in paragraph 5 of the ITA), a portfolio of lots curated by ICASA, or the spectrum amounts that coincide with the minimum spectrum portfolios set out in the table in paragraph 6 of the ITA.

*Who will be eligible to participate in the Opt-In Round?*

1. Clause 6.1 contains a clear “entry requirement” for the Opt-In Round since it provides that the bidder cannot be a Tier-1 operator. Beyond this, however, it is unclear which bidders will be entitled to participate in the Opt-In Round and what criteria ICASA will use to determine eligibility to participate.
2. ICASA has stated in the Response Document that:
   1. Bidders with less spectrum than the minimum spectrum portfolio may qualify for the Opt-In Auction Round (Response to Query 170, page 55, Response Document);
   2. In response to the query by Liquid asking “how will the opt-in rounds work”, ICASA referred bidders to section 6 of the ITA and stated that “*During the bidding process, the Authority will calculate the spectrum holdings of the bidders and determine those who qualify for Opt-In rounds so that they could acquire enough spectrum from the auction to be credible national wholesale operators*. (Response to Query 14; page 8, Response Document).

*What quantity of spectrum will be available in the Opt-In Round?*

1. The ITA does not inform bidders of the total quantity of spectrum that will be available in the Opt-In Round.
2. MTN, along with the other prospective bidders, sought to resolve this confusion in its queries to ICASA. MTN asked ICASA to confirm what quantity of spectrum will be available for auction following the opt-in auction round.
3. In response to a similar question from another party, ICASA responded that: “*The qualified bidders will be advised at the auction stage of this licensing process*.” (Response to Query 168, p55, Response Document).
4. The most comprehensive response provided by ICASA was in relation to Vodacom’s queries at Question 165 as follows:

The Authority conducted a competition assessment prior to the publication of the ITA. The competition assessment assessed the status pre-auction and post-auction of the ICT Sector. Section 12.6 of the ITA supports the objective of the efficient use of the radio frequency spectrum. The Authority has imposed the spectrum floors to ensure that any player that requires the radio frequency spectrum from the auction become a credible player in the market. The minimum spectrum portfolios are prescribed in the ITA to enable credibility of national wholesale operators. The minimum spectrum portfolios will be facilitated through the opt-in round which do not precluded the bidders to participate in other rounds. Opt-in rounds will be first round for all the bidders to acquire one of the minimum spectrum portfolios.”

1. It is not clear whether a participating bidder can bid only up to the spectrum floor set out in the table, or whether bidders can bid for spectrum in the Opt-In Round until they reach the overall spectrum cap of 184MHz or 2x21MHz for sub 1 GHz spectrum.
2. The confusion and uncertainty surrounding the operation of the Opt-in round has serious consequences for MTN and directly impacts its ability to value the spectrum and prepare its auction bidding strategy.
3. The value of a specific lot of spectrum to MTN depends upon:
   1. what spectrum is held by competitors after the auction; and
   2. what other spectrum MTN will hold at the end of the auction (in other words, how the particular lot will fit into MTN’s spectrum holding).
4. The ITA, the Response Document and the Reasons Document do not give any certainty on these issues. MTN does not know what lots it will be able to bid for in the subsequent auction rounds, nor can it predict what lots will be assigned to its competitors.
5. It is extremely difficult for MTN to undertake the task of valuing the spectrum in the ITA auction in these circumstances. These challenges are exacerbated by the short amount of time between the Opt-In Round and the subsequent auction rounds in which MTN will participate.
6. Similarly, the uncertainty as to the possible outcomes of the Opt-In Auction round makes it almost impossible to develop a meaningful bidding strategy in advance of the auction.
7. Formulating an auction bidding strategy is complex and time-consuming in the context of a SMRA auction format with multiple Lots because spectrum Lots can be complementary or substitutes for each other. Developing an auction bidding strategy requires an understanding of what spectrum a bidder can bid for.
8. ICASA has suggested that the bidders must wait until the mock auction rounds, or potentially even after the opt-in round is completed for full information. In these circumstances, MTN will simply not have enough time to develop a bidding strategy, train the bid team, prepare any auction support tools and obtain the necessary approvals as part of MTN's governance process.
9. It is vital that participating bidders in the ITA auction undertake the time-consuming and resource-intensive tasks of spectrum valuation, formulation of auction bidding strategy, bid team training and preparation of auction support tools. The uncertainty in the Opt-In round makes these tasks extremely challenging, and requires MTN to proceed to the auction rounds in the dark about what may occur, and without the opportunity to properly prepare.

## The Operator Categorisation

1. The ITA categorises bidders as follows:
   1. A Mobile Virtual Network Operator (MVNO) is a wireless communications services provider that does not own the wireless network infrastructure over which it provides services to its customers.
   2. A Sub-national operator is a licensee that control access to its RAN and is capable of providing IMT services on a wholesale basis to roaming and MVNO customers, where the licensee’s RAN is capable of serving less than 50% of the population in South Africa.
   3. A Wholesale National Operator is a licensee that controls access to its RAN and is capable of providing IMT services on a wholesale basis to roaming and MVNO customers, where the licensee’s RAN is capable of serving more than 50% of the population in South Africa.
   4. Tier-1 operators are Wholesale National operators that have a retail market share in excess of 45% in more than 10 municipalities.
   5. Tier-2 operators are Wholesale National operators that have a retail market share below 45% in less than 10 municipalities.
2. The ITA does not state which of the existing operators fall into each of these categories.
3. On a plain reading of the definitions of Tier 1 and Tier 2 operators, it is possible that a party could simultaneously fall within the ambit of both definitions. That would be the case if a national operator has a retail market share in excess of 45% in (say) twelve municipalities and has a retail market share below 45% in (say) eight other municipalities.
4. According to ICASA, there are 234 municipalities in South Africa. It is possible for a Wholesale National operator to simultaneously have a retail market share in excess of 45% in more than 10 municipalities and, at the same time, to have a retail market share below 45% in other municipalities.
5. MTN, along with the other prospective bidders, addressed a number of queries to ICASA in respect of the Tier-1 and Tier-2 categorisations. These are included as Questions 14 to 22, 29, 31, and 93 of the Response Document .
6. MTN asked ICASA:
   1. which operators are to be designated as Tier-1 operators (Qu 14, Response Document, p8);
   2. which operators are designated as the third and fourth national wholesale or Tier-2 operators (Qu 29, Response Document, p13);
   3. whether it had already formed the view that MTN is a Tier-1 operator. (Qu 31, Response Document, p13)
7. In the main, ICASA referred MTN to the Reasons Document or paragraph 6 of the ITA. It provided a more substantive response to Question 17, stating:

“the Authority conducted a competition assessment prior to the publication of the ITA. The competition assessment assessed the status pre-auction and post-auction of the ICT Sector. The details are contained in the Reasons Document to be published.

A number of licensees have significant market power in various municipalities, as measured using the dominance threshold applied in the Electronic Communications Act, 2005 (a 45% market share). Vodacom is dominant in 110 municipalities, MTN is dominant in 78 municipalities. MTN and Vodacom both have a share of 45% or more in 4 municipalities. Cell C has a market share of 45% in one local municipality and 41 municipalities do not have a dominant operator.”

1. Later, ICASA stated in response to another query that it “*has already decided which operators are categorised as tier-1 operators*.” (Ques 43, Response Document, p20). Indeed, in response to MTN’s question, it confirmed:

“MTN and Vodacom are Tier-1 Wholesale National Operators and Tier-2 (regarded as third and fourth national wholesale operators) are Cell C and Telkom Mobile as per the competition assessment that the Authority has conducted. The Sub-national RAN operators who own RANS but operate only in limited parts of South Africa include RAIN and Liquid Telecom. The Reasons Document will contain the competition assessment which will provide guidance as to how the Authority concluded in categorising the “mobile operators”.”

1. Vodacom and Liquid asked ICASA to clarify how the “retail market share” in ten municipalities would be calculated. (Qu 17, Response Document, p9). ICASA simply referred to the Reasons Document to be published. However, the competition assessment contained in the Reasons Document:
   1. does not answer how ICASA computed the market share;
   2. does not answer the point at which market share is determined;
   3. does not answer how ICASA arrived at the Tiering categorisations; and
   4. does not explain the position of an operator who has above 45% market share in some municipalities and below 45% market share in others.
2. The rationale and basis for the Tier-1 and Tier-2 distinction does not appear from the ITA, the Response Document or the Reasons Document.
3. It appears that the categorisation has simply been taken from ICASA’s Market Inquiry into Mobile Broadband Services initiated by the Notice of intention to Conduct Market Inquiry into Mobile Broadband Services 713 of 2018 in Government Gazette 42044 published on 16 November 2018, annexed marked **MMM15** (“**The Market Inquiry**”). I elaborate on this in the next section.

## The Market Inquiry

1. The purpose of the Market Inquiry is to assess the state of competition and to determine whether or not there are markets or market segments within the mobile broadband services value chain that may warrant regulation in the context of a market review in terms of section 67(4) of the ECA.
2. The Market Inquiry is not yet complete. The Notice, annexed hereto marked **MMM15**, sets out the five Phases for the Market Inquiry. At present, only phases 1 to 3 have been completed:
   1. As part of Phase 2, ICASA published a Discussion Document on 02 December 2019 in *Government Gazette* 42878. A copy of the relevant extracts of the Discussion Document is annexed hereto marked **MMM16**.
   2. The due date for submission of public comments was set at 45 working days from date of publication of Discussion Document – i.e. 6 February 2020 –but was extended by notice in *Government Gazette* 42941 to 27 February 2020. MTN submitted comments on the Discussion Document on 27 February 2020.
   3. Phase 3 public hearings on the Discussion Document took place on 26 and 27 October 2020. MTN presented on 27 October 2020. It is noteworthy that by then the ITA had already been published (on 2 October 2020) and that it categorised MTN as a Tier-1 operator.
3. Phases 4 and 5 remain in process. The Notice envisaged that:
   1. Under Phase 4 of the Market Inquiry, ICASA will publish in the *Government Gazette* a summary of its findings in relation to the inquiry as well as draft regulations for public comment for a period of 30 working days.
   2. Under Phase 5 of the Market Inquiry, ICASA may hold public hearings on responses to draft regulations.
   3. Under Phase 6, after consideration of responses to draft regulations, ICASA to publish final regulations and reasons document in the *Government Gazette*.
4. It is apparent from ICASA’s responses and the Reasons Document that the categorisation of operators into Tier-1 and Tier-2 was imported into the ITA from the Market Inquiry process. Remarkably, this occurred before ICASA had heard and considered the representations at the oral hearings in the Market Inquiry, and before the Market Inquiry had been finalised.
5. The Market Inquiry is a substantial undertaking involving a wide range of complex issues and multiple interested parties. Section 67(4)(a) requires that ICASA include in its inquiry pursuant to any regulations, the definition of the relevant wholesale and retail markets or market segments. The determination of the markets for mobile services remains an area of contention.
6. In its preliminary analysis set out in the Discussion Document, ICASA began this inquiry using a very narrow geographic area of local and metropolitan municipalities for the determination of the retail market. (Discussion Document, para 1.3.1; para 31). ICASA concluded that:

“The significant variability in prices, usage and costs between different geographic areas in South Africa suggests that competitive dynamics vary significantly between areas. These factors support the Authority's finding that there are sub-national markets that are at least as narrow as the local and metropolitan municipality level.” (Discussion Document, para 35)

1. However, in respect of spectrum, ICASA noted that spectrum has been assigned nationally and “*therefore competitive dynamics with respect to spectrum should be analysed nationally*”. (Discussion Document, para 80)
2. ICASA’s preliminary analysis of market shares and market power stated as follows:

“A number of licensees have significant market power, measured using the dominance threshold (a 45% market share), in various municipalities. Vodacom is dominant in 110 municipalities, MTN is dominant in 78 municipalities and MTN and Vodacom both have a share of 45% or more in 4 municipalities (see Figure 20). Cell C has a market share of 45% in one local municipality, and 41 municipalities do not have a dominant operator.” (Discussion Document, para 71)

1. ICASA concluded that MTN and Vodacom have significant market power in terms of the ECA (Discussion Document, para 76).
2. MTN submitted written and oral representations to ICASA setting out its position on many of these topics. In particular, MTN disagreed with ICASA’s conclusion that the markets should be narrowly defined. I deal with this aspect in more detail below.

# THE POTENTIAL CONSEQUENCES OF THE OPT-IN SCHEME

1. I have explained above that paragraph 6 of the ITA and the Reasons Document do not provide clarity regarding the operation of the Opt-In Round. In particular, it is not clear:
   1. Who is eligible to participate in the Opt-In Auction Round.
   2. What proportion of the total spectrum assignment from the ITA will be available in the Opt-In Auction Round.
   3. Whether the Opt-In Auction Round has its internal own spectrum caps or whether participating bidders may bid for spectrum lots up to the overall caps.
2. Of particular concern to MTN is the amount of spectrum that will be available during the Opt-In Round, since this will directly affect the remaining spectrum available to MTN in the subsequent auction rounds. Clause 6 of the ITA appears to contemplate that participating bidders could acquire spectrum up to their overall caps during the Opt-In Auction Round. This means that participating bidders would be constrained only by their overall spectrum caps when they bid during the Opt-In Round.
3. This has potentially devastating consequences for MTN, since it means that the Opt-In Round will enable participating bidders to take up all of the spectrum on offer (or at least the lion’s share of the spectrum on offer) before MTN even has an opportunity to place a bid. I explain this below.
4. The ITA makes 326MHz of spectrum available for assignment across three bands: 2600, 3500 and the sub-1GB (700MHz, 800MHz) bands.
5. If participating bidders will only be constrained by their overall spectrum caps when they bid during the Opt-In Round, this would have the following implications:
   1. Telkom has an existing allocation of 2x12 in the 1800MHz, 2 x 15MHz in the 2100, 60MHz in the 2300 and 28MHz in the 3500MHz band. This is a total of 142MHz and means that Telkom may bid for an additional **42MHz** in the Opt-In Round.
   2. Liquid has an existing allocation of 2x5 in the sub-1GB bands, 2x12 in the 1800MHz, and 56MHz in the 3500MHz band. This is a total of 90MHz and means that Liquid may bid for an additional **104MHz** in the Opt-In Round.
   3. Rain has an existing allocation of 2 x 12 in the 1800MHz band, 10MHz in the 1800 TDD band, and 20MHz in the 2600MHz band. This is a total of 54MHz and means that Rain may bid for an additional **130MHz** in the Opt-In Round.
   4. Cell C has an existing allocation of 22MHz in the 900MHz band, 24 MHz in the 1800 band, 30 MHz in the 2100MHz band. This is a total of 76MHz and means that Cell C may bid for an additional **108MHz** in the Opt-In Round.
6. If one assumes that all bidders would seek to reach their overall cap during the Opt-In Round, it would be possible for the participating bidders to cumulatively acquire all of the available spectrum (or at least most of the available spectrum) during the Opt-In Round. A further concern is that all of the spectrum in particular bands may be taken up during the Opt-In Round. This is particularly concerning in respect of the 3500MHz band. I have explained above that spectrum in the 3500MHz band is a critical requirement for any operator seeking to roll out 5G technology.
7. I accept that there are a variety of commercial and practical factors influencing the quantity of spectrum that each operator will seek to procure, and there is no guarantee that all operators will bid for spectrum up to the overall spectrum caps during the Opt-In Round. Notwithstanding this, there remains a real risk that all (or most) of the available spectrum may be bid for during the Opt-In Auction round.
8. The potential outcomes of the Opt-In Scheme are far-reaching. They are not only prejudicial to MTN, but will render the ITA auction economically inefficient to the detriment of the South Africa public.
9. Ordinarily, an auction will be economically efficient if the Regulator allocates spectrum to those who can make best use of it, who value it the most, and who are able to place bids up to the full value of the spectrum to their business.
10. ICASA accepts that the major operators like MTN and Vodacom are seriously constrained by their limited spectrum holding (for example, see Competition Assessment, Reasons Document, p94, para 29). These are the bidders that will place the highest value on the spectrum and are most likely to optimally utilise the spectrum assigned to them.
11. Despite this, the Opt-In Round creates the opportunity for eligible Tier-2 operators to bid for spectrum protected from competition by Tier-1 operators and non-eligible bidders. In other words, the two largest operators will be precluded from participating in the award for all available spectrum.
12. The Opt-In round will render the auction economically inefficient and will limit the potential benefits of the newly-released spectrum to current and future South Africa consumers and businesses. This is so for several reasons:
    1. The first reason is that this will have a direct impact of the proceeds of the auction. It is likely that the successful bidder or bidders in the Opt-In round will pay a price lower than the true value of the spectrum to the market as a whole. The smaller operators with significant spectrum holdings and smaller consumer bases are under less pressure to secure additional spectrum. This is what occurred in the 4G / LTE auction in the United Kingdom, where the Auditor General found that the proceeds of the auction were £159 million lower than if the spectrum assigned during the Opt-In Round had been offered to all bidders.
    2. The second reason is that valuable spectrum desperately required by the Tier-1 operators will be assigned to Tier-2 operators who may not be in a position to fully utilise it. The public will not derive the full benefit of the newly released spectrum - and in particular, cheaper and more efficient services. In contrast, the Tier-1 operators with larger market-share and network of sites are guaranteed to derive the maximum socio-economic value from spectrum by ensuring that spectrum is fully utilised and provides the greatest level of coverage to the population.
    3. The third reason is that the award of spectrum to operators who need it most would boost investment in infrastructure. In November 2019, MTN made a pledge to invest R50 billion into network infrastructure over the next five years. This pledge was made on the understanding and expectation that the new spectrum allocation process would present a fair opportunity for MTN to bid for viable spectrum and enable the roll out of 5G network infrastructure. In the absence of spectrum in the 3500MHz band, the investment in infrastructure on this scale is unlikely to proceed.
13. All of these considerations are simply ignored by ICASA. When asked whether it considered the extent to which and the efficiency with which Tier-2 operators employ the spectrum assigned to them, ICASA stated that that it “*was more concerned about the competition post the auction*” and referred broadly to other obligations imposed by the ITA. (Response to Query 161, p52, Response Document)

# REVIEW GROUNDS: the OPERATOR CATEGORISATION

1. Against the background set out above, I turn now to set out the basis on which MTN challenges the legality of the Operator Categorisation and the Opt-In Scheme.
2. In prayer 2.1 of the notice of motion, MTN seeks an order reviewing and setting aside ICASA’s decision to categorise operators into Tier-1 and Tier-2 operators, as those terms are defined in the ITA. I submit that the Operator Categorisation is unlawful for the reasons set out below.

## The definitions are impermissibly vague

1. The definitions of “Tier-1 operator” and “Tier-2 operator” are impermissibly vague. Prospective bidders cannot be expected to understand and apply those definitions, or to anticipate how ICASA intends to apply them. I have explained the reasons for this above.
2. Even if the definitions have an intelligible meaning (which is denied), it would still be impossible to understand how they must be applied in practice. For example, what is the source of the information that must be used to determine the retail market share of an operator in every municipality in the country? Is the “retail market share” limited to voice or does it include voice and data? Is the “retail market share” based on the number of subscribers or on revenue earned? Finally, on what date or dates must the “retail market share” be calculated? Despite repeated requests, ICASA has not answered any of these questions.
3. The confusion and contradictions in the definitions are prejudicial to potential bidders, not only because they are cumbersome and time-consuming, but because they allow ICASA to exercise its discretion and powers in ways that are arbitrary and discriminatory.

## The categorisation is arbitrary

*Ten municipalities*

1. The definition of Tier-1 operators is based on retail market shares in ten municipalities. The use of a threshold of ten municipalities is entirely arbitrary. According to ICASA, there are 234 municipalities in South Africa, and there is no rational basis for selecting ten municipalities as being the relevant threshold. A 45% retail market share in 4% of the country says nothing about the competitive position or wholesale credibility of an operator, or why such an operator should be excluded from the Opt-in Auction Round.
2. There is nothing in the Response Document or the Reasons Document that explains the basis for ICASA’s decision to use ten municipalities as the threshold in the definitions.

*Use of retail market shares*

1. ICASA has explained that the objective of the Opt-In round and spectrum floors is to ensure that at least five credible national wholesale operators emerge after the ITA auction. However, the definitions of Tier-1 operators and Tier-2 operators rely on retail market shares.
2. There is no link between retail market share and the ability of an operator to be a credible national wholesale operator. An operator with a low retail market share could well be a credible national wholesale operator. Indeed, ICASA accepts this in respect of the WOAN – it regards the WOAN as a credible national wholesale operator despite the fact that it will have no subscriber base at all.
3. It is also unclear on what basis ICASA has determined the retail market shares in each municipality in South Africa, or the date on which this calculation was supposedly done. This data is likely to change on a daily basis. The ITA gives no indication of the date on which it must be determined whether an operator has a retail market share in excess of 45% in more than ten municipalities.
4. Further and in any event, the distinction between Tier-1 and Tier-2 operators fails to have any regard to the existing spectrum holding of operators. It is irrational and unreasonable to proceed on the basis that an operator might qualify as a Tier-2 operator even if it has massive spectrum holdings that it is not using. In the UK, the exclusion of EE, Vodafone and O2 from the opt-in round was based on the size of their spectrum portfolios, while H3G and new entrants qualified for the opt-in round based on their smaller (or non-existent) spectrum portfolios. This provides another ground on which the Operator Categorisation is irrational.

*Market share within a municipality*

1. The definitions of Tier-1 operators and Tier-2 operators depend on the market shares of Wholesale National Operators in municipalities. This approach is unreasonable and irrational because Wholesale National Operators participate - by definition - in a market that is national in ambit.
2. MTN has consistently argued that there is no evidence to support the existence of narrow geographic markets based on municipalities, whether at the retail or wholesale level. It has set out its reasons for this in paragraph 3.1 of its submissions to ICASA in the Market Inquiry. I do not repeat those submissions here, but ask that they be read as if incorporated herein. For present purposes, I merely highlight the following:
   1. Mobile services are, by definition, provided to a single consumer as he or she moves across different regions, and connect that consumer to consumers in other regions or allow the consumer to access information located in other regions. This is incompatible with a geographic market definition based on municipalities.
   2. It is incorrect, as a matter of economics, to conclude that different usage patterns and effective prices are indicative of narrow geographic markets, given that the same inputs are used to provide data services across the whole country, as well as the fact that the networks of Vodacom and MTN provide national data coverage.
   3. Such narrow geographic markets are fundamentally inconsistent with the way in which competition takes place between mobile service providers. Infrastructure competition is a critical component of network coverage and quality, and MTN and Vodacom have continuously made massive investments in their infrastructure over time, across the country, to improve their coverage and introduce better, more efficient, and faster technologies each year.
3. I attach a copy of the submissions as Annexure **MMM17**.
4. I accordingly submit that ICASA’s decision to categorise operators on the basis of their retail market shares in municipalities is irrational and unreasonable.

## The categorisation pre-empts the on-going Market Inquiry

1. I have explained above that ICASA has imported into the ITA process the definitions of Tier-1 and Tier-2 operators that were developed during the separate Market Inquiry. That is irregular because the Market Inquiry process has not yet been finalized and is ongoing.
2. The last consultative engagements with ICASA on the Market Inquiry were held at the end of October 2020. This was a few weeks after ICASA had published the ITA. This means ICASA either pre-empted the decision in the Market Inquiry or decided to impose this categorisation regardless of what might be the outcome in the Market Inquiry. On either basis, ICASA’s decision is irregular because ICASA failed to have regard to the final outcomes of the assessment of competition undertaken in the Market Inquiry, and failed to have proper regard to the representations of interested parties at the consultative engagements. ICASA therefore misdirected itself by not having regard to relevant considerations.
3. Further and in any event, it was irrational for ICASA to include the Operator Categorisation in the ITA before the Market Inquiry had been completed, because it means that ICASA did not have regard to the submissions made by interested parties in the Market Inquiry.

## Summation

1. For all the reasons set out above, I submit that the ICASA’s decision to categorise operators into “Tier-1 operators” and “Tier-2 operators” should be reviewed and set aside on the basis that:
   1. The definition of “Tier-1 operator” and the definition of “Tier-2 operator” are void for vagueness;
   2. The Operator Categorisation is arbitrary, within the meaning of section 6(2)(e)(i) of PAJA *alternatively* within the meaning of the doctrine of legality;
   3. The Operator Categorisation is irrational, within the meaning of section 6(2)(f)(ii) of PAJA *alternatively* within the meaning of the doctrine of legality;
   4. The Operator Categorisation fails to have regard to relevant considerations and has regard to irrelevant considerations, within the meaning of section 6(2)(e)(iii) of PAJA *alternatively* within the meaning of the doctrine of legality;
   5. The Operator Categorisation is unreasonable, within the meaning of section 6(2)(h) of PAJA *alternatively* within the meaning of the doctrine of legality;
   6. The Operator Categorisation is otherwise unconstitutional or unlawful, within the meaning of section 6(2)(i) of PAJA.

# REVIEW GROUNDS: THE categorisation of mtn as a tier-1 operator

1. In prayer 2.2 of the notice of motion, MTN seeks an order reviewing and setting aside ICASA’s decision to categorise MTN as a Tier-1 Operator.
2. I have submitted above that the definition of a Tier-1 Operator is void for vagueness. For this reason alone, ICASA misdirected itself in categorising MTN as a Tier-1 Operator.
3. Further and in any event, MTN has never been informed that ICASA intended to categorise MTN as a Tier-1 Operator. The first MTN learned of the fact that it had been characterised as a Tier-1 Operator was when it received ICASA’s Response Document. At that stage, ICASA stated that it had “already decided which operators are categorised as tier-1 operators.” (Response to Query 43, p20, Response Document). ICASA confirmed that “MTN and Vodacom are Tier-1 Wholesale National Operators”. (Response to Query 31, p14, Response Document).
4. MTN was at no stage given notice of the fact that ICASA intended to categorise it as a Tier-1 Operator and was not afforded an opportunity to make representations as to why it should not be classified as a Tier-1 Operator. ICASA’s decision was therefore procedurally unfair and should be reviewed and set aside in terms of section 6(2)(c) read with section 3 of PAJA.

# REVIEW GROUNDS: THE OPT-IN SCHEME

1. In prayer 2.3 of the notice of motion, MTN seeks an order reviewing and setting aside ICASA’s decision to include in the auction structure an Opt-In Scheme comprising of Opt-In lots and spectrum floors, as described in paragraphs 6 and 17.2 of the ITA.
2. ICASA acknowledges that “spectrum is a strategic asset for national wholesalers and access to spectrum is likely to have a major impact on a national wholesaler’s competitive strength in the market.” (Competition Assessment, Reasons Document, p118, para 93.). ICASA also acknowledges that “spectrum is a scarce resource and the forthcoming auction of spectrum is the best opportunity to access additional spectrum resources. This suggests that the outcome of the auction is likely to shape the future competitiveness of the mobile sector for at least the next decade.” (Competition Assessment, Reasons Document, p118, para 94.) Despite these statements, ICASA has imposed an auction structure that is impermissibly vague; that fails to achieve the objectives of the ITA and the ECA; and that is unreasonable. I elaborate below on the reasons for this.

## The Opt-In Scheme is impermissibly vague

1. I have already explained the lack of clarity regarding how the Opt-In Auction Round will operate in practice. This makes it impossible for MTN to predict the likely outcomes of the Opt-In Auction Round and to anticipate the spectrum that will be available in the remaining auction rounds.
2. The prospective bidders have repeatedly requested further information from ICASA. No coherent answers have been provided. On the contrary, ICASA has suggested that the information regarding the Opt-In Auction Round will only be disclosed to qualified bidders at the auction stage of the ITA process.
3. The lack of answers to these questions hampers the ability of stakeholders to take informed decisions on the auction process and to prepare adequately. It introduces uncertainty and risk for all participants in the ITA process.
4. By way of contrast, I record that in the 4G Auction, Ofcom published 70 pages of detailed rules a full two months prior to the auction specifying the specific rules around opt-in, including the requirements to become an opt-in bidder, how opt-in bids would be selected, how opt-in bids were to be submitted, what constituted a valid opt-in bid, the procedures for the opt-in round, and how winning bids would be selected. I attach as annexure **MMM18** a copy of The Wireless Telegraphy (Licence Award) Regulations 2012, Ofcom, 9 November 2012. A reading of the Ofcom documents makes it clear to what extent the ITA fails to furnish adequate particularity regarding how the Opt-In Auction Round will be conducted.

## The Opt-In Scheme is contrary to the objectives of the ITA and is irrational

1. When it regulates spectrum, ICASA is required to act in accordance with the primary objects of the ECA, which is to “provide for the regulation of electronic communications in the Republic in the public interest”. In order to achieve this purpose, the ECA requires ICASA to have regard to its obligations to:
   1. ensure efficient use of the radio frequency spectrum;
   2. promote the universal provision of electronic communications networks and electronic communications services and connectivity for all;
   3. encourage investment, including strategic infrastructure investment, and innovation in the communications sector.
   4. promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services;
   5. promote competition within the ICT sector;
   6. ensure the provision of a variety of quality electronic communications services at reasonable prices; and
   7. promote the interests of consumers with regard to the price, quality and variety of electronic communications services.
2. These objectives are largely mirrored in the ITA. The objectives of the ITA are set out at paragraph 3 and include:
   1. Promoting the universal provision of electronic communications networks and electronic communications services and connectivity for all (para 3.1.2);
   2. Promoting the interests of consumers with regards to the price, quality and the variety of electronic communications services (para 3.1.3);
   3. Encouraging investment and innovation in the communications sector (para 3.1.5);
   4. Promoting competition within the ICT sector (para 3.1.7); and
   5. Ensuring efficient use of the radio frequency spectrum (para 3.1.9).
3. These objectives must be read in the context of the broader objectives of :
   1. The Policy on High Demand spectrum and Policy Direction of the Licencing of Wireless Open Access Network published in Government Gazette No. 42597 of 26 July 2019.
   2. South Africa Connect: Creating Opportunities, Ensuring Inclusion - South Africa’s Broadband Policy in General Notice 953, Government Gazette No 37119 of 6 December 2013.
4. ICASA stated in its Reasons Document that the “*intention of the Auction is to reveal the true fair value of the spectrum (including IMT3500), hence the spectrum will ultimately be assigned to the I-ECNS Licensees who value it the most*”. (Reasons Document, p37)
5. In respect of its obligation to consider competition in the market, ICASA notes in the Market Inquiry Discussion Document that one of the competition concerns has to do with the “greater ability to launch new services without affecting existing services – if one operator has this ability and not its competitors.” ICASA concludes:

“Neither an unmatchable competitive advantage nor spectrum hoarding appears to be a feature of the market in South Africa currently. Future assignments will need to consider spectrum caps in order to ensure that this continues to be the case, and should ensure that a single operator does not have an advantage (i.e. to launch a new service) over the other competitors.

(Discussion Document, para 89)

1. I submit that the Opt-In Scheme has the potential to produce outcomes that will undermine these objectives and to create the very situation ICASA has stated should be avoided. I make this submission for the following reasons:
   1. It is generally accepted that 5G is a critical requirement for the Information Technology services of the future, and that for any network provider looking to remain relevant in the 5G environment, an essential ingredient is spectrum in the 3500MHz band.
   2. However, the ITA creates a scheme that deliberately sterilizes the two major operators (MTN and Vodacom) from bidding during the Opt-In Round for the spectrum that they need to advance their 5G networks. As I have explained above, this may conceivably produce an outcome in which MTN is foreclosed from bidding for any 3500MHz spectrum at all. That would undermine the objectives of the ECA, and would be irrational and unreasonable.
   3. The effect of the Opt-In Scheme is that the least efficient users of spectrum will be prioritised over the more efficient users of spectrum. It is irrational to exclude operators that make best use of the spectrum and value it the most, whilst rewarding the most inefficient users of this public good with more spectrum. This undermines the objectives of the ECA and the ITA.
   4. Given 3500 MHz scarcity and the bias of the existing assignments towards Tier-2 operators, 5G spectrum should be awarded on a level playing field across the industry. The Opt-In Scheme creates a playing field that is uneven. This undermines the objectives of the ECA. It is also irrational and unreasonable.

## The Opt-In Scheme is based on an error of fact

1. ICASA says in paragraph 88 of its competition assessment that a “Tier-1 player’s existing spectrum holdings, site dominance and dominance in retail markets are likely to be sufficient for it to be a credible national wholesaler into future even if **it wins no additional spectrum** (particularly sub-1GHz low frequency spectrum) in the auction/award” (emphasis in original).
2. There is no basis for ICASA’s extraordinary statement that MTN would remain a credible national wholesaler “even if it wins no additional spectrum”. The evidence relied on by ICASA establishes the exact opposite. For example:
   1. In paragraph 29 of the competition assessment (page 94 of the Reasons Document), ICASA states that “Table 2 together with Figure 1 clearly illustrates that given the number of subscribers on each network, Vodacom and MTN are more spectrum constrained that the other two operators.” This points to a need for MTN to acquire more spectrum.
   2. In paragraph 30 (page 95 of the Reasons Document), ICASA concludes that “the current spectrum assignments are reasonably balanced among the four MNO’s [MTN, Vodacom, Telkom and Cell C] offering nationwide services, except for Telkom’s lack of sub-1GHz spectrum.” Based on this conclusion, all four operators should be afforded the same opportunity to compete for new spectrum.
   3. In the discussion document emanating from the Market Inquiry, ICASA concluded that it “considers a national market for spectrum, an important input for the supply of mobile services. While the supply of spectrum is limited, there are no licensees that have substantially greater holdings than other licensees, and there are no licensees that have significant market power in this market.” (Market Inquiry, Discussion Document, p10, para 1.3.2.). ICASA has inexplicably departed from this position in the ITA.
3. ICASA’s conclusion is not only based on errors of fact, but it ignores the stark reality that it will take another 20 years before the next spectrum auction takes place. As I have explained above, it is simply not possible for MTN to remain a competitive operator without access to the spectrum that will enable the roll-out of 5G technology.

## The Opt-In Scheme is disproportionate and unreasonable

1. In light of the spectrum caps and spectrum set-aside, I submit that spectrum reservation is not necessary to achieve the desired policy outcomes and that it amounts to a disproportionate and unreasonable intervention.
2. ICASA finds in the Competition Assessment that:

“the current spectrum assignments are reasonably balanced among the four MNOs offering nationwide service, except for Telkom’s lack of sub-1GHz spectrum. At the same time, Telkom has significantly higher assignments of spectrum overall.”

(Competition Assessment, Reasons Document, p95, para 30)

1. ICASA concludes that its “pro-competition measures … are individually and collectively justified and proportionate.” (Competition Assessment, Reasons Document, p119, para 97)
2. This statement, however, refers specifically to “sub-1GHz caps, overall spectrum caps, spectrum portfolios/floors, WOAN.” In Step 4 of the Competition Assessment, ICASA considers what measures are “appropriate and proportionate to adopt to enhance national wholesale competition” (Competition Assessment, Reasons Document, p120, para 100). ICASA’s competition assessment does not engage with the Opt-in Round as a pro-competition measure.
3. After the WOAN set-aside, 326 MHZ of spectrum is available for award at the ITA auction: 100 MHz of sub-1GHz and 226MHz of mid-band spectrum (2600 and 3500).
4. The spectrum caps constrain the bidding of Tier-1 operators in the following respects:
   1. Both MTN and Vodacom have an existing allocation of 22MHz in the sub-1GHz band. The spectrum cap of 2 x 21MHz limits their bids to an additional 20MHz each. A total of 40MHz in the sub-1GHz band may be taken up by the Tier-1 operators.
   2. MTN has an existing allocation of 2x12 in the 1800MHz, 2 x 15MHz and 10MHz in the 2100 spectrum band. This is a total of 86MHz. Taking into account the 20MHz that may be assigned in the lower spectrum, this means that MTN may bid for an additional **78MHz** before it reaches the spectrum cap of 184MHz. MTN has made an application to amend its licence number 00-495-603-1 in order to return 10MHz of spectrum in the 2100MHz frequency band. Should the application be successful, MTN’s total spectrum holding will be reduced and it will be able to bid for a further 10MHz before reaching the spectrum cap.
   3. Vodacom has an existing allocation of 2x12 in the 1800MHz, 2 x 15MHz and 5MHz in the 2100 spectrum band. This is a total of 81MHz. Taking into account the 20MHz that may be assigned in the lower spectrum, this means that Vodacom may bid for an additional **83MHz** before it reaches the spectrum cap of 184MHz.
5. Assuming Vodacom and MTN both bid to the maximum sub-cap of 42 MHz in sub-1GHz (a 20MHz acquisition for each) and the 184 MHZ overall cap (an 83MHz and 78MHz spectrum acquisition respectively), this means that 60MHz of sub-1GHz and 65 MHz would be left for “non-Tier 1” operators in an open auction.
6. Even in this extreme scenario, the spectrum left over for “non-Tier 1” operators allows many combinations where bidders achieve spectrum in excess of the minimum spectrum portfolios, and therefore securing five or more credible national wholesale operators. The possible outcomes include the following:
   1. Telkom is awarded 30MHz sub-1GHz, Rain is awarded 20MHz sub-1GHz, Liquid is awarded 10MHz sub-1GHz, and Cell C is awarded 10MHz mid-band. This would mean that four operators achieve spectrum holdings that exceed the minimum spectrum floors set out in clause 6 of the ITA. Seven credible national wholesalers then emerge post-auction.
   2. Telkom is awarded 20MHz sub-1GHz, Liquid is awarded 10 MHz sub-1GHz, a new entrant is awarded 30MHz sub-1GHz+ 40MHz mid band, and Cell C is awarded 10MHz mid-band. This would mean that four operators achieve spectrum holdings that exceed the minimum spectrum floors set out in clause 6 of the ITA. Seven credible national wholesalers then emerge post-auction.
   3. Telkom is awarded 20 MHz sub-1GHz, Rain is awarded 20 MHz sub-1GHz, and a new entrant is awarded 20Mhz sub-1GHz + 60MHz mid band. This would mean that three operators achieve spectrum holdings that exceed the minimum spectrum floors set out in clause 6 of the ITA. Six credible national wholesalers then emerge post-auction.
   4. Telkom is awarded 30MHz sub-1GHz, Rain is awarded 30 MHz sub-1GHz, and Cell C is awarded 10 MHz mid-band. This would mean that three operators achieve spectrum holdings that exceed the minimum spectrum floors set out in clause 6 of the ITA. Six credible national wholesalers then emerge post-auction.
   5. Telkom or Rain is awarded 30MHz, and a new entrant is awarded 30 MHz + 40MHz mid-band. This would mean that two operators achieve spectrum holdings that exceed the minimum spectrum floors set out in clause 6 of the ITA. Six credible national wholesalers then emerge post-auction.
   6. Telkom or Rain is awarded 40MHz sub-1GHz, and a new entrant is awarded 20MHz sub-1GHz + 60MHz mid band. This would mean that two operators achieve spectrum holdings that exceed the minimum spectrum floors set out in clause 6 of the ITA. Five credible national wholesalers then emerge post-auction.
7. The spectrum caps preclude Tier-1 operators from bidding for two thirds of the sub-1GHz spectrum, 45% of the mid-band spectrum, and 50% of the overall award. These interventions substantially achieve the objective that is sought to be achieved by ICASA by the use of the Opt-In Scheme and spectrum floors. It demonstrates that there are available alternatives to achieve the desired objective without the potential risks highlighted above.
8. As I have already explained, the use of spectrum floors and opt-in rounds is very rare and extremely complex. A more standard way to achieve similar objectives would involve the use of spectrum set-asides. A similar outcome to the one sought to be achieved by ICASA could be achieved by setting aside two portfolios for competitive bidding (the pre-auction) prior to the main auction stage (the open auction) by two separate groups of operators, with only a single possible winner for each (and spectrum returned to the open auction in case of no bid):

|  |  |  |
| --- | --- | --- |
|  | **Set aside 1** | **Set aside 2** |
| **Spectrum set-aside** | 20 MHz sub 1GHz | 2.a 30 MHz sub 1GHz +  40MHz mid-band  or  2.b 20 MHz sub 1GHz +  60MHz mid-band |
| **Qualifying bidders** | Tier 2 operators | New entrants |
| **Outcome** | Any winner achieves PF1 | Any winner achieves PF1 or 2 |

1. The winner in each set aside would be the highest monetary bid in each group. Winners of the set-aside spectrum can complement their already “MSP-compliant” portfolios with additional spectrum in the open auction, some of which will remain shielded from Tier 1 operators through the spectrum caps.
2. A mechanism such as this would achieve the same outcome as the Opt-In Scheme and spectrum floors, without any of the technical complexities and uncertainties that I have highlighted above.

## Summation

1. For all the reasons set out above, I submit that the ICASA’s decision to include the Opt-In Scheme in the ITA should be reviewed and set aside on the basis that:
   1. The description of the Opt-In Scheme in the ITA is void for vagueness;
   2. The Opt-In Scheme is arbitrary, within the meaning of section 6(2)(e)(i) of PAJA *alternatively* within the meaning of the doctrine of legality;
   3. The Opt-In Scheme is irrational, within the meaning of section 6(2)(f)(ii) of PAJA *alternatively* within the meaning of the doctrine of legality;
   4. The Opt-In Scheme fails to have regard to relevant considerations and has regard to irrelevant considerations, within the meaning of section 6(2)(e)(iii) of PAJA *alternatively* within the meaning of the doctrine of legality;
   5. The Opt-In Scheme is unreasonable, within the meaning of section 6(2)(h) of PAJA *alternatively* within the meaning of the doctrine of legality;
   6. The Opt-In Scheme is otherwise unconstitutional or unlawful, within the meaning of section 6(2)(i) of PAJA.

# REMEDY

1. For the reasons given above, I submit that ICASA’s decision to include the Operator Categorisation and the Opt-In Scheme as part of the ITA should be declared unlawful and should be reviewed and set aside. That is the relief sought in prayer 2 of the notice of motion.
2. The provisions of the ITA that give effect to Operator Categorisation are the definitions of “Tier-1 operator” and “Tier-2 operator”. The provisions of the ITA that give effect to the Opt-In Scheme are paragraphs 6 and 17.2. All of these provisions should be declared to be unlawful and should be excised from the ITA. That is the relief sought in prayer 3 of the notice of motion.
3. If the relief sought by MTN were to be granted, the ITA process could continue but without the Opt-In Round.

# URGENCY

1. This application seeks to review and set aside ICASA’s decisions to include the Operator Categorisation and the Opt-In Scheme in the ITA. In order for MTN to obtain such relief, the matter would have to be determined before the Opt-In Auction round commences. The reasons for this are as follows:
   1. If the Opt-In Auction round were to be conducted, successful bidders would be awarded spectrum in the course of that round. They would be expected to pay substantial sums of money (hundreds of millions of rand) with immediate effect.
   2. Those bidders are likely to take immediate steps to use the new spectrum. This means, for example, that they will purchase network equipment to use the spectrum and will begin installing equipment on site. This will involve the expenditure of massive amounts of money.
   3. If MTN’s application were to be heard after the Opt-In Round has already been conducted, the successful bidders are likely to contend that no relief should be granted to MTN because of the prejudice they would suffer if the Opt-In Round were to be found unlawful. This makes it necessary for MTN’s application to be determined in advance of the commencement of the ITA auction.
2. The timelines in the ITA show that the first auction round is scheduled to take place on 23 March 2012 (being 119 days from the date of publication of the ITA). Attached hereto is an extract from the ITA reflecting the indicative timelines, marked annexure **MMM19.**
3. If MTN were to seek relief in the ordinary course, the ITA auction will already have been concluded by the time that the matter is heard. MTN could not be afforded substantial redress at a hearing in due course because by then the ITA auction would already have occurred.
4. For all of these reasons, MTN has set this matter down for hearing so that it can be argued and so that that judgment can be delivered before the Opt-In auction round that is scheduled to commence on 23 March 2021. In accordance with the Practice Directions of this Division, MTN intends to approach the Deputy Judge President in order to secure a special allocation for the hearing of the matter.
5. MTN has elected to proceed in terms of Rule 6 in order to obviate the lengthy periods that would be associated with a Rule 53 review. For the purposes of paragraph 2(3)(a) of the Administrative Review Rules, I record that ICASA has not furnished MTN with a record of proceedings in relation to the decisions that form the subject matter of this application.
6. Some of the time periods provided for in Rule 6 have had to be shortened in order to have a hearing before the deadline of 23 March 2021. The respondents have been afforded slightly less than the ordinary time periods afforded to them by Rule 6 to give notice of intention to oppose and to file their answering affidavit.
7. I submit that MTN acted with due expedition in launching this application. The Reasons Document was only published on 4 December 2020. MTN then engaged in further correspondence with ICASA. However, it was not apparent until early this year that ICASA was unwilling to provide further clarity on the Opt-In Scheme and the Operator Categorisation. I have described the interactions above but reiterate the following by way of summary:
   1. On 22 October 2020, MTN sent queries to ICASA seeking clarification and information regarding issues that were unclear or not sufficiently comprehensive in the ITA, in particular, issues pertaining to the Opt-In Scheme and its implications for MTN.
   2. On 11 November 2020, ICASA published a responses document in which it responded to some queries raised by interested persons.. Many of the responses were either cursory of deferred the explanation to a reasons document still to be published.
   3. On 25 November 2020, MTN sent ICASA follow-up queries because many of its initial queries had not been answered or clarified.
   4. On 4 December 2020, ICASA published a reasons document in which it purported to give more detailed explanations in supplementation of the responses document it had published on 11 November 2020.
   5. On 11 December 2020, ICASA sent a letter to MTN indicating that it had answered all MTN queries in detail and that further clarifications are contained in the reasons document of 4 December 2020.
   6. On 18 December 2020, MTN sent a letter to ICASA detailing its concerns regarding the Operator Categorisation and the Opt-In Scheme and demanding an undertaking from ICASA that the spectrum auction will be conducted without the Opt-In Scheme.
   7. On 23 December 2020, ICASA’s attorneys Kunene Ramapala answered the 18 December 2020 letter from MTN. In its response, ICASA stated that MTN understood the Opt-In Schemes that the Scheme was rational and lawful, and that it is intended to encourage competition and avoid market concentration. In paragraph 17 of the letter, ICASA closed the door to any further engagement on MTN’s concerns regarding the Opt-In Scheme.
   8. On 30 December 2020, MTN responded to the letter from ICASA’s attorneys pointing out that its queries regarding the Opt-In Scheme had not been clarified by any of the ICASA responses and reasons documents. MTN made a further point that the responses document had in fact created more confusion, especially in respect of whether or not the 3500MHz spectrum would form part of the Opt-In auction round.
   9. On 5 January 2021, ICASA’s attorneys responded to the last MTN letter of 30 December 2020, essentially maintaining ICASA’s posture that sufficient clarity has been provided regarding the Opt-In Scheme and that the decision on which spectrum bands will form part of the Opt-In auction round will only be made after the prequalification of bidders.
8. It was at this point that it became apparent to MTN that regardless of the serious deficiencies with the spectrum auction process, ICASA intended to proceed with the ITA process as planned, including the Opt-In Rounds commencing on 23 March 2021. MTN accordingly met with its legal team (some of whom were still on leave) on 6 January 2021. After the consultation, MTN instructed its legal team to commence the process of drafting the papers in a review application. At the same time, MTN procured input from its external technical consultants as well as internal technical experts.
9. This application will be launched on Wednesday, 27 January 2021 -- approximately 15 court days after it became clear that ICASA would not accede to MTN’s requests.
10. In the circumstances, MTN humbly requests that this Court grant prayer 1 of the notice of motion declaring that the matter be heard urgently, and that any truncation of time periods be condoned.

# TELKOM’S APPLICATION TO SET ASIDE THE ITA

1. On 22 December 2020, Telkom launched an application seeking relief in relation to the ITA in three parts (“**Telkom’s application**”):
   1. Part Ais an application for substituted service where Telkom seeks the leave of the court to effect service of the application by directing ICASA to publish the application on its website. Telkom withdrew this part of its application on 7 January 2021.
   2. Part Bis an urgent application for interim interdictory relief against ICASA pending the outcome of the review application in Part C, to stop ICASA from assessing and adjudicating applications pursuant to the ITA, and to suspend the closing date for WOAN applications.
   3. Part Cis an application consisting of two parts:
      1. In the first part, Telkom brings an application for judicial review under Rule 53 of the Uniform Rules, seeking an order to set aside decisions pertaining to the respective WOAN and spectrum auction ITA processes;
      2. In the second part, Telkom seeks several orders, some directed at ICASA and others at the Minister of Communications, to carry out specified activities before the ITA can be published again.
2. In short, Telkom’s application seeks to halt the entire ITA process until ICASA and the Minister of Communications have implemented a number of specified actions.
3. As presently advised, MTN intends to abide the relief sought by Telkom in Parts B and C of its application. However, there are a number of allegations Telkom makes in its founding affidavit that MTN disputes. For the limited purpose of putting its side of the story on factual allegations it disputes, MTN will in due course file an answering affidavit in the Telkom application.
4. MTN’s application is much more limited than Telkom’s application. MTN seeks relief with a very narrow focus, being to excise the Opt-In Scheme and the Operator Categorisation from the ITA process, whereas Telkom’s application seeks to bring the entire ITA process to a grinding halt. MTN’s preference would be to have the auction proceed as scheduled, albeit without the Opt-In scheme and Operator Categorisation.
5. Although some of the facts and information in this application and Telkom’s application overlap, it is apparent that the MTN and Telkom applications are in pursuit of largely incompatible outcomes.
6. In the event that Telkom were to succeed in obtaining an interim interdict halting the auction rounds, MTN will seek to have the hearing of its application consolidated with the hearing of Part C of Telkom’s application.
7. In the event that Telkom is unsuccessful in obtaining interim relief, MTN will persist in seeking to have its application argued in advance of 23 March 2021.

# CONCLUSION

1. In the circumstances, MTN prays for an order in terms of the notice of motion to which this affidavit is attached.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**MOSES MUXE MASHISANE**

The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at   
on 2020, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

Commissioner of oaths

Full names:

Business address:

Designation:

Capacity: