

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO. 2018 / 20057

In the matter between :-

CELL C LIMITED

Applicant

and

**THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA**

First Respondent

**CHAIRPERSON OF THE INDEPENDENT
COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA**

Second Respondent

AMANDLA.MOBI

Third Respondent

**CRYSTAL WEB MOBILE AND LEASP (PTY)
LTD**

Fourth Respondent

FREE MARKET FOUNDATION

Fifth Respondent

**INTERNET SERVICE PROVIDERS'
ASSOCIATION NPC**

Sixth Respondent

**LIQUID TELECOMMUNICATIONS SOUTH
AFRICA (PTY) LTD**

Seventh Respondent

MARK P LISTER

Eighth Respondent

MOBILE TELEPHONE NETWORK (PTY) LTD

Ninth Respondent

MWEB

Tenth Respondent

NATIONAL CONSUMER COMMISSION

Eleventh Respondent

**WIRELESS ACCESS PROVIDERS'
ASSOCIATION NPO**

Twelfth Respondent

TELKOM SOC SA LTD

Thirteenth Respondent

VODACOM (PTY) LTD

Fourteenth Respondent

FILING SHEET: APPLICANT'S PART B AFFIDAVIT

TAKE NOTICE THAT the applicant hereby files its combined affidavit comprising its supplementary affidavit in Part A and its founding affidavit in relation to Part B.

SIGNED at ILLOVO on the 25 day of **SEPTEMBER 2018**.



FALCON AND HUME INCORPORATED

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TO:

THE REGISTRAR

High Court of South Africa

Gauteng Local Division

Johannesburg

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APPLICANT'S PART B AFFIDAVIT

I, the undersigned,

GRAHAM NEIL MACKINNON

do hereby make oath and say that:

1. I am an adult male and the Chief Legal Officer of the applicant ("Cell C"), the applicant in these proceedings. I am the deponent to the founding affidavit in the so-called Part A of this application, and I depose to this affidavit in the same capacity and with the same authority as before.
2. The allegations contained in this affidavit are, save where the context indicates the contrary, within my personal knowledge and are true and correct. Where I make legal submissions, these are made on the advice of Cell C's legal representatives, which advice I accept as correct.
3. This affidavit serves to supplement the founding papers in circumstances where Cell C has obtained access to the record in terms of Rule 53. It is filed in support of the relief claimed by Cell C in both Part A and B of the application, but particularly Part B, in which Cell C seeks an order:
 - 3.1. reviewing and setting aside clause 8 of the End-User and Subscriber Services Charter Amendment Regulations, published by ICASA on 7 May 2018 as Notice 233 of Government Gazette 41613 ("the Amendment Regulations"); and

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- 3.2. remitting the determination of the appropriate implementation date for the Amendment Regulations to ICASA.
4. This affidavit considers the record of proceedings filed by ICASA on 8 August 2018, and thus consolidates both the founding and supplementary affidavits as contemplated in rule 53(1) and (4) of the Rules of Court.

THE PROCEEDINGS THUS FAR

5. The Amendment Regulations were due to come into force on 8 June 2018, one month after their publication in the Government Gazette. Following engagement with ICASA, more fully described below, Cell C instituted an urgent application seeking an interim interdict against the coming into force of the Amendment Regulations until such time as the merits of the application could be determined under Part B of the notice of motion.
6. ICASA had not filed answering papers and, on the appointed hearing date, had made no effort to oppose the matter on the basis of urgency, for example, by opposing urgency by arguing off the founding papers (an option that was open to it if it wished to pursue it). Rather, ICASA proposed that the matter be removed from the roll, and that the implementation date of the Amendment Regulations be postponed until the final determination of Part A of Cell C's application, with an undertaking that licensees would not be found to be non-compliant with the Amendment Regulations during the interim period. ICASA also proposed time-frames for the filing of affidavits, and asked Cell C to prepare a draft order along these lines.

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7. Cell C drafted an order as requested, and ICASA agreed to the draft order as proposed, which formed the subject matter of engagement by all of the respondents in this application. The draft, which obliged ICASA not to take any steps to implement the Amendment Regulations, and which provided for time periods for the filing of answering and replying affidavits, was made an order of this honourable Court. Neither ICASA, nor any other respondent, reserved the right to contest urgency when the matter came to be heard. A copy of the order is annexed hereto marked "GNM1".
8. On 11 June 2018, ICASA published a notice suspending the effective date of the Amendment Regulations pending the determination of this application (annexure "RA2" to Cell C replying affidavit to Part A). ICASA's conduct indicates that it waived reliance on urgency as a ground of opposition and accepted the urgency of the matter in the circumstances. It will be argued at the hearing that ICASA, through its actions, forfeited any right to rely on the alleged absence of urgency.
9. The court therefore may appropriately deal with the application on the merits without further regard to the question of urgency.
10. Following a case-management meeting convened on 17 September 2018, it was agreed that the hearing of both Part A and Part B of the application is set down for two days on 15 – 16 November 2018. This affidavit is filed in accordance with the timeframes set out in the minute to the meeting. The minute is not attached to this affidavit as it already forms part of the court file.
11. In this affidavit, I do not repeat in detail the factual averments and background to the application, which are contained in the Cell C founding affidavit to Part A (paginated pages 22 – 27). As such this affidavit is structured as follows:

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- 11.1. First, an assessment of the record of proceedings as filed by ICASA;
- 11.2. Second, the grounds of review upon which the application is based;
- 11.3. Third, the steps taken by Cell C to implement the obligations of the Amendment Regulations; and
- 11.4. Fourth, the relief sought.

THE RECORD OF PROCEEDINGS

12. On 8 August 2018 ICASA filed a record of proceedings comprising:

- 12.1. A notice to the Minister of Communications with a first draft of the Amendment Regulations attached;
- 12.2. The written submissions received from stakeholders in response to the public participation process in August and September 2017;
- 12.3. The second draft of the Amendment Regulations dated 17 November 2017;
- 12.4. The written submissions received from stakeholders in response to the public participation process in January 2018;
- 12.5. The transcripts of and presentations submitted during the public hearings of the draft Amendment Regulations convened over 1 and 2 March 2018;
- 12.6. Supplementary submissions received following the public hearings; and

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- 12.7. The minutes of ICASA Council meetings at which the Amendment Regulations were discussed and the final version of the Amendment Regulations together with the Reasons Document.

THE GROUNDS OF REVIEW

13. There are three grounds of review on which this application is founded. All the grounds of review reside under the Constitutional principle of legality, alternatively PAJA, further alternatively, the common law.

- 13.1. The first is articulated in the founding affidavit to Part A, namely that it is practically impossible for licensees to comply with the obligations in clause 8 of the Amendment Regulations within the stipulated 30-day period, and that non-compliance would expose Cell C and other licensees to hefty statutory fines of up to R5 million in terms of regulation 18(2) of the End-User and Subscriber Services Charter Amendment Regulations, published by ICASA on 1 April 2016 in Government Gazette 39898 (which regulation was not amended by the Amendment Regulations). Clause 8 of the Amendment Regulations is thus reviewable under the principle of legality, alternatively, section 6(2)(e)(iii), (vi) and (f)(ii)(cc) of the Promotion of Administrative Justice Act, 2000 (PAJA), further alternatively, the common law.

- 13.2. The second ground of review is that clause 8 of the Amendment Regulations is unreasonable in its application under the principle of legality, section 6(2)(h) and (i) of PAJA, and the common law.

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13.3. The third ground of review arises from the record of proceedings. In terms of section 4(5) of the ECA, ICASA is obliged, 30 days prior to making regulations, to inform the Minister of its intention and to provide to the Minister a copy of the proposed regulations. The record of proceedings shows that this mandatory statutory requirement was not complied with. The Amendment Regulations as a whole thus fall to be reviewed and set aside under the principle of legality, alternatively sections 6(2)(b), (d) and (f)(i) of PAJA.

14. The grounds of review are elaborated on below.

Compliance with clause 8 of the Amendment Regulations is impossible within the prescribed time period

15. The process for concluding the Amendment Regulations consisted in several one on one discussions with ICASA and two drafts of the proposed amendments. In none of these discussions or consultations was a commencement date proposed by ICASA.. This is important when taking into account the significant financial and operational impact the proposed change would have on the business of licensees, as indicated below. It flows naturally from the discussion on the complexity of the changes that would be required to licensees' networks and operations, that any changes would necessarily take time. Licensees' submissions accordingly focussed on whether alternatives could be found to the proposed changes, or how the proposed changes might work in practise.

16. Compliance with the Amendment Regulations is an onerous task, given the complexity of the business operations concerned. The technical analysis of the necessary changes could only proceed once the commercial analysis and

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implementation plan was completed and agreed upon, which itself could only be agreed once the Amendment Regulations had been finalised and licensees had certainty on the obligations that would apply (the previous drafts having been amended substantially during the course of the consultation period).

17. The obligations imposed on licensees include:

- 17.1. point of sale engagement with customers;
- 17.2. bi-annual reporting obligations on licensees to ICASA;
- 17.3. usage depletion notifications that must be sent to end-users at specified intervals in respect of (i) voice and SMS services; and (ii) data bundle services;
- 17.4. the option for end-users to roll over unused data before the data expiry date;
- 17.5. the option for end-users to transfer data to other end-users on the same network;
- 17.6. the obligation to carry out educational awareness campaigns on, at a minimum, a quarterly basis. The educational awareness campaigns are to be aimed at education end-users on the use of smartphones, the use of data, and the products and services offered by the licensee.

18. During the public participation process there were at least three submissions in which the entry into force of the Amendment regulations was raised:

- 18.1. MTN in its September 2017 and January 2018 written submissions at paginated pages 83 and 216 respectively;

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- 18.2. Vodacom in its January 2018 written submissions at paginated page 319;
- 18.3. WAPA in its January 2018 written submissions at paginated page 322.
19. Telkom, in its submissions of August 2017 (record of proceedings, paginated pages 90, 96 and 104) informed ICASA of the technical requirements of the proposed regulations and state that certain functionalities, such as the percentage-based notifications, were not technically possible on the Telkom network as it was then configured. These concerns were repeated in Telkom's written submissions of January 2018 (record of proceedings, paginated pages 287, 290) in which Telkom states that it will "have to uniquely define and develop notifications for each bundle [type]".
20. In its various submissions to ICASA, Cell C also raised the complexity and difficulty of compliance with the proposed amendments to the regulation, which necessarily involved discussion with various teams within the business regarding implementation – these discussions could only take place after the regulations were in final form.
21. These submissions alerted ICASA to the fact that time would be needed to implement the Amendment Regulations, and it was indicated to ICASA that a period of 6 months (in the case of the Vodacom submissions) and a phased-in approach (in the case of WAPA) would be required.
22. In the public hearings of March 2018, ICASA did not question the timing, or the operational or financial considerations of the proposed regulations. Although ICASA did mention its proposed date for finalising the Amendment Regulations, no reference was made to a proposed commencement date for either the Amendment Regulations or a deadline for implementation of the obligations

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contained in the Regulations. Accordingly, there was no indication when the effective date of the Amendment Regulations would be (record of proceedings, paginated pages 335-356).

23. Following the public hearings, Cell C made further written submissions on 13 March 2018 to ICASA in which it alerted ICASA to the technical configurations necessary, and the operational and financial implications of the proposed regulations (record of proceedings, paginated page 602).

24. Based on collective information conveyed to ICASA and the fact that ICASA, as national industry regulator, is well aware of the technical framework in which its licensees operate, ICASA cannot claim to have failed to appreciate that the Amendment Regulations would require back-end technical and operations changes to the business of each licensee, as well as front-end changes to consumer contracts in relation to the rules of use and expiry of data bundles, necessary communications from customers to indicate their preferences, and the configuration of new customer packages. The implications for all licensees are largely similar and thus operationally complex for all licensees.

25. On publication of the Amendment Regulations in their final form on 26 April 2018, all licensees, including Cell C, for the first time understood the operational changes that would be required to comply with the new regulatory framework. It is only at this stage that all licensees, including Cell C, could carry out an implementation exercise across its corporate, technical and operational divisions to assess the necessary changes and the sequence in which those changes could be implemented.

26. As soon as Cell C completed this task, it informed ICASA of the difficulties and complexities. In this regard, I refer to the letter written to ICASA on 4 May 2018

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("FA2" to the founding affidavit in Part A). This letter emphasised that the proposed amendments would require major changes and further developments to Cell C's billing and technical platforms, including software (source code) upgrades, business rule changes, and significant product offering changes and restructuring. Each of these changes needed to be scoped, tested, and integrated into the business and IT structure without compromising the existing technology platforms and provision of services. In order to achieve this, any errors identified during the testing phase had to be resolved and the test conducted again, in order to ensure a seamless business, IT and service offering.

27. ICASA was thus again alerted to the operational requirements of licensees necessitated by the Amendment Regulations, prior to its promulgation of the Amendment Regulations on 7 May 2018 ("FA4" to the founding affidavit in Part A). It is not explained why the Amendment Regulations had to be promulgated on 7 May 2018, why there was any urgency in doing so or, if there was, what the basis for the urgency was in relation to that publication date (if any). Nor were any reasons given why ICASA elected to ignore the practical implications of clause 8 of the Amendment Regulations and the one-month timeframe stipulated therein on all licensees. ICASA failed to acknowledge receipt or respond to either of Cell C's letters.

28. In the founding affidavit to the Part A application, I explained the various operational and technical components of ensuring compliance with the Amendment Regulations. The steps outlined therein, are still applicable. I set out below the extent to which Cell C has taken steps toward compliance with the Amendment Regulations and the work still to be completed. On Cell C's current projections, and barring any unforeseen circumstances, it is expected that it

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should be able to roll out its obligations under the Amendment Regulations, by mid-December 2018. This is, of course, subject to the Regulations as a whole not being declared invalid for non-compliance with section 4(5) of the ECA.

29. This implementation period amounts to approximately 6 months from the date on which the Amendment Regulations required licensees to be compliant, in circumstances where ICASA afforded licensees only 1 month in which to comply with the Amendment Regulations.

30. Clause 8 of the Amendment Regulations is thus reviewable and fall to be set aside on the following grounds:

30.1. *The principle of legality, alternatively section 6(2)(e)(iii) of PAJA:*

30.1.1. ICASA failed to take into account relevant considerations when determining the appropriate timeframe within which the Amendment Regulations ought to be brought into operation.

30.1.2. Not only was ICASA alerted to licensees' need for a six-month or phased-in timeframe to implement the Amendment Regulations, but even where timeframes were not proposed, ICASA was alerted to the fact that the Amendment Regulations would require significant operational and technical changes to the networks and their component parts (e.g. the IT systems and billing systems), and to each product/bundle package offered to customers by licensees, and that all licensees would be similarly affected.

30.1.3. As set out in the founding affidavit to Part A, Cell C itself has over 119 primary products and, unlike the other mobile operators, also offers wholesale services to entities called mobile virtual network

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operators ("MVNOs"), such as Virgin Mobile and FNB, as well as to Mobile Virtual Network Enablers ("MVNEs") who host billing services on behalf of MVNOs. Both MVNOs and MVNEs will have to make consequential changes to their own systems in order to ensure that they too comply with the requirements of the Amendment Regulations because they deal with customers directly.

30.1.4. It is inconceivable that integrated and fully operational compliance with the Amendment Regulations could ever be possible within a one-month period, and it is also inconceivable that an industry sector regulatory authority such as ICASA, with its specialist knowledge of the industry, would not know this, or would not have carried out even the most basic regulatory impact assessment.

30.1.5. ICASA simply failed to take these considerations into account or to ask further clarity or input from stakeholders on this issue, either in any of the drafts of the Amendment Regulations on which stakeholders were asked to comment, or in any meetings between ICASA and stakeholders, or in the hearings held by ICASA in March 2018.

30.2. *The principle of legality, alternatively section 6(2)(e)(vi) of PAJA*

30.2.1. The promulgation of clause 8 under the circumstances outlined above is thus arbitrary and capricious.

30.2.2. ICASA, having been informed in different ways of the wide-ranging impact of the obligations in the Amendment Regulations, and the cost and technical changes the obligations would mean for the

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business of licensees, elected not only to ignore those submissions but arbitrarily failed to make further inquiries of licensees when it had ample opportunity to do so at the oral hearings of March 2018.

30.2.3. Instead ICASA informed licensees only that it intended to finalise the process and promulgate the Amendment Regulations during April 2018. While ICASA managed loosely to adhere to this timeline, it cannot have reasonably conceived that licensees could possibly know the form of the Amendment Regulations, the obligations that would be incorporated therein and, consequent thereto, to commence internal processes and workflow schedules to implement what was then a draft regulation subject to possible change. To do so would have been to undermine and render nugatory the very purpose and aim of the public hearings, and to make assumptions regarding the regulations that could have caused significant financial prejudice to any licensees that took steps to make changes to their networks and operations in advance of seeing the final Amendment Regulations. Commercially, this would have been nonsensical.

30.2.4. Clause 8 of the Amendment Regulations thus falls to be set aside on this ground of review too.

30.3. *The principle of legality, alternatively section 6(2)(f)(ii)(cc) of PAJA*

30.3.1. Clause 8 of the Amendment Regulations, in addition, is not rationally connected to the information placed before ICASA.

30.3.2. In circumstances where the national industry regulator is informed of the complexities of its proposed regulations, and has conducted a

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public participation process in order to solicit that information, its determination on the implementation date of the Amendment Regulations bears no rational connection to the information placed before it.

30.3.3. If the information was not sufficiently clear or articulated in a manner that was technically complex and ICASA did not understand the implications of the submissions made to it, it is incumbent on ICASA as sector-specific regulator to use the public participation process to ensure that it understood all aspects of the submissions made by stakeholders, whether they be of a substantive, operational or technical nature, so as to regulate its industry in an effective manner, ultimately with the view to ensuring that licensees would be capable of abiding by the obligations contained therein.

30.3.4. The lack of rationality in the present circumstances renders ICASA's decision reviewable.

ICASA's conduct is unreasonable

31. On the factual averments set out above, and the insufficient time ICASA afforded licensees to implement the Amendment Regulations, regulation 8 is unreasonable in its application and is manifestly unjust.

32. This constitutes an infringement of the principle of legality, and section 6(2)(h) and (i) of PAJA, alternatively the common law.

ICASA's failure to comply with section 4(5) of the ECA

33. Section 4(5) provides:

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"The Authority must, not less than 30 days prior to making regulations, inform the Minister in writing of its intention and provide the Minister with a copy of the proposed regulations."

34. It is evident from the record of proceedings (paginated pages 12 and 13) that ICASA under cover of a letter to the Minister dated 2 August 2017, submitted to the Minister a draft copy of a proposed set of the Amendment Regulations.

35. The version of the draft regulations submitted to the Minister was not the final draft, and two subsequent drafts of the regulations were circulated for public comment in writing and in public hearings, prior to the promulgation of the Amendment Regulations.

36. The approach followed by ICASA failed to comply with the legal requirements of section 4(5) of the ECA, in that ICASA failed to provide the Minister with a copy of the final draft of the proposed regulations prior to publication.

37. The material changes between the draft regulations submitted to the Minister and the Amendment Regulations, as promulgated, include:

37.1. The insertion of several new definitions in the Amendment Regulations, including that of "hybrid-plans", "out-of-bundle", "post-paid plans" and the deletion of the definitions of "quality of service measurements", "service activation" and "service activation time".

37.2. Regulation 4(2) was substituted in its entirety and a new regulation 4(4), concerning biannual reporting to ICASA, was inserted in the Amendment Regulations.

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37.3. Regulation 5 headed "Promotions" in the Amendment Regulations included the addition of a new regulation 5(4), concerning biannual reporting to ICASA.

37.4. Regulations 8A (Voice and SMS Services) and 8B (Data Services) were substantially amended in the final promulgated Amendment Regulations.

37.4.1. regulation 8A(1) and 8B(1)(a) altered the usage depletion notifications to be sent to customers from four messages to three;

37.4.2. regulation 8A(2) no longer applies to hybrid-tariff plans and obliges licensees to permit customers to purchase additional voice or SMS services at any time, as opposed to at the depletion of such services;

37.4.3. regulation 8A(3) was amended to oblige licensees to permit customers who had reached a depletion of voice and SMS services to nevertheless access to emergency services, customer care services, and incoming voice calls, incoming SMSs and any other free services;

37.4.4. regulation 8B, obligating a licensee to ensure that an end-user is sent warning notifications when his/her data has completely run out has been deleted from the Amendment Regulations;

37.4.5. regulation 8B(1)(b) obliges licensees to permit customers to purchase additional data at any time, as opposed to only permitting the purchase at the depletion of data services;

37.4.6. regulation 8B(2) restricts the ability of a licensee to impose an out-of-bundle charge to customers, until such time that the customer

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purchases new data bundles or consents to be charged out-of-bundle data rates;

37.4.7. regulations 8B(4), (5) and (6) dealing with the expiry of data practices has been deleted in its entirety;

37.4.8. regulations 8B(3) dealing with the roll-over of unused data has been amended and licensees are obliged to offer to customers the option to roll-over unused data prior to the data expiry date; and

37.4.9. regulation 8B(7), which required licensees to get confirmation from an end-user for acceptance prior to billing for: (a) applicable out of bundle rates; and (b) subscription to third-party services, has been deleted.

38. These amendments are not minor and the majority of the amendments go to the very purpose motivating the need for an amendment to the End-User Regulations, 2016.

39. ICASA's failure to comply with a necessary statutory prerequisite under the ECA renders the decision to promulgate the Amendment Regulations reviewable under the principle of legality, alternatively sections 6(2)(b) of PAJA, for non-compliance with a mandatory and material procedure or condition prescribed by an empowering provision. The decision is also reviewable under the principle of legality, alternatively section 6(2)(d) of PAJA, in that the action was materially influenced by an error of law; or section 6(2)(f)(i) of PAJA, in that the action contravenes a law or is not authorised by the empowering provision.

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40. On this ground of review, the Amendment Regulations fall to be reviewed and set aside and ICASA must be required to comply with the procedural statutory obligations prior to promulgation of the Amendment Regulations.

THE STEPS TAKEN BY CELL C TO COMPLY WITH THE AMENDMENT REGULATIONS

41. Since obtaining the court order of 7 June 2018, Cell C has not been supine and it has been actively working to develop and implement the operational and technical changes necessary to ensure compliance with the Amendment Regulations, should they be held to be valid.

42. It is important to note that as a mobile network operator that offers numerous customer services and is also operating a complicated system of networks nationally, the changes necessitated by the Amendment Regulations must be accommodated within the existing business planning and operational requirements of the company. Ordinarily, Cell C updates and upgrades parts of its network throughout the year in accordance with its business plan, to implement new technology, maintain existing systems in good operating order, and satisfy customer demand wherever its customer base is situated around the country by increasing capacity (building new sites for example).

43. Cell C also interfaces with all other networks to ensure that its own customers can communicate seamlessly with customers on other networks, which means that Cell C must also maintain the connection arrangements with those other operators and this is an ongoing and highly technical set of arrangements. The

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arrangements now required must therefore be accommodated within Cell C's existing and future business plans.

44. Without disclosing commercially sensitive information, Cell C has completed the following tasks and, barring any unforeseen circumstances, has projected that it should be able to roll out its obligations under the Amendment Regulations by mid-December 2018, should they be held to be valid.

45. As stated in the founding affidavit to Part A, the requisite commercial requirements entail that, for each of the obligations imposed on licensees in the Amendment Regulations, Cell C is obliged to ensure that all existing, legacy, new, and planned products are in compliance with the Amendment Regulations.

46. All Cell C products are dependent on the configuration of technical platforms. The Amendment Regulations therefore require that all Cell C billing and technical platforms (including business support systems and the technical front-end and back-end systems) are assessed to establish the changes required and thereafter these changes must be tested on the network before implementation. The testing period is critical as the network changes pose a risk to the smooth operation of the provision of service (such as the requirement to ensure data rollover for customers on certain packages) and billing.

47. If not correctly implemented, customers may be incorrectly billed or not receive the correct amount of data in any one month or in any subsequent months, or be cut off before they have had the opportunity to select an ongoing provision of data once they have exhausted their bundles, or choose a different package to ensure they have the correct amount of data that they need (these are the sorts of obligations that the Amendment Regulations have introduced).

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48. In the founding affidavit to Part A, Cell C referred to the formulation of a scope of work that is aligned to the commercial product requirements. Cell C embarked on a phased approach to implementing the Amendment Regulations according to a number of initiatives, over a projected period of six months. The scope of works has been formulated and implemented, and canvasses work to be completed in the following four initiatives: information technology (IT), retail, wholesale (MVNOs and MVNEs), and customer care and training.

49. At a high level the project delivery has been conceptualised in the following manner:

- 49.1. Initiation phase. The regulatory team engaged with all impacted departments to prepare the scope of works taking into account the motivation, costs and high-level requirements involved.
- 49.2. High-level Assessment phase. A capability assessment was performed to identify all impacted systems, processes and people. Internal approvals were required to start the project planning and resource allocation for the next phase, and to ensure the acquisition of any new IT systems or adjustments to existing systems.
- 49.3. Technical Design phase. The technical team prepared a Functional requirement specification and integration specification. The Technical Design was then completed and the requisite approvals obtained.
- 49.4. Business Analysis Phase. The detailed business requirements were compiled and approvals obtained. This phase differs from the second and third phases in that in a corporate environment, the operational team must formulate the business plan for approval by the management team,

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particularly where resource changes, system upgrades or changes, and financial investment is required.

- 49.5. Work effort is allocated and once approved an implementation order and work breakdown structure is signed off.
- 49.6. Test Phase. The system integration testing must then be concluded. On obtaining the necessary approvals the system launch is scheduled.
- 49.7. Training phase. Once completed, the business acceptance and readiness testing must be performed and training for all Cell C's outlets and customer service teams will commence.
- 49.8. Post Implementation Support Phase. This includes tracking customer feedback, fixing any anomalies and errors that arise, and logging any enhancements identified.

50. The components of each phase are important. At the stage that the systems are operational, it is critical that customers engage with a seamless interface that remains responsive and does not frustrate or delay the customer experience, or fail to comply with the Amendment Regulations. I set out below the component parts of these initiatives in the scope of works, by way of example:

Information technology:

51. In respect of IT this entails the development of technology and operational mechanisms in the following areas:

- 51.1. business requirements;
- 51.2. technical and detail design;

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- 51.3. implementation order;
- 51.4. middleware enterprise integration system;
- 51.5. build and configure CD Rator (a critical part of the billing system);
- 51.6. configuration of business rules i.e. processes for dealing with activation and fault fixes;
- 51.7. integration, system integration and user testing;
- 51.8. implementation of the programmes; and
- 51.9. business simulation for troubleshooting, analysis and corrective measures.

52. These processes cannot be carried out simultaneously and subsequent operations are dependent on the successful completion of earlier steps in the scope of works. In total the process was projected to take 30 weeks, barring any problems that may be identified during testing. At the time of deposing to the affidavit, Cell C is in the final third of its projected programme of activities.

Retail division:

- 53. The retail business requirements must ensure the successful integration of changes to the following systems:
 - 53.1. Call centres, point of sales, the customer profiles and options management and alterations to the existing product definitions.
 - 53.2. The online billing system – including real-time online billing for pre-paid customers, product options, the communication of notifications to customers, enforcement of limits, the definitions applicable to tariffs, callback and notifications;

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53.3. The converged billing system – including real-time online billing for pre-paid and post-paid customers, the processing of bills and accounts, the communication of notifications to customers, enforcement of limits, the definitions applicable to tariffs. In this regard, revisions are being effected to the process of bills and accounts, the communications of notifications, the enforcement of limits, and changes to the tariff definitions.

53.4. The changes to the Cell C internet portal, App, and USSD options for communication by customers with Cell C are all critical and part of the retail division functions – they are the interface with the customer with whom this Amendment Regulation is ultimately concerned.

53.5. The Cell C customer terms and conditions must be changed, along with customer service scripts and customer service training, to ensure compliance with the requirements of the Amendment Regulations.

54. This process is projected to take 30 weeks, barring any problems that may be identified during testing, and Cell C is well underway in completing the necessary work.

Wholesale (including MVNOs and MVNEs)

55. This aspect involves Cell C engaging with its contracted MVNOs and MVNEs and explaining to these stakeholders the operational and technical implications of the Amendment Regulations. Some amendments to Cell C's contracts with these entities may be necessary and will have to be negotiated.

56. It is important that these service providers understand the systems changes and functionality developed and rolled out by Cell C, in compliance with the

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obligations contained in the Amendment Regulations. Separate and specific changes are being implemented in the following systems:

- 56.1. MVNO CD Rator (billing system);
- 56.2. The call centres and product definitions;
- 56.3. The online billing system – including real-time online billing for pre-paid customers, product options, the communication of notifications to customers, enforcement of limits, the definitions applicable to tariffs, callback and notifications;
- 56.4. The converged billing system – including real-time online billing for pre-paid and post-paid customers, the processing of bills and accounts, the communication of notifications to customers, enforcement of limits, the definitions applicable to tariffs;
- 56.5. The enterprise service business; and
- 56.6. Middleware software, which enables the integration of the various software applications.

57. This process is projected to take 30 weeks. Barring any problems that may be identified during testing, Cell C is engaged in completing the necessary work.

Customer care and training:

58. In the customer care and training division, much is reliant on the significant milestones being achieved in the IT and product divisions. Once this part of the project has reached a satisfactory stage it is necessary that customer care complete, amongst others, the following:

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- 58.1. a new USSD menu (i.e. a new set of instructions for customers to signify their preferences regarding data usage and payment to Cell C);
- 58.2. a new value-added service interface (to introduce the rollover and transfer of data required by the Amendment Regulations);
- 58.3. training materials and manuals for customer service operatives; and
- 58.4. approximately 116 training sessions nationwide over a two-week period. This training will be provided to, among others, call centre staff, Cell C owned-stores and franchisee premises. The legal and regulatory department, the compliance department, the fraud department and billing department will also need to undergo training on the requirements, and what to do if a system should fail or a customer should complain.

59. At present Cell C is in a position to complete the work in respect of out of bundle selection and usage notifications by the end of September 2018, for testing and troubleshooting and is at an advanced stage in respect of the work to be completed for the roll-over, sharing of data and hardware configuration.

RELIEF SOUGHT

60. Cell C has engaged with ICASA on the Amendment Regulations repeatedly, over a lengthy period, and even after the publication of the Regulations (annexures "FA4", paginated page 114). Cell C twice invited ICASA to its premises to inspect for itself what would be required to implement the Amendment Regulations as promulgated. As can be seen from the extensive work already completed, is committed to implementing the Amendment

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Regulations as soon as it is practically possible to so, while ensuring uninterrupted services to its customers.

61.Despite the likelihood that the Amendment Regulations as a whole are likely to be declared unlawful, it is important to Cell C that its engagement with ICASA on the practical impossibility of compliance with the one-month timeframe, is not interpreted as an unwillingness by a licensee to adhere to prescribed regulatory obligations. For this reason, Cell C has set out in detail in this affidavit the onerous implications of the Amendment Regulations and the steps it has taken to ensure its compliance within an expedited period.

62.To the extent that certain technical and operational specifications have been omitted from this affidavit, this is to ensure that commercially sensitive information is protected. I submit that such detail would not substantially advance the grounds of review and that the application is not deficient on this basis. In the event that the court is mindful to receive more detailed information, such may be filed at court on a confidential basis.

63.Cell C submits that the clause 8 of the Amendment Regulations fall to be reviewed and set aside on the principle of legality, alternatively sections 6(2)(e)(iii) and (vi), 6(2)(f)(ii)(cc), and 6(2)(h) of PAJA, further alternatively, the common law. The Amendment Regulations as a whole fail to be reviewed and set aside on the principle of legality, alternatively sections 6(2)(b), (d) and (f)(i) of PAJA, further alternatively, the common law.

WHEREFORE the applicant prays for relief as set out in Part B of the Notice of Motion to which this affidavit is attached.

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GRAHAM NEIL MACKINNON

I CERTIFY that this affidavit was signed and sworn to before me at on this the day of SEPTEMBER 2018, by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on his conscience and who uttered the following words: "I swear that the contents of this affidavit are true, so help me God".



COMMISSIONER OF OATHS

Name:

Address:

Capacity:

CHARLES RONALD WATSON

Commissioner of Oaths

Practising Attorney R.S.A.

1 Commerce Square, 39 Rivonia Road

(Cnr Helling & Melville Roads), Sandhurst 2196

Tel: 011 911 4300

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2018/20057

PH NO:

JOHANNESBURG, on 07 June 2018

BEFORE THE HONOURABLE JUDGE OPPERMAN

In the matter between :-

CELL C LIMITED

Applicant

and

**THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA & 13 OTHERS**

Respondents

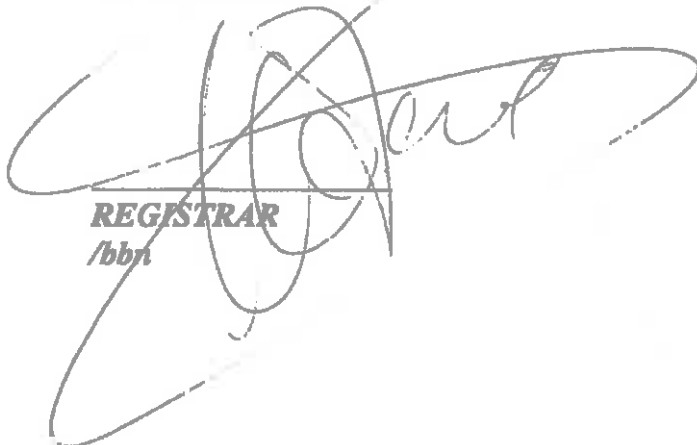
HAVING read the documents filed of record and having considered the matter:-

IT IS ORDERED THAT:-

- 1. Draft Order marked 'X' signed and dated 7th June 2018, is made an Order of Court.***

BY THE COURT

**REGISTRAR
/bbn**



7/06/2018

"X"



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO. 2018/20057

On this the 7th day of JUNE 2018

Before the Honourable Judge Wepener Opperman

In the matter between :-

CELL C LIMITED

Applicant

and

THE INDEPENDENT COMMUNICATIONS

First Respondent

AUTHORITY OF SOUTH AFRICA

THE CHAIRPERSON, INDEPENDENT

Second Respondent

COMMUNICATIONS AUTHORITY OF SOUTH

AFRICA

AMANDLA.MOBI

Third Respondent

CRYSTAL WEB MOBILE AND LEASP (PTY) LTD

Fourth Respondent

FREE MARKET FOUNDATION

Fifth Respondent

INTERNET SERVICE PROVIDERS' ASSOCIATION

Sixth Respondent

NPC



LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LTD **Seventh Respondent**

MARK P LISTER **Eighth Respondent**

MOBILE TELEPHONE COMMUNICATIONS (PTY) LTD **Ninth Respondent**

MWEB **Tenth Respondent**

NATIONAL CONSUMER COMMISSION **Eleventh
Respondent**

WIRELESS ACCESS PROVIDERS' ASSOCIATION NPO **Twelfth Respondent**

TELKOM SOC SA LTD **Thirteenth
Respondent**

VODACOM (PTY) LTD **Fourteenth
Respondent**

ORDER

By agreement between the parties,

IT IS ORDERED THAT:

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- 1 This application is removed from the roll;
- 2 Until such time as the relief in Part A of the notice of motion is determined:
 - 2.1 the first respondent will not take any steps to implement the End-User and Subscriber Services Charter Amendment Regulations, Notice 233 of Government Gazette 41613 ("the Amendment Regulations"); and
 - 2.2 the first respondent shall not make any determination, publish any notice, take any steps, or institute any proceedings against Cell C, or any other licensee to whom the Amendment Regulations apply, for any non-compliance or failure to comply with the Amendment Regulations.
- 3 The respondents shall deliver answering affidavits, if any, within 10 days of the date of this Order;
- 4 The applicant shall deliver its replying affidavit, if any, within 5 days of the delivery of the answering affidavit(s).
- 5 Costs are reserved.

BY ORDER

THE REGISTRAR

