



ORIGINAL

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

In the matter between:

Case NO: 55311/15

CELL C (PTY) LIMITED

and

CHAIRPERSON OF THE INDEPENDENT COMMUNICATIONS AUTHORITY

THE INDEPENDENT COMMUNICATIONS AUTHORITY

NEOTEL (PTY) LIMITED

VODACOM (PTY) LIMITED

MOBILE TELEPHONE NETWORKS (PTY) LIMITED

TELKOM SA SOC LIMITED

INTERNET SERVICE PROVIDERS' ASSOCIATION

WIRELESS ACCESS PROVIDERS' ASSOCIATION

DIMENSION DATA (PTY) LIMITED t/a INTERNET SOLUTIONS

CRYSTAL WEB (PTY) LIMITED

SEPCO COMMUNICATIONS (PTY) LIMITED

VSNL SNOSPV PTE LIMITED

NEXUS CONNEXION SA (PTY) LIMITED

MINISTER OF COMMUNICATIONS

Applicant

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

6th Respondent

7th Respondent

8th Respondent

9th Respondent

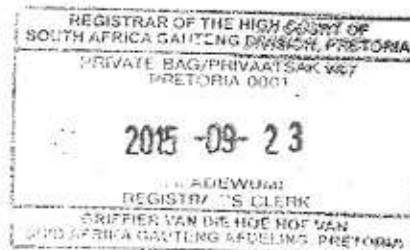
10th Respondent

11th Respondent

12th Respondent

13th Respondent

14th Respondent



**MINISTER OF TELECOMMUNICATIONS AND
POSTAL SERVICES**

15th Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT the Applicant intends to apply to this Court, on 10 November 2015, for an order in the following terms:

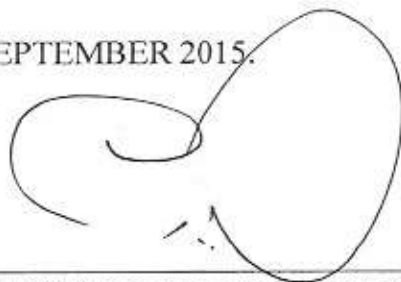
1. Reviewing and setting aside the Second Respondent's decision, taken on or about 11 June 2015 in terms of sections 13(1) and 31(2A) of the Electronic Communications Act 36 of 2005, to permit the transfer of control of the Third Respondent's various individual and radio frequency spectrum licences to the Fourth Respondent;
2. Remitting to the Second Respondent for reconsideration, the applications of the Fourth, Eleventh, Twelfth and Thirteenth respondents, submitted on or about on 17 June 2014, for permission to transfer control of the Third Respondent's various individual and radio frequency spectrum licences to the Fourth Respondent;

TAKE NOTICE FURTHER THAT if any respondent wishes to oppose this application, it is required to:

- (a) notify the Applicant's attorneys in writing on or before 29 September 2015;
- (b) to appoint in such notice an address referred to in Uniform Rule of Court 6(5)(b) at which it will accept service of all documents in these proceedings; and
- (c) to deliver its answering affidavits, if any, by 12 October 2015.

Kindly enrol the application for hearing accordingly.

DATED at PRETORIA this the 23rd day of SEPTEMBER 2015.



FRIEDLAND HART SOLOMON & NICOLSON
4-301 Monument Office Park
79 Steenbok Ave
Monument Park
Pretoria
Attention: Gerhard Painter/ Wendy Thompson

TO:

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Attorneys for the First and Second Respondent

7 Eton Road

Sandhurst

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Attention: Leslie Mkhabela/ Emmanuel Tivana

AND TO:

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Attorneys for the Third Respondent

165 West Street

Sandton

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Attention: Livia Dyer

AND TO:

EDWARD NATHAN SONNENBERGS INC.

Attorneys for the Fourth Respondent

150 West Street

Sandton

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AND TO:

WEBBER WENTZEL

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Attention: Stuart Macafferty/ Debbie van Rooyen

AND TO:

WERKSMANS ATTORNEYS

Attorneys for the Sixth Respondent, Telkom SA SOC Limited

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Sandton

Email: cmanaka@werksmans.co.za

Tel: 011 535 8000

Attention: Corlett Manaka/ Sarah Moerane

AND TO:

THE INTERNET SERVICE PROVIDERS' ASSOCIATION

The Eighth Respondent

c/o Elaine Zinn

85 Allen Road

Glen Austin

Midrand

AND TO:

DIMENSION DATA (PTY) LTD/ t/a INTERNET SOLUTIONS

The Ninth Respondent

Le Mans Building

57 Sloane Street

Bryanston

AND TO:

CRYSTAL WEB (PTY) LTD

The Tenth Respondent

7 Masefield Street

Farrarmere

Benoni

Email: paulj@crystalweb.co.za

Attention: Paul Hjul

AND TO:

SEPSCO COMMUNICATIONS (PTY) LTD

The Eleventh Respondent

269 Oxford Road

Illovo

AND TO:

VSNL SNOSPV PTE LIMITED

The Twelfth Respondent

39 Ferguson Road

Corner of Rivonia and Ferguson Roads

Illovo

AND TO:

NEXUS CONNEXION SA (PTY) LTD

The Thirteenth Respondent

30 Waterford Office Park

Corner Witkoppen and Waterford Drive

Fourways

AND TO:

MINISTER OF COMMUNICATIONS

The Fourteenth Respondent c/o

The State Attorney Pretoria

255 Francis Baard Street

Corner Francis Baard & Thabo Sehume Streets

Pretoria

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION, PRETORIA)**

In the matter between:

Case NO: 55311 / 15

CELL C (PTY) LIMITED

Applicant

and

**THE CHAIRPERSON OF THE INDEPENDENT
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA** 1st Respondent

**THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA** 2nd Respondent

NEOTEL (PTY) LIMITED 3rd Respondent

VODACOM (PTY) LIMITED 4th Respondent

MOBILE TELEPHONE NETWORKS (PTY) LIMITED 5th Respondent

TELKOM SA SOC LIMITED 6th Respondent

INTERNET SERVICE PROVIDERS' ASSOCIATION 7th Respondent

WIRELESS ACCESS PROVIDERS' ASSOCIATION 8th Respondent

**DIMENSION DATA (PTY) LIMITED t/a INTERNET
SOLUTIONS** 9th Respondent

CRYSTAL WEB (PTY) LIMITED 10th Respondent

SEPCO COMMUNICATIONS (PTY) LIMITED 11th Respondent

VSNL SNOSPV PTE LIMITED 12th Respondent

NEXUS CONNEXION SA (PTY) LTD 13th Respondent

MINISTER OF COMMUNICATIONS 14th Respondent



**MINISTER OF TELECOMMUNICATIONS AND
POSTAL SERVICES**

15th Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

GRAHAM NEIL MACKINNON

do hereby make oath and say:

THE DEPONENT

1. I am an admitted non-practising attorney and the chief legal officer of the applicant, having held this position since February 2010.
2. I am authorised to represent the applicant in these proceedings and depose to this affidavit on its behalf.
3. The facts set out herein are, to the best of my knowledge and belief, true and correct.



4. Save where the contrary is expressed or appears from the context, the facts lie within my personal knowledge. Where I make submissions of law, I do so on the advice of the applicant's legal representatives, which advice I believe to be correct.

THE PARTIES

5. The applicant is Cell C Proprietary Limited ("Cell C"), a company duly incorporated in terms of the company laws of South Africa, which has its registered office and principal place of business at Waterfall Campus, corner Maxwell Drive and Pretoria Main Road, Buccleuch, Gauteng.
6. The first respondent is the Chairperson of the Independent Communications Authority of South Africa, who is cited by virtue of Uniform Rule of Court 53(1) and who has his or her principal place of employment at Blocks A-D, Pin Mill Farm, 164 Katherine Street, Sandton, Gauteng.
7. The second respondent is the Independent Communications Authority of South Africa ("ICASA"), a juristic person established in terms of section 3(1) of the Independent Communications Authority of South Africa Act

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13 of 2000 (“**the ICASA Act**”), which has its registered office and/or principal place of business at Blocks A-D, Pin Mill Farm, 164 Katherine Street, Sandton, Gauteng.

8. The third respondent is Neotel Proprietary Limited, a company duly incorporated in terms of the company laws of South Africa, which has its registered office and/or principal place of business at 4A Old Pretoria Main Road, Halfway House, Midrand.
9. The fourth respondent is Vodacom Proprietary Limited (“**Vodacom**”), a company duly incorporated in terms of the company laws of South Africa, which has its registered office and/or principal place of business at Vodacom Corporate Park, 82 Vodacom Boulevard, Vodacom Valley, Midrand, Gauteng.
10. The fifth respondent is Mobile Telephone Networks Proprietary Limited (“**MTN**”), a company duly incorporated in terms of the company laws of South Africa, which has its registered office and/or principal place of business at 216 14th Avenue, Fairland, Roodepoort, Gauteng.
11. The sixth respondent is Telkom SA SOC Limited (“**Telkom**”), a State



Owned Company duly incorporated in South Africa, which has its registered office and/or principal place of business at Telkom Towers North, 152 Proes Street, Pretoria, Gauteng.

12. The seventh respondent is The Internet Service Providers Association, an association not for gain, with its principal place of business at c/o Elaine Zinn, 85 Allen Road, Glen Austin, Midrand.
13. The eighth respondent is the Wireless Access Providers Association, an association not for gain, with its principal place of business at 92 McGillivray Road, Glenferness AH, Midrand.
14. The ninth respondent is Dimension Data Proprietary Limited trading as Internet Solutions, a company duly incorporated in terms of the company laws of South Africa, which has its principal place of business at Le Mans Building, 57 Sloane Street, Bryanston.
15. The tenth respondent is Crystal Web (Pty) Ltd, a company duly incorporated in terms of the company laws of South Africa, which has its principal place of business at 7 Masfield Street, Farrarmere, Benoni.



16. The eleventh respondent is Sepco Communications Proprietary Limited, (“**SEPCO**”), a company duly incorporated in terms of the company laws of South Africa, which has its registered office and/or principal place of business at 269 Oxford Road, Illovo, Johannesburg.
17. The twelfth respondent is VSNL SNOSPV Pte Limited (“**VSNL**”), a company duly incorporated in terms of the company laws of South Africa, which has its registered office at c/o 39 Ferguson Road, Corner Rivonia and Ferguson Roads, Illovo, Johannesburg.
18. The thirteenth respondent is Nexus Connexion SA Proprietary Limited (“**Nexus**”), a company duly incorporated in terms of the company laws of South Africa, which has its registered office at Waterford Office Park, Corner Witkoppen and Waterford Drive, Fourways.
19. The fourteenth respondent is the Minister of Communications (“**the Minister of Communications**”), a member of the national Cabinet who has his or her principal place of employment at Tshedimosetso House, 1035 Frances Baard Street (corner Festival Street), Hatfield, Pretoria, Gauteng. The Minister of Communications is the Cabinet member responsible for the administration of, and entrusted with exercising the



powers and functions conferred by, the ICASA Act.

20. The fifteenth respondent is the Minister of Telecommunications and Postal Services ("**the Minister of Telecommunications**"), a member of the national Cabinet who has his or her principal place of employment at iParioli Office Park, 1166 Park Street, Hatfield, Pretoria, Gauteng. The Minister of Telecommunications is, since 12 July 2014, the Cabinet member responsible for the administration of, and entrusted with exercising the powers and functions conferred by, the Electronic Communications Act 36 of 2005 ("**the ECA**").

21. No relief is sought against the third to fifteenth respondents, unless they elect to oppose this application. In the event of such opposition, Cell C seeks an order that the opposing respondents bear and pay the costs hereof, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.

CONSOLIDATION OF THIS APPLICATION WITH THAT OF TELKOM

22. On 16 July 2015, Telkom filed an urgent application in this Honourable Court under case number 55311 / 2015 ("**Telkom's application**"). In Part



B, Telkom seeks an order in the following terms:

- “1. Declaring the decision of ICASA and the procedures followed (“the decision and procedures”) to approve the application by Neotel and Vodacom for the acquisition by Vodacom of the entire issued share capital of Neotel published in Government Gazette 38951 of 2 July 2015 to be unlawful;
 2. Reviewing and setting aside ICASA's decision and procedures.”
23. Cell C is cited as the seventh respondent in Telkom's application.
24. Telkom's application relates to the same ICASA decision which is the subject of this application brought by Cell C. Similarly, both Cell C and Telkom pray for an order reviewing and setting aside that decision.
25. The parties cited in both applications are the same, save for the fact that Telkom has, in addition, cited Ms Katharina Pillay N.O. as the second respondent. Ms Pillay was the ICASA councillor who was delegated to consider, analyse and conduct hearings in relation to, *inter alia*, the application for the approval of the transfer of control of Neotel's licences to Vodacom. Cell C does not consider it necessary to cite Ms Pillay as a respondent.

26. There is some overlap between the grounds upon which both Telkom and Cell C say that ICASA's decision falls to be reviewed and set aside. They are not, however, identical. Where Cell C adopts the same or similar grounds to those raised by Telkom they will appear below. To the extent that Cell C does not expressly adopt specific grounds relied on by Telkom it does not dispute them either. It will abide the decision on any such grounds.
27. In these circumstances, Cell C seeks to pursue its own review of the decision, but submits that it is appropriate and convenient that its review application be consolidated with Telkom's application and/or that it be heard by this Honourable Court on the same day that Telkom moves Part B of its application.
28. At a meeting on 10 September 2015 before the Deputy Judge President, the parties agreed that it would be appropriate and convenient to consolidate Telkom's application, this application, as well as one to be brought by MTN.
29. It should be noted that the Record of the ICASA decision sought to be reviewed was filed with the Court on or about 13 August 2015. As a

respondent in Telkom's application, Cell C has received a copy of the Record, albeit belatedly on 31 August 2015.

30. Cell C does not, therefore, require the first and second respondents to dispatch another record in terms of Uniform Rule 53 on receipt of this application. References to "*the Record*" in this affidavit are to the record filed by ICASA in Telkom's application.¹

THE DECISION SOUGHT TO BE REVIEWED

31. This is an application for judicial review of a decision taken by a resolution of the Council of ICASA purportedly acting in terms of sections 13(1) and 31(2A) of the Electronic Communications Act (the ECA).
32. The ICASA decision in issue was taken on 11 June 2015. A copy of the Minutes of the Special Council Meeting of ICASA, at which the decision was made, is annexed marked "GMI".

¹ It should also be noted that the Minutes that are included in the Record, are also required to be published on ICASA's website within "30 days of the conclusion of the meeting..." in terms of section 11A of the ICASA Act, but no such Minutes have ever been published in the required form. Cell C is reliant solely on the Minutes disclosed in the Record, a fact which in and of itself prejudiced it in commencing the preparation of this review application.



33. The ICASA decision related to an application for approval which had been submitted to ICASA on 17 June 2014 by SEPCO, VSNL and Nexus (Neotel's shareholders and the eleventh to thirteenth respondents in this application) as well as Vodacom. A copy of the application is at pages 15 – 21 of the Record ("**the Application**").
34. The Application was made to ICASA for approval of a transaction in terms of which Vodacom is acquiring all of the shares in Neotel. The transaction is also a "large merger" under the Competition Act 89 of 1998 ("**the Competition Act**"). A large merger requires the approval of the Competition Tribunal before it can be implemented. The large merger proceedings before the Tribunal are scheduled to commence on 23 November 2015.
35. In terms of paragraph 3 of the Application, the parties sought ICASA's approval, in terms of the sections 13(1) and 31(2A) of the ECA for the transfer of control of various licences issued to Neotel. The Application explained that control of the Neotel licences would be transferred to Vodacom as a result of a proposed acquisition, by Vodacom, of the entire issued share capital (100%) of, and all of the Neotel shareholders' loan claims against, Neotel.
- 

36. The ICASA decision reflected in Annexure "GM1" was that:

"The transaction be and is hereby approved".

37. I respectfully draw the Honourable Court's attention to the fact that the resolution actually taken by the ICASA Council on 11 June 2015 reflected in the Minutes provided by ICASA as part of the Record did not make the approval subject to any conditions.

38. Paragraph 2 of the Minutes (Annexure GM1) indicate that the Council merely "*noted*", following discussion:

"That Council can approve the matter [sic] subject to the following conditions

- The pre-requisite that the BEE requirement be met;
- A rollout obligation subject to public consultation process."

39. The resolution of the Council recorded in the Minutes was, however, that "*the transaction be and is hereby approved*". The approval was not, in its express terms at least, given subject to any conditions.

40. Notice of the ICASA decision was published as Notice 684 of 2015 in *Government Gazette* Number 38951 (Volume 601) on 2 July 2015 (“**the Notice**”). For convenience, a copy of the Notice is annexed marked “GM2”.
41. The heading of the Notice reads as follows:
- “Application for approval of the proposed acquisition by Vodacom (Pty) Ltd of the entire issued share capital of Neotel (Pty) Ltd made in terms of sections 13(1) and 31(2A) of Electronic Communications Act, No. 36 of 2005”
42. Paragraph 1 of the Notice says that on 17 June 2014 Neotel (together with all its shareholders) and Vodacom submitted an application to ICASA “*for approval in respect of the proposed acquisition by Vodacom of the entire issued share capital of Neotel (“the Application”)*”.
43. Notably, “*the Applicants*” are described in this paragraph as SEPCO, VSNL, Nexus and Vodacom.
44. Paragraph 4 of the Notice says that “*Having considered the Application, the Authority has approved the Application, subject to the following: ...*”.



This is factually incorrect. As I have highlighted above, ICASA had not formally resolved to approve the application “*subject to*” anything.

45. Two lengthy sub-paragraphs follow. It is necessary to quote them in full:

- “a. First, the Applicants are required to comply with the requirement for 30% (thirty percent) of the equity ownership of the individual licence [sic] that is the subject of the transfer of control application being held by persons from historically disadvantaged groups (“the BEE Requirement”), as contemplated in section 13(6) read with section 9(2)(b) of the EC Act. The Authority, however, recognises that it may not be practicable for Applicants to comply with the BEE Requirement from the onset. Therefore the Authority wishes to determine the reasonable period within which the Applicants should be permitted to ensure compliance with the BEE Requirement; and
- b. Second, the Authority has established that the implementation of the proposed transaction will result in consolidation of spectrum. The Authority recognises that broadband access across the country remains a challenge that needs to be addressed with due speed. The Authority views the implementation of transactions such as the present to offer an opportunity, amongst other initiatives, for the Authority to utilise the regulatory instruments at its disposal to facilitate the attainment of universal service and access to broadband services by all South Africans, with priority being given to rural and under serviced areas (as defined in the Under Serviced Area Regulations, 2011). Accordingly, in accordance with the provisions of section 13(6) read with section 9(2)(c) of the EC Act, and in order to ensure the utilisation of spectrum (which is a scarce resource) to achieve the developmental goals of the Republic of South Africa in relation to broadband, the Authority is considering the imposition of the condition that at least 25% (twenty five percent) of any broadband roll out to be undertaken by Neotel following the implementation of the transaction (with the specification of a minimum of 5Mbps), be undertaken in under serviced areas (hereinafter “the USA Roll - Out Condition”).”

(My emphasis).

46. It is clear that the imposition of the so-called “*USA roll-out Condition*” is only something that “*the Authority is considering*”. ICASA has not yet imposed it.
47. By contrast, the Notice (in paragraph 4.a) says that ICASA has approved the Application subject to a requirement that “*the Applicants*” comply with a “requirement for 30% (thirty percent) of the equity ownership of the individual licence [sic] *that is the subject of the transfer of control application being held by persons from historically disadvantaged groups*”.
48. I should mention that it is unclear how “*the Applicants*” are expected to comply with this requirement. As a result of the proposed transaction, which ICASA approved, Neotel’s entire issued share capital will be transferred to Vodacom. SEPCO, VSNL and Nexus will no longer be shareholders in Neotel. On its face, the requirement in paragraph 4.a of the Notice may mean that the sellers (SEPCO, VSNL and Nexus) may only transfer 70% of Neotel’s shares to Vodacom and must find a buyer from historically disadvantaged groups to purchase the remaining 30%.
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49. Paragraph 5 of the Notice records that during the evaluation of the Application, ICASA “*considered the potential impact that the consolidation of valuable and substantial spectrum under the control of Vodacom may have on the various markets*”. Moreover, it says:

“The Authority recognises that it cannot regulate the effects of such consolidation on competition in the various markets until it has undertaken an in-depth enquiry in terms of Chapter 10 of the EC Act read with section 4B of the Independent Communications Authority of South Africa Act No. 13 of 2000. The Authority will consider to undertake such an inquiry in due course.”

50. It is clear from paragraph 5 that ICASA did not determine the effect that the consolidation of valuable and substantial spectrum under the control of Vodacom would have on competition. It chose rather to “*consider*” undertaking an inquiry into that question, in terms of Chapter 10 of the ECA, read with section 4B of the ICASA Act, in due course.
51. ICASA’s failure to determine what effect the consolidation of scarce spectrum under the control of Vodacom would have on competition, *before* deciding whether to approve the transfer of control of Neotel’s spectrum licences to Vodacom, lies at the heart of the Cell C’s review application.

52. Paragraphs 6 to 10 of the Notice set out a process for the Applicants and interested parties to make representations in relation to paragraphs 4.a and 4.b. Importantly, however, ICASA did not invite representations on whether the conditions contemplated in those paragraphs are appropriate. Submissions could only be made on:
 - 52.1 The period that ICASA should determine for compliance with the BEE Requirement; and
 - 52.2 The reasonable target and timelines that ICASA may impose for fulfilment of the USA Roll-out Condition.
53. On 13 August 2015, ICASA issued reasons for its decision. A copy of this document is to be found at pages 991 – 1037 of the Record (“**the Reasons**” or “**ICASA’s Reasons**”).
54. I will refer to the Reasons in greater detail below.

SUMMARY OF CELL C’S GROUNDS OF REVIEW

55. This is an application to review and set aside ICASA’s decision of 11 June

2015. It is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), alternatively section 3(5) of the ICASA Act.

56. This Honourable Court has jurisdiction in terms of section 6(1) of PAJA to decide this application

57. The grounds on which relief is sought by Cell C, together with the facts and circumstances relied on in support thereof, are set out in detail below. In summary, for the reasons set out in this affidavit, Cell C’s *substantive* grounds of review are as follows.

58. First ground of review

58.1 On 1 April 2015, the Radio Frequency Spectrum Regulations, 2015 (“the **RFSR2015**”) came into force. This was more than two months before ICASA made the decision. ICASA decided that the RFSR2015 did not apply when taking the decision in relation to the Application pending before it on the basis that those regulations could not be applied “*retrospectively*” (Reasons, para 21.10 at Record, page 1025).

- 58.2 This was wrong in law. The RFSR2015 regulated the exercise of ICASA's discretion when it made the decision to approve the transfer of control of Neotel's spectrum licences to Vodacom.
- 58.3 In failing to apply the RFSR2015 when exercising its discretion, ICASA failed to comply with a mandatory and material procedure or condition prescribed by an empowering provision, was materially influenced by an error of law and failed to take relevant considerations into consideration.
59. Second ground of review (in the alternative to the first)
- 59.1 In the alternative, if the above Honourable Court finds that the RFSR2015 did not apply to the exercise of ICASA's discretion at the time that it took the decision, it will be argued that the Radio Frequency Spectrum Regulations, 2011 ("the **RFSR2011**") were applicable.
- 59.2 These regulations came into effect on 1 April 2011. Although the term "*transfer*" is defined in the RFSR2011 as "*assign, cede, or transfer of a licence from one person to another*" (my emphasis), the



words “*transfer of a licence*” in this definition must be interpreted purposively and so as to avoid absurdity, in the light of the 2014 amendments to the ECA which were in force at the time that the Application was lodged, to include the “*transfer of control of a licence*”.

- 59.3 ICASA, however, found that the RFSR2011 did not apply. In doing so, it failed to comply with a mandatory and material procedure or condition prescribed by an empowering provision, was materially influenced by an error of law and failed to take relevant considerations into consideration.

60. Third ground of review (in the further alternative to grounds 1 and 2)

- 60.1 In the further alternative, even if *neither* the RFSR2015 nor the RFSR2011 were applicable, ICASA did not have an unbounded discretion in relation to the application that served before it. In particular, there is a duty on ICASA to regulate the allocation and use of spectrum, which is a scarce resource. This duty is an onerous one, requiring rigorous application. Moreover, ICASA is enjoined by section 2(f) of the ECA to act in a manner which “*promote[s]*

competition in the ICT sector”.

60.2 By its own admission in the Reasons, and as confirmed by other parts of the Record, ICASA decided to “defer” the determination of the competition issues which arose in relation to the Application to the Competition Commission of South Africa (“**the Commission**”). It was not entitled to defer the determination of the competition issues to the Commission. In doing so it abdicated its statutory duties.

60.3 ICASA thus failed to comply with a mandatory and material procedure or condition prescribed by the ECA, was materially influenced by an error of law and failed to take relevant considerations into account.

61. Fourth ground of review

61.1 A Memorandum of Agreement (“**the MoU**”) has been concluded between the Commission and ICASA, as required by section 21(1)(h), read with sections 3(1A)(b) and 82(1), (2) and (3) of the Competition Act.



61.2 ICASA breached the MoU. It did so by failing to consult with the Commission on the appropriateness of the so-called USA Roll-out condition, or any other possible condition, and failing to advise the Commission that it was likely to decide that the Application should be permitted, before taking the decision to approve the transfer.

61.3 Accordingly, ICASA's decision falls to be reviewed and set aside on the basis that ICASA failed to comply with a mandatory and material procedure.

62. Fifth ground of review

62.1 ICASA found, correctly, that the HDI equity requirement reflected in the so-called BEE Condition was mandatory. Having so found, it was not open to ICASA to approve the Application at all and the purported condition was itself unlawful. ICASA thus acted *ultra vires* when it approved the Application.

62.2 Moreover, given its compulsory subject matter ICASA could not competently classify the BEE Condition as one which it "may" impose under section 10 of the ECA, as it did in the Notice. ICASA



thus failed to comply with a mandatory and material procedure or condition prescribed by the ECA and was materially influenced by an error of law.

63. Sixth ground of review

63.1 ICASA did not seek any representation from interested parties, nor even from Neotel and Vodacom, on whether the USA Roll-out Condition is appropriate *before* taking its decision. Even now the *ex post facto* consultation process is not to be directed at whether such a condition is appropriate but is restricted to submissions on “*The reasonable target and timelines that the Authority may impose for fulfilment of the USA Roll-Out Condition*” (para 6 of the Notice).

63.2 ICASA approved the application, failed to include the USA Roll-out requirement as a true condition and only invited consultation after the fact and in a limited manner. Moreover, the so-called USA Roll-out condition does not in any way address the competition issues raised by the consolidation of spectrum and its imposition.

63.3 In taking the decision to approve in these circumstances, ICASA



acted in a manner that was procedurally unfair, failed to comply with a mandatory procedure and acted arbitrarily and irrationally.

THE LEGISLATIVE FRAMEWORK

LICENCES AND TRANSFERS

64. ICASA is established in terms of section 2 of the ICASA Act to regulate both broadcasting and electronic communications in the public interest. It has specific functions and duties regarding licensing, the assignment and control of spectrum, the approval or dismissal of applications for transfer of control and transfer of licences, ownership profiles of licensees, rollout and coverage and universal service.
65. ICASA discharges its functions as sector regulator under the provisions of the ECA. The primary object of the ECA is to regulate various forms of electronic communications in South Africa in the public interest (section 2 of the ECA).
66. To that end, the ECA seeks *inter alia* to:

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- 66.1 promote and facilitate the development of interoperable and interconnected electronic networks;
 - 66.2 promote the universal provision of electronic communications networks and electronic communications services and connectivity for all;
 - 66.3 encourage investment, including strategic infrastructure investment and innovation in the communications sector;
 - 66.4 ensure the provision of a variety of quality electronic communications services at reasonable prices;
 - 66.5 promote the interests of consumers with regard to the price, quality and the variety of electronic communications services; and
 - 66.6 promote stability in the information, communications and technology (“ICT”) sector.
67. Significantly, section 2(f) of the ECA states as an object of the ECA the promotion of competition in the ICT sector.

68. ICASA is empowered by section 4(1) of the ECA to make regulations *“with regard to any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation”*.
69. Section 4(1) of the ECA also specifies that ICASA may make regulations with regard to, inter alia:
 - 69.1 any matter of procedure or form which may be necessary or expedient to prescribe for the purposes of this Act or the related legislation (including the ICASA Act)(section 4(1)(b);
 - 69.2 generally, the control of the radio frequency spectrum, radio activities and the use of radio apparatus (section 4(1)(d)).
70. No person may offer a telecommunications service in South Africa without a licence. Chapter 3 of the ECA regulates the “LICENSING FRAMEWORK”. It contains the provisions under which SEPCO, VSNL, Nexus and Vodacom submitted their application for approval.
71. Section 5 deals generally with licensing and refers to “*individual*” licences

which are required in order to provide inter alia electronic communication services and network services, which are forms of what are defined generally as “*service*” licenses.

72. A “*radio frequency spectrum licence*” is required in addition to a “*service licence*” whenever the provision of such service entails the use of radio frequency spectrum.

73. Paragraph 8 of the Application (Record, pages 17 – 19) reveals that Neotel has 4 (four) “*individual*” service licences, being:

73.1 an individual electronic communications network service (IECNS) licence under licence number 004/IECNS/JAN/2009 reissued on 25 January 2011;

73.2 an individual electronic communications service (IECS) licence under licence number 004/IECS/JAN/09 reissued on 21 December 2010;

73.3 an IECNS licence under licence number 0471/IECNS/DEC/2010 issued on 21 December 2010; and

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- 73.4 an IECS licence under licence number 0471/IECS/DEC/10 issued on 21 December 2010.
74. An “*individual licence*” means a licence that is granted by the Authority to a person in terms of section 5(2) (section 1 of the ECA).
75. Neotel also has 9 (nine) radio frequency spectrum licences. These were issued in terms of section 31(1) of the ECA.
76. Section 9 of the ECA sets out the process for the granting of individual licences. Such licences may only be applied for consequent upon an invitation by ICASA which is then obliged to give notice of the application itself, having regard to the requirements contained in subsection (2). One of those requirements is that the notice of application is to include the percentage of equity ownership to be held by persons from historically disadvantaged groups, in the applicant, which must be a minimum of 30%.
77. When ICASA grants a licence to a particular person it does so on the basis that it is satisfied that the particular characteristics of that person render it a suitable applicant in the light of the objects of the ECA. The position is no different when it considers the transfer of a licence or control thereof –



the transferee is a different person to that to which the licence was granted and the transaction therefore requires the same degree of scrutiny as in the case of a new applicant.

78. Section 13 of the ECA governs the transfer of “*individual licences*” or changes of ownership. It says:

“13. Transfer of individual licences or change of ownership

- (1) An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, and the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.
- (2) An application for permission to let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede or transfer control of an individual licence may be made to the Authority in the prescribed manner.
- (3) The Authority may by regulation, set a limit on, or restrict, the ownership or control of an individual licence, in order to—
 - (a) promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote broad-based black economic empowerment; or
 - (b) promote competition in the ICT sector.”

79. Section 31 of the ECA governs “*Radio frequency spectrum licences*”. It provides as follows:

- (1) Subject to subsections (5) and (6), no person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum licence granted by the Authority to such person in terms of this Act.
- (2)
 - (a) A radio frequency spectrum licence is required in addition to any service licence contemplated in Chapter 3, where the provision of such service entails the use of radio frequency spectrum.
 - (b) A service licence is required in addition to any radio frequency spectrum licence where the provision of such service entails the use of radio frequency spectrum.
- (2A) A radio frequency spectrum licence may not be assigned, ceded or in any way transferred, and the control of a radio frequency spectrum licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.
- (3) The Authority may, taking into account the objects of the Act, prescribe procedures and criteria for –
 - (a) radio frequency spectrum licences in instances where there is insufficient spectrum available to accommodate demand;
 - (b) the amendment, transfer, transfer of control, renewal, suspension, cancellation and withdrawal of radio frequency spectrum licences; and
 - (c) permission to assign, cede, share or in any way transfer a radio frequency spectrum licence, or assign, cede or transfer control of a radio frequency spectrum licence as contemplated in subsection (2A)."

80. Section 13(1) was amended² and section 31(2A) of the ECA was inserted by the Electronic Communications Amendment Act 1 of 2014.
81. The commencement date of the Amendment Act was 21 May 2014.
82. As noted above, the Application for ICASA's approval, in terms of the sections 13(1) and 31(2A), was submitted on 17 June 2014. It is common cause that in terms of sections 13(1) and 31(2A) of the ECA, ICASA's prior permission (approval) is required for the transfer of control of Neotel's individual and spectrum licences to Vodacom.
83. ICASA initiated a process in terms of its powers under section 13(6) of the ECA read with section 9(2).
84. Sections 9(2)(a) and (d) of the ECA necessitated a process of inviting representations and response from interested parties.
85. Section 9(2)(e) empowered ICASA to conduct a public hearing in relation

² Prior to amendment, section 13(1) said "*An individual licence may not be assigned, ceded or transferred to any other person without the prior written permission of the Authority.*"



to the Application and it did so.

86. Section 9(3) empowers ICASA to require an applicant or interested party who has submitted representations in terms of subsection 2(a) to furnish to it within a specified period, "*such further information as may be reasonably necessary in order to consider the application*".
87. This power, which is similar to the power contained in section 4C(2) of the ICASA Act, is clearly required to be exercised by ICASA whenever further information is relevant to the exercise of its powers to consider applications such as the Application.
88. ICASA is required, in any matter that serves before it in connection with the granting or transfer of or control in an individual licence or radio frequency spectrum licence, to consider the objects contained in section 2 of the ECA, in the public interest as well as specific matters such as those set out in sections 9, 13, 31 and any relevant regulations. The ambit of those matters traverse *inter alia* requirements of efficient use of spectrum, consumer interests and competition.

THE MEMORANDUM OF AGREEMENT

89. The MoU has been concluded between the Competition Commission and ICASA, as required in terms of section 21(1)(h), read with sections 3(1A)(b) and 82(1), (2) and (3) of the Competition Act 89 of 1998.
90. A copy of the MoU, as published by Notice 1747 of 2002 in *Government Gazette* number 23857 (Vol 447) on 20 September 2002 can be found at pages 1 – 14 of the Record).
91. The MoU governs the manner in which the Commission and ICASA interact with each other in respect of the investigation, evaluation and analysis of mergers and acquisition transactions and complaints involving telecommunication and broadcasting matters. The application which served before ICASA was an acquisition transaction involving telecommunication matters. In terms of clause 2 of the MoU, where a transaction requires the approval of both the Commission and ICASA, parties are required to submit separate and concurrent applications to both ICASA and the Commission.
92. The MoU concluded between the Competition Commission and ICASA

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provides, in relevant part, as follows:

- "2 Where a transaction requires the approval of both the Commission and the Authority, parties shall submit separate and concurrent applications to the Commission (in accordance with Competition Act) and to the Authority (in accordance with the IBA Act, the Broadcasting Act and the Telecommunications Act) for their respective consideration.
- 2.2 The Commission and the Authority shall thereafter make independent determinations on the basis of the criteria and mandates of their respective legislation. In arriving at these determinations the Commission and Authority may consult with each other.
- 2.3 In the event of the Commission and the Authority arriving at different determinations, the following process shall apply:
 - 2.3.1 The Commission and the Authority may discuss the matter in order to identify the reason(s) for the difference in determinations and whether such differences, if they pertain substantially to similar criteria used by both the Commission and the Authority on issues (e.g. definition of the market), could be resolved prior to the determinations being made public, by the imposition of certain conditions;
 - 2.3.2 If the Commission and the Authority reach an agreement following the course suggested in 2.3.1 above, the Commission and the Authority shall make known their unanimous decision to the applicant(s) and the transaction shall be approved or disapproved accordingly;
 - 2.3.3 If the difference in conclusion cannot be resolved following the course suggested in 2.3.1 above, the Commission and the Authority shall make known their respective determinations and reasons for the decisions to the applicant(s);
 - 2.3.4 If either the Commission or the Authority does not approve the transactions, such transaction will not

be an approved transaction.”

93. There can be no question that clause 2 of the MoU applied to the exercise of ICASA’s discretion and, consistently with the ECA itself, enjoined ICASA to determine the competition issues attendant upon the proposed acquisition of control of Neotel’s spectrum by Vodacom.
94. When it considers competition issues, ICASA as the sector regulator is required to bring to bear its unique sectoral expertise to the particular matter before it. In this respect it has independent jurisdiction.

THE RADIO FREQUENCY SPECTRUM REGULATIONS, 2011

95. Prior to its amendment, the ECA on the face of it regulated the transfer of individual licences and did not expressly regulate the transfer of control of such licences.³ In relation to spectrum licences, the ECA did not contain

³ The 2003 Regulations in respect of the Limitation of Ownership and Control of Telecommunications Services (made under the repealed predecessor to the ECA) stipulated that a licensee could not transfer a “control interest” in a “concentrated market” without ICASA approval. In 2015 when ICASA promulgated the criteria and procedures for both transfers and transfers of control it did so under a single described purpose in section 2 of those regulations which refers to “permissions to ...transfer ownership and control” of a spectrum licence. The concepts of transfer of a licence and transfer of

any express provisions dealing with either their transfer to other persons or the transfer of their control.

96. Cell C submits, and it will be argued, that this did not mean that control of individual and spectrum licences could be freely transferred from one person to another without ICASA's scrutiny. This would defeat the objects of the ECA and the purpose of the licensing regime. Logically such scrutiny ought to have been the same regardless of whether the relevant transaction took the form of transfer of a licence or transfer of control- there is no legal basis to distinguish between the two.
97. It will be argued that the purpose of the amendment to sections 13(1) and the insertion of section 31(2A) of the ECA by the 2014 Amendment Act was simply to clarify the legal position: that ICASA's permission was (and always had been) required for any form of transfer, direct or indirect, of a licence from one person to another.
98. Support for this submission is provided by the explanatory Memorandum on the Objects of the Electronic Communications Amendment Bill, 2013,

control thereof have never been conceptually distinct for purposes of ICASA's responsibility.



a copy of which is annexed marked “GM3”. The Memorandum explains that:

“1.1 The Electronic Communications Act, 2005 (Act No. 36 of 2005) (the Act), created the first converged regulatory framework for telecommunications and broadcasting in South Africa. It established the framework in line with developments internationally, renaming telecommunications “electronic communications” for consistency and introducing various changes to the way in which networks and services were regulated.

1.2 Because it was the first such law, over time it has become obvious that certain provisions are not capable of implementation in the way that was intended or do not have the intended effect when applied. There are also areas of ambiguity and vagueness which hamper efficient and effective regulation.”

(My emphasis.)

99. In relation to the amendment to section 13(1) of the ECA, the Memorandum clarifies (in paragraph 3.9) that:

“This clause seeks to ensure that the transfer of individual licences including the transfer of control, letting and sub-letting of such licences, requires the prior approval of ICASA.”

100. This confirms Cell C’s central submission that the “transfer” of licences contemplated in the ECA includes the transfer of control. It was always

intended that “transfer” of a licence would embrace “transfer of control” and require the prior approval of ICASA. The Amendment Act did no more than clarify this.

101. Until April 2015, the Radio Frequency Spectrum Regulations, 2011 governed the manner in which ICASA regulated the “transfer” of spectrum licences.
102. The RFSR2011 were, at the time the Amendment Act came into force, still in effect. They were not repealed by the Amendment Act.
103. A copy of the RFSR2011 is annexed marked “GM4”.
104. The RFSR2011 were published by ICASA acting in terms of sections 4(1)(b), 4(1)(d), 4(2)(b), 31(3), 31(6) and 33(3) of the ECA. As noted above, sections 4(1)(b) and 4(1)(d) expressly authorised ICASA to make regulations, inter alia, with regard to “*any matter of procedure or form which may be necessary or expedient to prescribe for the purposes of this Act or the related legislation*” and “*the control of the radio frequency spectrum, radio activities and the use of radio apparatus*”.



105. Regulation 10 of RFSR2011 governed the procedure in respect of the transfer of radio frequency spectrum. Regulation 10(1)(a) said that *“Except with the approval of the Authority, no licensee must [sic] transfer a Radio Frequency Spectrum Licence.”*

106. Regulation 10(7) of RFSR2011 provided as follows:

“The Authority will not approve the transfer of a spectrum licence

- (a) ...
- (b) if such transfer will reduce or limit competition or
- (c) if such transfer will result in the reduction of direct ownership by HDIs”

107. It is important to note that “transfer” is defined in regulation 1 to mean *“assign, cede, or transfer a licence from one person to another”*. This does not mean that RFSR2011 did not apply to the transfers of control, at least once the Amendment Act came into force. I am advised and it will be argued that regulations which remain in force, particularly after the amendment of a principal Act under which they were promulgated, must be interpreted purposively in the light of, and to give effect to, the intention of the legislature that all forms of transfer, direct or indirect, of licences, required the prior approval of ICASA.



108. I should note that the basis for considering transfers from a competition perspective in the RFSR2011 – “reduce or limit” competition – is worded differently to section 2(f) of the ECA which states that it is an object of that legislation to “promote” competition. However, the regulations would need to be read and applied in furtherance of the object so that even under the RFSR2011 ICASA could not approve a transfer which did not promote competition.
109. Similarly ICASA could not under these regulations approve a transfer which would reduce direct HDI ownership.

THE RADIO FREQUENCY SPECTRUM REGULATIONS, 2015

110. The Radio Frequency Spectrum Regulations, 2015 (RFSR2015) came into force on 1 April 2015. They were made in terms of section 4, read *inter alia* with sections 31(4) of the ECA.
111. A copy of RFSR2015 is annexed marked “GM5”. I have excluded the annexures to RFSR2015 as they are lengthy and not relevant to this application.

112. In terms of regulation 43 of RFSR2015, the RFSR2011 were repealed with effect from 1 April 2015.
113. On 30 April 2015, ICASA amended the RFSR2015 to correct numbering inconsistencies in regulation 15, which is directly relevant to the present application. A copy of this amendment is annexed marked “GM6”.
114. Regulation 15 governs ICASA’s *“Permission to Assign, Cede or Transfer of Control of a Radio Frequency Spectrum Licence”* as contemplated in section 31(2A) of the ECA. The following provisions are important:
- 114.1 Regulation 15(1), which says that *“No licensee must assign, cede or transfer control of a radio frequency spectrum licence without the prior written approval of the Authority”*;
- 114.2 Regulation 15(5), which says that *“A radio frequency spectrum licence transfer application will be evaluated on the basis of the following criteria”*:
- “(a) technical efficiency;
 - (b) functional efficiency;
 - (c) promotion of competition and interests of consumers;



- (d) equity ownership and control by HDP's; and
- (e) economic efficiency.”;

114.3 And regulation 15(8) which provides:

“The Authority will not approve the assignment, ceding or transfer of control of a radio frequency spectrum licence:

- (a) ...
- (b) if such transaction will not promote competition; or
- (c) if such transfer will result in the reduction of equity ownership held by HDP to be less than 30% or the reduction of the BBBEE status of a licensee to below Level 4 contributor or below the level which the transferor is already at.”⁴

115. There are no transitional provisions in RSFR2015. It was in full force and effect when ICASA evaluated and approved the transfer of control of Neotel’s radio frequency spectrum licences to Vodacom.

116. The effect of these regulations is clear: absent a showing by the applicants of promotion of competition and a maintenance of HDP equity ownership at the 30% level (or at least the transferor’s existing) level, ICASA could

⁴ As already pointed out the same criteria apply to transfer of a licence under Regulation 12



not approve the Application.

THE IMPORTANCE OF SPECTRUM AND THE COMPETITION ISSUE

117. I respectfully submit that it will be useful to explain to the Court what “spectrum” is and what effect Vodacom’s acquisition of Neotel’s spectrum licences, and therefore Neotel’s spectrum, is likely to have on competition, other industry participants and consumers. As I will show below, the importance of the spectrum issue and its competition consequences is not, and never has been, in dispute by any of the parties, including ICASA itself.
118. Radio spectrum is the part of the electromagnetic spectrum allocated for telecommunication purposes. Radio spectrum is also used for radio and television broadcasting. The transmission and reception of radio waves using that spectrum is essential for mobile telecommunication. Without spectrum, and using current technology, no person would be able to receive or make a cellular telephone call. No data could be sent from or received by devices such as tablets and smart phones.
119. Spectrum (along with land, numbers and rights of way) is known in



telecommunications as a “scarce resource”. At least given the world’s current state of technological development, radio spectrum cannot be duplicated and it is finite in nature. In general, only a limited number of subscribers or a fixed amount of data can be carried on a given allocation of spectrum and there is a limited amount to allocate.

120. It is technically possible to increase capacity to carry data and communications by adding more radio access network (RAN) sites. These commonly take the form of the cell phone masts and corresponding technical equipment, which sometimes appear as poorly disguised palm trees. Adding RAN sites to increase capacity is, however, relatively far more expensive than acquiring additional radio spectrum. Moreover, various different types of approval are required for the building of new RAN sites such as environmental approvals and building and other municipal land approvals, which can take up to 3 years, and many of the existing suitable sites are already occupied.
 121. As a result, the use of spectrum to provide telecommunications services is typically subject to specific allocation by way of a licence by the government as the custodian of scarce resources, and then by way of assignment by ICASA as the sector regulatory authority.
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122. The appropriate allotment of spectrum is in fact a matter of national importance, given that it must be allocated and assigned in the public interest. Unequal allocations can result in distortions in the market and competitive advantages or benefits being distributed unfairly among licensees, who need spectrum to provide their services.
123. I understand from various media reports that the Minister of Telecommunications and Postal Services is in the process of developing and publishing a national spectrum policy direction, in terms of section 3 of the ECA, which will determine how best to allocate and assign spectrum in so-called "high demand" bands, which are those bands that are most useful for the provision of high quality broadband data services. It is not certain when that will occur.
124. Vodacom is a leading and very likely dominant player in the South African mobile telecommunications market(s). It has the largest number of subscribers. It earns the most revenues. It has the highest number of radio access network (RAN) sites. And it has massive investment capacity. This position of scale provides Vodacom with a significant cost advantage relative to all other mobile operators in South Africa.



125. Each of the three mobile operators (Vodacom, MTN and Cell C) currently enjoys similar allocations of spectrum.⁵ However, the precise nature of the spectrum within those bands is not the same. Cell C's allocations have historically been less attractive and have resulted in higher costs than those of MTN and Vodacom.
126. The proposed change of control of Neotel's spectrum licences, which ICASA approved on 11 June 2015, radically changes this landscape. It provides Vodacom with control (directly or indirectly) of an additional 90MHz of spectrum formerly assigned to Neotel. It will thus hold a 90MHz spectrum advantage over MTN and Cell C, its direct competitors.
127. Critically, Vodacom will control twice the amount of 1800MHz band spectrum as the rest of the market and, uniquely would get access to spectrum in the 800MHz band, which it did not have before. It should also be noted that the 800MHz band of spectrum offers an additional significant technical and financial advantage in providing wider geographic coverage and in-building penetration which the spectrum in

⁵ For purposes of this application I am ignoring the fact that there is a fourth mobile operator, Telkom Mobile, because Telkom Mobile uses the spectrum already allocated to Telkom, and does not have a separate licence as it is a business unit within Telkom.



higher bands is not able to offer.

128. From the perspective of Cell C and a number of other market participants this advantage will have severe negative implications for competition in the South African telecommunications market.
129. While Vodacom and Neotel strongly disagree with this position it is apposite to point out that the Commission also regards the merger as one which would result in a substantial lessening of competition.
130. In what follows I explain the basis for that finding. In so doing it is not intended to ask the Court to determine the correctness or otherwise of the finding. I do so simply in order to demonstrate that the issue is one seriously raised and which manifestly required the most careful analysis by ICASA in coming to its decision.
131. The Commission has found that the transaction, if it is to allowed to proceed, will afford the following competitive advantages to Vodacom:
- 131.1 First, Vodacom would be able to rapidly roll-out a national LTE network (without the need to reallocate any of its existing spectrum



away from voice) well in advance of any other competitor in the mobile market today – providing an already dominant player with a head-start in the all-important LTE data (high speed broadband services) market;

131.2 Second, Vodacom would benefit from an additional, structural cost and/or capacity advantage relative to its mobile competitors as this additional spectrum would mean significantly less radio sites need to be built (and maintained) in order to serve demand (conversely, significantly more demand can be served out of the same number of radio sites because of a greater allocation of spectrum, as I have explained above).

131.3 As a first mover, Vodacom will likely enjoy a lasting advantage, first, due to the ability to sign up subscribers to the new service for lengthy contract terms, who are then more difficult to attract to a new entrant's network (as history has shown in this market), and second due to the superior scale economies and associated cost-savings from having that subscriber base first. Hence, Vodacom is likely to gain an entrenched and dominant market position that will be difficult to be competed away later by rivals, even if they were to be given



access to equivalent amounts of spectrum in the future.

- 131.4 To remain competitive, a mobile network operator must constantly invest in improvements to its network coverage, capacity and quality of service. As a consequence of the acquisition of control of Neotel's spectrum licences (and other assets), Vodacom will be able to attract sufficient subscriber revenues away from other operators to prevent them from reinvesting significant profits into such improvements. In a relatively short period of time, operators such as Cell C will become less effective competitors and not capable of constraining Vodacom, even to the limited extent that they are able to now. Consumers will be the ultimate losers as Vodacom will have no incentive to lower its prices and rivals such as Cell C and MTN will be forced to raise theirs to meet their increased costs.
132. For a more comprehensive discussion of the competition problems that arise in relation to the transfer of control of Neotel's spectrum licences to Neotel, I respectfully refer the Court to the discussion in the Competition Commission's report on the transaction (at pages 64 to 85). A non-confidential copy of these pages of the report is annexed marked "GM7".

133. It must be noted that ICASA is the regulatory body tasked with controlling the radio frequency spectrum in South Africa. It does so in accordance with the applicable standards and the requirements of the International Telecommunication Union ("the ITU").⁶ South Africa is a member of the ITU. ICASA manages the radio frequency spectrum under the provisions of the ECA, when it exercises its powers regarding *inter alia* the assignment of spectrum, licensing, as well as the approval or dismissal of applications for transfer of control of licences.
134. As I show below, ICASA failed to determine (i.e. come to a conclusion on) the competition issues, which had been the subject of lengthy and detailed submissions to it by Vodacom and Neotel, Cell C, MTN, Internet Solutions and Telkom. It was enjoined by statute to do so as the sector regulator and its abdication of responsibility in this important respect is nothing short of startling.

THE ICASA PROCESS

135. In this section of the founding affidavit, I outline the process that was

⁶ The ITU was founded in Paris in 1865 as the International Telegraph Union. The current name "International Telecommunication Union" was adopted by the Madrid Plenipotentiary Conference in 1932.



followed by ICASA leading up to the decision of 11 June 2015.

136. It is not necessary for me to refer to every meeting that was held or document that was prepared by, or submitted to, ICASA. My primary purpose is to illustrate that:

136.1 Vodacom and Neotel had the opportunity to make representations to ICASA on the competition question that I have framed above and took it;

136.2 Most of the interested parties who made written and oral submissions to ICASA, including Cell C, identified competition concerns;

136.3 Vodacom and Neotel conceded that the competition question had to be determined by ICASA;

136.4 ICASA had appointed a set of experts, namely Acacia Economics, to advise it on the competition aspects of the transaction, and they did, but ICASA ignored Acacia's findings;

136.5 A Special Committee of ICASA was considering the competition



issue until it was apparently advised that ICASA was not permitted to do so in relation to the Application; and

- 136.6 Despite legal advice, which I have not seen but which is reflected in documents in the Record, ICASA failed to consult on the USA rollout condition *before* deciding to approve the Application.

THE NOTICE AND INITIAL REPRESENTATIONS BY INTERESTED PARTIES

137. Following the submission of the application by SEPCO, VSNL, Nexus and Vodacom, ICASA issued a Notice in *Government Gazette* Number 37998, of 15 September 2014, that it had “*received an Application for approval of the acquisition of Neotel (Pty) Ltd by Vodacom SA (Pty) Ltd*”. The Notice, a copy of which is at pages 46 – 49 of the Record, called upon interested parties to lodge written representations in relation to the Application. Interested parties were afforded twenty one (21) working days from the date of publication of the Notice to submit their comments.
138. Cell C responded on 15 October 2014 by way of a letter to ICASA, which I signed. A copy of the response is at pages 54 – 73 of the Record. I respectfully draw the Court’s attention to paragraph 1 of the letter in which

I highlighted that the application “*requires serious consideration by both ICASA and the Competition Commission (Commission), given the likely result for competition in the mobile market, and the mandate of both regulatory authorities*”. I went on to explain Cell C’s concerns regarding the proposed transfer of control of Neotel’s licences by Vodacom.

139. Written representations were also submitted by:

139.1 MTN (the fifth respondent);

139.2 Telkom (the sixth respondent);

139.3 the WAPA (the eighth respondent);

139.4 Dimension Data t/a Internet Solutions (the ninth respondent); and

139.5 Crystal Web (the tenth respondent),

on 15 October 2014.

140. These submissions are available in the Record at pages 74 – 125.



THE MERGING PARTIES' RESPONSE AND CONCESSION

141. ICASA granted the merging parties an opportunity to respond to the written submissions of the interested parties.
142. On 13 November 2014, the merging parties submitted the document which is at pages 1038 – 1098 of the Record.
143. I will not traverse the details of this response but it is important for me to highlight the concession made by Vodacom and Neotel in paragraph 21.2 (Record, page 1044–5). There, the merging parties said:

“The effect of the Transaction on competition is a relevant factor to be considered by the Authority, amongst all relevant factors, in exercising its discretion in terms of sections 13(1) and 31(2A) of the ECA. This is because section 2(f) of the ECA provides that “ [t]he primary object of [the ECA] is to provide for the regulation of electronic communications in [South Africa] in the public interest and for that purpose to ... promote competition within the ICT sector’.”

(My emphasis)

144. As I show below, Vodacom and Neotel's representatives made the same concession during the public hearing.
145. Moreover, in or about August 2014, Vodacom and Neotel submitted a

detailed economic report prepared by Frontier Economics to ICASA. A copy of the non-confidential (redacted) version of the Frontier Report (dated April 2015) is in the Supplementary Record at pages 22 – 118. The Frontier Report purported to address the competition issues. There can be no doubt that Vodacom and Neotel expected ICASA to determine whether the Application promoted competition.

ESTABLISHMENT OF THE SPECIAL COMMITTEE AND DELEGATION

146. On 20 October 2014, ICASA, acting in terms of section 17 of the ICASA Act, established a “*Special Committee on Market Consolidations*” to consider, analyse and conduct hearings (where necessary), and provide recommendations to the ICASA Council on various applications for approval that it had received, including the application relating to the Vodacom/Neotel transaction (“**the Special Committee**”).
147. The Special Committee consisted of Councillors Katharina Pillay (who was appointed Chairperson) and Nomvuyiso Batyi (Deputy Chairperson) and, in terms of section 4(4)(a) of the ICASA Act, the ICASA Council delegated to them its powers and functions, inter alia, to conduct inquiries and liaise with the Commission and other stakeholders in relation to the

applications.

148. A copy of the resolution of the ICASA Council is at pages 126 – 130 of the Record.
149. I note that in paragraph 1.4 the resolution ICASA said that *“In terms of section 4(4)(e) of the ICASA Act, the Council is not divested of any power or function or relieved of any duty which it may have delegated in terms of paragraph (a) or (c), and may amend or revoke any decision made in terms of such a delegation ...”*. This is consistent with section 4(4)(f) of the ICASA Act, which says that *“The power to grant, renew, amend, revoke or transfer any individual licence may not be delegated to a councillor or to a committee of the Council.”*
150. Paragraph 2.1 of the resolution defined the functions of the Special Committee delegated to it, as follows:
- “2.1.1 to consider, analyse and conduct hearings (where necessary), and provide recommendations to Council on but not limited to the Vodacom Neotel, Telkom-MTN, MTN-Afrihost, MWeb-Internet Solutions, and Telkom-Business Connexion transactions;
 - 2.1.2 to make decisions on the processes to be followed on these matters;
- 

- 2. 1.3 to liaise with the Competition Commission, other interested and relevant stakeholders; and
- 2. 1.4 to consider and make determinations and decisions on requests for confidentiality on these matters.”

151. In terms of paragraph 2.4 of the resolution, the delegation was subject to the following terms and conditions:

- “2.4.1 The Committee must perform such functions as are delegated to it in terms of 2.1 above and must do all such other things necessary for or reasonably incidental to the proper performance of this delegation.
- 2.4.2 The Committee may liaise with all relevant stakeholders regarding all matters pertaining to the functions delegated to it.
- ...
- 2.4.6 The Committee must consider all the relevant information and representations and make appropriate findings of fact and make decisions as contemplated by the enabling legislation.
- 2.4.7 All decisions of the Committee must be submitted to Council as a recommendation for consideration by Council, before they are made known or announced to the members of the public.”

THE ACACIA ECONOMICS REPORT

152. Before the Special Committee had been established, ICASA appointed Acacia Economics, a firm of expert economists, to conduct an initial economic analysis of the impact of the transaction on the market. This

appears from a Minute of a meeting of the Special Committee held on 10 November 2014, a copy of which is at pages 135 – 136 of the Record.

153. It should be noted Acacia Economics counts Dr Simon Roberts, the ex-Chief Economist of the Competition Commission, among its members. There can be no doubt about its competence. Acacia Economics gave a presentation of its report to the members of the Special Committee at the meeting on 10 November 2014.

154. I have not seen a copy of the Acacia Economics Report. It has been claimed as confidential by ICASA. I am advised that it is included in the confidential Record. Nevertheless, ICASA's Reasons says the following about the Report:

“21.42 After receipt of the Application the Authority commissioned Acacia Economics (“Acacia”) to develop a position paper for the Authority on the following:

- (a) potential benefits that may accrue to social welfare if the market consolidations agreements are to be approved;
- (b) potential negative consequences if these agreements were to be approved; and
- (c) implications for one deal being approved and one deal not being approved.

21.43 Following a consultation process that was conducted by Acacia with various major licensees the Authority received a report from Acacia which indicated that the Proposed



Transaction may raise a number of potential anti-competitive effects and recommended various possible remedies that could be undertaken by the Authority.”

(My emphasis.)

THE FRAMEWORK FOR COOPERATION AGREEMENT WITH THE COMMISSION

155. On or about 8 October 2014, representatives of the Commission and ICASA met. A copy of the Minutes of this meeting has not been included in the Record. It is included in the Commission’s record in the large merger proceedings. I annex a copy marked “GM8”. It appears from the heading that the meeting occurred in October 2014, although the minutes were only signed by the Commission’s representatives in April 2015. I draw attention to the fact that the Commission and ICASA recorded, in paragraph 3.6, that:

“It was agreed that in the event that there are any diverging views expressed in the reports prepared by CCSA and ICASA the authorities will meet in order to discuss their respective findings based on their legislative mandate.”

156. It also appears from documents in the record of the Competition Commission that in early November 2014, members of the Commission’s



staff made contact with ICASA personnel and proposed a meeting or teleconference. This appears from an exchange of emails, a copy of which is annexed marked "GM9".

157. A teleconference or meeting occurred on either 7 or 10 November 2014 or both. On 11 November 2014, Werner Rysbergen of the Commission sent an email to Gordon Mashigo and Norman Gidi of ICASA in which he referred to "*yesterday's conversation*" and enclosed a "*draft working document*". It is clear from the email heading that the attachment was a document entitled "*Framework for cooperation Vodacom_Neotel.docx*".
158. I am advised by my legal representatives that this document is in the Commission's record, but not in the Record of ICASA. It is stamped as confidential and I have not seen a copy. Nevertheless, I am advised that it does not contain confidential information and that in substance it records an acceptance by both ICASA and the Commission that they have concurrent jurisdiction in relation to the Vodacom/Neotel transaction and that they would follow the procedures set out in paragraphs 2.1, 2.2 and 2.3 of the MoU.
159. ICASA, as I show below, failed to comply with these agreements and



hence with the MoU.

THE PUBLIC HEARINGS

160. On 12 December 2014, ICASA gave Notice in *Government Gazette* Number 39329 (Notice 1143 of 2014) that public hearings would be held “*in respect of an application received for the acquisition of Neotel by Vodacom*”. A copy of the Notice is at pages 149 – 156 of the Record.
161. The public hearings were held on 15 and 16 January 2015. The proceedings were recorded and the Transcript of the recording is at pages 301 – 710 of the Record.
162. Vodacom and Neotel and various interested parties made submissions. All of the parties supported their oral presentations with “written notes” or PowerPoint presentations. I respectfully submit that it is not necessary for the Court to read these documents in detail. A cursory review will, however, reveal that most of the submissions of the interested parties raised a number of significant competition concerns in relation to the Application.



163. The merging parties also addressed the topic of competition in detail. Notably, Vodacom and Neotel once again made the material concession that ICASA had the jurisdiction to consider the effect that Vodacom's acquisition of control of Neotel's licences would have on competition. They did so orally in their opening address to the Special Committee, as follows:

"Now, the next broad theme that we come to in relation to the interested parties' arguments is a fairly meaty one and that's the issue of competition. Now, before we get to their specific submissions, if we may just refer briefly to the regulatory environment for competition in the electronic communications sector and specifically this regulatory body's role in relation to competition issues and of course in relation to the competition regulators, because this Authority well knows that the Competition Act requires Vodacom and Neotel to apply to the Competition Commission for approval and we have done so and the Commission is currently considering the transaction.

So, then we must ask what is this Authority's role in relation to competition and we say it is clear that of course while the Competition Commission and the Tribunal have their own roles in terms of those laws, we are not suggesting that this Authority shouldn't consider competition issues at all. We recognise that in terms of Section 2F of the ECA this Authority is specifically required to consider competition as one of the many goals of the ECA in Section 2.

But Section 4B 8(b) of the ICASA Act as recently amended makes it clear that the Competition Commission has primary authority to review mergers within any industry or sector in terms of the Competition Act. The primary authority responsible for considering the competition implications is therefore the Commission and not the Authority.

We are alive, of course, also to the memorandum of understanding concluded between the Competition Commission and this Authority in terms of which the Commission will consult with this Authority on aspects of the transaction that touch on both competition and electronic communications.

So, we submit that in relation to competition the Authority, ICASA, has two roles. First it must consider competition as one factor among many in order to promote the goals of the ECA and second it must consider competition in order to assist the Commission and its role in considering competition is, however, secondary to the Commission's role, but where the Authority does have a mandate to consider competition and this Authority will indeed exercise that mandate, our broad submission is that there are indeed benefits for competition and for consumers that will flow from this transaction."

(Record, pages 364 – 366. My emphasis)

164. The same concession can be found in paragraph 19 (Record, pages 297–8) of the merging parties' written "*Notes for Public Hearing*", made available to ICASA and the interested parties. This document is at pages 284 – 300 of the Record.
165. It is important for me to comment briefly on the merging parties' suggestion that because section 4B(8)(b) of the ICASA Act, as amended in 2014, contains the words "*the Commission has primary authority ... to review mergers within any industry or sector in terms of the Competition Act*", it is the Commission that is the "*primary authority*" responsible for considering the competition implications of the Transaction. ICASA in its Reasons (which I discuss further below) appears to have embraced this suggestion as somehow justifying its decision to "defer" to the Commission on the competition issues raised by the Transaction and to do

so in such a manner that it ultimately abdicated its concurrent competition jurisdiction and its obligation to “promote competition” in all of its regulatory activities.

166. This submission and ICASA’s view, it will be argued, fails to appreciate that:

166.1 Section 4B of the ICASA Act was not relevant at all. The empowering section under which ICASA was acting was section 9(2) of the ECA, which as noted above contains a self-standing power to conduct the proceedings in relation to the Application;

166.2 Section 4B(8) plainly says that the provision only applies when ICASA is considering conducting an inquiry under section 4B of the ICASA Act.

166.3 In any event, even if relevant (which is denied), section 4B(8)(b) of the ICASA Act clearly says that the Commission’s authority is “*subject to ... the terms and conditions of any concurrent jurisdiction agreement concluded between the Authority and the Competition Commission*”. In this case, the relevant concurrent jurisdiction



agreement is the MoU, concluded in 2002, which plainly states that Commission and ICASA must “*make independent determinations on the basis of the criteria and mandates of their respective legislation*” (Record, page 5, para 2.2).

- 166.4 Moreover, as I have noted above, the Commission and ICASA agreed in November 2014, in terms of their “*Framework for Cooperation on the Vodacom/Neotel transaction*”, that each had concurrent jurisdiction in terms of the MoU.
- 166.5 Whatever the subsection means by saying that ICASA must “*bear in mind*” that the Commission has “*primary authority*” it cannot mean that in consequence ICASA can simply wash its hands of its statutory duties, which include the promotion of competition in the sector.
- 166.6 ICASA as the expert sector regulator was best poised to bring that expertise to bear in considering the competition issue within the ambit of all of the factors it was required to consider,
167. Once it is accepted that the effect on competition was at its lowest one of the “criteria” in the determination to be made by ICASA, as the merging

parties did when they made the concessions highlighted above, there can be no scope for them to argue that ICASA was entitled to “*defer*” to the Commission on this issue let alone shrug off its obligation entirely.

THE COMMISSION’S PRELIMINARY VIEWS

168. On 25 February 2015, the Commission addressed a letter to ICASA in which it set out its preliminary view on the implications for competition of the proposed transaction. This view was that “*implementation of the proposed merger is likely to substantially prevent or lessen competition in the retail market for the provision of mobile services through spectrum concentration*” (para 5.3).
169. A copy of the Commission’s letter is at pages 780 – 784 of the Record.
170. The Commission reasoned as follows (in paras 4 and 5):
- 170.1 Implementation of the proposed merger will give Vodacom access to Neotel’s high demand spectrum;
- 170.2 Vodacom does not, in the Commission’s preliminary view, require

access to Neotel's 1800MHz spectrum in order to remain competitive or exercise a competitive constraint on Telkom Mobile and MTN;

170.3 Neotel's spectrum will provide Vodacom with market power which will allow Vodacom to behave in a unilateral manner and impede competition in mobile services as Vodacom will not face any significant competitive constraint. This includes both data services as well as voice services (which are sold in combination with data for handset use).

170.4 The Commission's assessment was made out on the basis that Vodacom only uses Neotel's 1800MHz spectrum in order to accelerate the roll-out of its LTE network. The competitive harm will likely be exacerbated by Vodacom's additional use of Neotel's 800MHz and 3500MHz spectrum in future.

170.5 Moreover, the use of Neotel's RAN sites and fibre network is also likely to enhance Vodacom's market power.

171. Needless to say, these preliminary findings echoed the submissions that had been made by many of the interested parties at the public hearings



before ICASA and resonated with the earlier warning by Acacia in its economics report to ICASA that implementation of the transaction would have an anti-competitive outcome.

172. Importantly, the Commission's views did not change significantly as it continued to investigate. It ultimately found, on much the same basis as that set out in its letter of 25 February 2015, that the proposed acquisition of control of Neotel by Vodacom is likely to substantially prevent or lessen competition.

ICASA'S RESPONSE

173. On 12 March 2015, Councillor Pillay responded to the Commission's letter of 25 February 2015. A copy of this correspondence is at pages 838 – 845 of the Record.

174. Two aspects of ICASA's letter are notable.

- 174.1 First, it appears from paragraph 5.1 of the letter, under the heading "Spectrum matters" (Record, page 839), that the Special Committee was at the time evaluating the Application under the assumption that



the RFSR2011 were applicable. The letter records: *"In terms of section 31(2A) of the ECA, Licensees may not assign, cede or in any way transfer control of spectrum licences without prior written approval of the Authority. Also in terms of the Radio Frequency Spectrum Regulations, 2011 the Authority is empowered to consider the technical, functional and economic efficiencies"* (my emphasis). Given that the RFSR2015 were not yet in force, it will be argued that ICASA's view that the RFSR2011 had to be applied, was correct at that time. Why the letter did not go on to note that under those same regulations ICASA was required to consider the competition aspect of the application is a mystery.

- 174.2 Second, in paragraph 6.1.1 of the letter (Record, page 841), the Special Committee said *"Vodacom has made it known that through this transaction it hopes to gain access [to] Neotel's radio frequency spectrum using "appropriate commercial agreements". In 2014, Vodacom doubled its number of LTE sites and significantly increased its network footprint. Furthermore, its entire network is LTE Advanced ready, however, the network is held back by a lack of spectrum. The Commission's view therefore is correct as far as Vodacom's access to Neotel's spectrum for the roll-out of LTE is*

concerned.” This is significant because it confirms that the effect of the transaction would plainly be to give Vodacom access to Neotel’s spectrum to utilise for its LTE network. Cell C had repeatedly made the point that it is wholly inappropriate to focus on the ‘form’ of the transfer for which approval had been sought. In ‘substance’, the result would be that Vodacom will be permitted to access and use Neotel’s spectrum licences in a manner no different than if the spectrum licences themselves had been transferred to it.

THE SPECIAL COMMITTEE’S FIRST REPORT TO THE ICASA COUNCIL

175. On 25 March 2015, and again on 22 April 2015, the Special Committee met to formulate its position in relation to the various issues raised by the Application.
176. The Minutes of the former can be found at pages 872 – 875 of the Record, while the Minutes of the second are at 894 – 899.
177. It will be argued at the hearing of this application that the Minutes reflect a dismal failure on the part of the Special Committee to understand the interested parties’ submissions or the issues before it.

A handwritten signature, possibly 'R', followed by a large checkmark.

178. By way of example, Cell C's submissions were mischaracterised and reduced to the following (Record, page 873):

"Cell C is of the view that Vodacom's acquisition of Neotel spectrum would provide it with a head start on LTE services."

And then dismissed by the Special Committee as follows:

"Committee View –

Section 31(2) of ECA in that the law prohibits direct access of spectrum without prior written permission from the Authority hence Vodacom will only have indirect access to Neotel's spectrum."

179. This is simply not an answer to Cell C's objection. The Court will appreciate that the real issue was whether Vodacom's *access* to Neotel spectrum, achieved through the transaction, will provide Vodacom with an unassailable (first mover) advantage in the roll-out and provision of LTE services. Whether such access is afforded directly or indirectly is irrelevant. The *form* of access should have made no difference at all to the Special Committee's assessment of this concern.

180. The submissions of Internet Solutions were caricatured as "*the proposed*

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transaction will cause an over concentration of spectrum". This was apparently rejected on the basis that *"Each party will remain the licence holder of its spectrum. Vodacom will only have indirect access to Neotel's spectrum"* (Record, page 874). Again, the Special Committee appears to have been blinkered by the form of access to Neotel's spectrum assets that Vodacom would enjoy, when the real concern was whether, in substance, the transaction would result in a concentration of spectrum in Vodacom's hands which will provide it with enhanced market power.

181. Perhaps most remarkable is the manner in which the Special Committee dealt with the concerns which had been raised by Acacia Economics, ICASA own economic experts. Paragraph 5 of the Minutes of the meeting of 25 March 2015 (Record, page 875) reveal that the Acacia Report had found *"that mobile operators need to access equivalent spectrum assignments in order for them to compete effectively"*. The Committee discarded this expert opinion for the entirely specious reason that *"Spectrum is but one of the considerations to take into account for an operator to compete effectively"*. None of the other *"considerations"* are identified in the minute. Even if some other considerations do come into play, access to spectrum is certainly an essential input and Acacia's concerns must have covered the issues adequately. Certainly there is no

indication that the ICASA representatives who had selected and briefed a respected firm of economists had any basis to come to a conclusion at odds with that expert's report. I am advised that the report itself will be referred to in argument to demonstrate this.

182. I submit and it will be argued that the Special Committee appears to have had no understanding of the nature of individual licences, the nature of spectrum as a scarce resource, and the fact that the transfer of all of Neotel's shares to Vodacom would in fact confer control by Vodacom over those licences and therefore over that spectrum. These are basic and intrinsic regulatory principles which should have been understood by ICASA, the regulatory authority tasked with controlling the radio frequency spectrum in South Africa.
183. Following these two meetings, Councillor Pillay proceeded to prepare a report to ICASA Council recommending that the Application be approved. The report is dated 15 May 2015. A copy of the report is at pages 913 – 920 of the Record.
184. I respectfully draw the Court's attention to the following features of the report.



185. In the paragraph dealing with "Spectrum issues" (Record, page 917), Councillor Pillay identified the issue as follows:

"Vodacom can only make use Neotel's 1800MHz assignment immediately, however, it will not be able to do the same with regard to the 800MHz and 3500MHz. The use of 800MHz for LTE is still to be harmonised by the WRC 15 conference. Neotel would first have to migrate its WiMAX subscribers from the 3500MHz band before the spectrum can be used for LTE. Effectively Vodacom will only be able to use 24MHz of the 90MHz of Neotel's LTE suitable spectrum. This will nevertheless result in Vodacom having access to twice the 1800MHz spectrum capacity as its competitors and being the only mobile licensee with access to 3500MHz today to enable LTE."

186. But there was a complete failure to identify for the ICASA Councillors reading the report, some of whom would probably have been grappling with the issues for the first time, what the likely *consequences* of this would be for the industry generally and other mobile operators. No mention was made, in these paragraphs, or anywhere else in the report, of the fact that both the Commission and Acacia Economics had concluded that Vodacom's access to "*twice the 1800MHz spectrum capacity as its competitors*" raised serious concerns. Instead, after dealing superficially with two peripheral issues, the report concluded (Record, page 917 – 918:

"The Committee did not find any reason to conclude that this transaction will not ensure efficient use of the radio frequency spectrum nor did it find any reason to withdraw the spectrum from Neotel."

Therefore, the Committee resolved that there are no sufficient technical and regulatory grounds for the disapproval of the Application for the transfer of control of Neotel's radio frequency spectrum licences to Vodacom. The basis for this is that while the control of the licence will change, Vodacom will not have direct access to Neotel's spectrum. Further, the Authority is not empowered through legislation to disapprove this application based on the information before it. (My emphasis.)

187. I do not understand the final sentence of this critical paragraph. It is plainly wrong in law.
188. Moreover, the entire approach of ICASA (which also finds expression in its Reasons) that only "efficiency" criteria had to be considered and that ICASA had to find grounds to disapprove the application, is at odds with the objects of the ECA as set out in section 2 which lists efficiency as only one object, together with *inter alia* the promotion of competition and consumer interests regarding price. It is also at odds with ICASA's own approach as set out in the RSFR2015, which even if not applicable (which I deny) clearly articulate in regulation 15(6) that "*promotion of competition and the interests of consumers*" are material considerations. Finally it is at odds with the fact that the burden obviously rests on the applicants for a transfer to satisfy ICASA as to these criteria.
189. The report to the ICASA Council proceeded to discuss the "Competition

issues” as if they were distinct from the “Spectrum issues” (Record, page 917). These paragraphs reveal, for the first time in the Record, that:

“The Committee received a legal opinion on whether the Authority can consider competition factors as part of its consideration of the application in the absence of a section 4B market inquiry (ICASA Act), as prescribed by a section 67 when considering competition matters. The opinion advised that the Authority cannot assess the application on competition grounds. It can only ask the Competition Commission to do so for the following reasons -

a) Section 13(3)(b) of ECA provides that the Authority must promulgate regulations providing for the limitation or restriction on ownership or control of individual licences in order to promote competition in the ICT sector. No applicable regulations have been promulgated under section 13(3)(b).

b) Regulations which may be made under section 31(3) do not include regulations relating to competition matters. Therefore, the transfer of control of a spectrum licence cannot be assessed for its competitive effects. This was only made possible as of 31 March 2015 with the coming into effect of the 2015 Radio Frequency Spectrum Regulations.

The Committee has concluded that this transaction should be approved, and any negative anti-competitive conduct by the dominant player will be addressed through the respective legislative frameworks and the Competition Act.”

190. I do not understand paragraph (b). If the RSFR2015 made it “possible” to consider competition matters, and they came into force on 1 April 2015, it is unclear why the opinion advised, and the Special Committee concluded, “that the Authority cannot assess the application on competition grounds”. The statement that any negative anti-competitive conduct by Vodacom,

which was regarded as the “dominant player”, will be “*addressed*” through the “*respective legislative frameworks and the Competition Act*” is exceedingly vague. Whatever it may have been intended to mean the competition harm fell to be addressed by ICASA whether under the RFSR2015, the RFSR2011, or under its general discretion and duties, having due regard to the objects of the ECA. Moreover ICASA failed to “*address*” the issue at all – it “*deferred*” everything to the Commission in an act of abdication.

191. One of the issues discussed in the report is the HDI ownership question. The issue had arisen in the representations of interested parties and the Applicants, which served before ICASA, given that Vodacom had only 6.25% HDI ownership and Neotel 19% “with the result that post transaction Neotel would have only 6%”.
192. ICASA considered that it was, under section 9(2)(b) (which had been rendered applicable by section 13(6) of the ECA), obliged to “impose” upon the transferee of an individual licence, on the person to whom control thereof was to be transferred, a clear requirement of 30% ownership by historically disadvantaged groups and that it thus lacked any “discretionary powers” to depart from this requirement.

193. It considered however, ostensibly on legal advice, that it did have a discretion *inter alia* to approve the Application “conditionally” and to allow a timeframe for compliance with the equity requirement.

THE SECOND REPORT TO THE ICASA COUNCIL

194. On 18 May 2015, the ICASA Council met to consider the Special Committee’s report and the recommendation that the Application be approved. The Minutes of this meeting are at 923 – 924 of the Record.
195. The Minutes reflect that after the Council deliberated on the matter, it resolved to: “*Defer the decision to the Council meeting of 26 May 2015 for the committee to consider inputs received.*”
196. The Special Committee met the next day, 19 May 2015, to reflect on what the ICASA Council had said. The Minutes of this meeting of the Special Committee are at pages 925 – 927. They reflect that the ICASA Council had

“... referred the report back to the Committee for consideration and inclusion of the following:

- Scope and limitations of the analysis



- Obligations / concessions
- The report ought to focus more on the conclusions of the analysis of the Committee
- Scenarios to be considered for an approval
- Clarity on issues to be dealt with by the Committee and line departments”

197. I also draw the Court’s attention to paragraph 6 of the Minutes (Record, page 927), which reads as follows:

“Spectrum and concessions as well as impact on Competition

- Vodacom will directly or indirectly have access to Neotel’s spectrum post transaction.
- The Committee should consider obligations which may be imposed to mitigate the impact of the transaction
- The Committee to consider various options for Council’s consideration

The Committee resolved that further legal advice is to be sought on how the conditions will be imposed.”

(My emphasis.)

198. In the light of this paragraph, it is possible that some members of the ICASA Council may have taken the view that the transfer of control of Neotel’s spectrum licences would have a negative impact on competition and that conditions would have to be considered to “mitigate” the effect.



199. On 5 June 2015, Councillor Pillay finalised the preparation of a revised report to the ICASA Council. A copy of this report is at pages 942 – 961 of the Record (“**the second report**”). In contrast to the first, the second report was a more comprehensive piece of work.
200. The second report records that following the ICASA Council meeting of 18 May 2015, the Special Committee had sought further legal advice “*to assist in respect of the conditions*”. The second report summarises the advice of a “senior counsel” who appears to have furnished the Special Committee with an opinion. The following should be noted:
- 200.1 The report records that the senior counsel had advised that the conditions “*must be consulted on and that is the only procedurally acceptable mechanism for engaging the parties on their views of the conditions as well as those of other parties*”.
- 200.2 Accordingly, the second report said, a recommendation on a decision and appropriate conditions “*can only be submitted thereafter*”. The legal opinion advised that a decision “*cannot be made in the absence of the discussion on conditions on the basis that once a decision has been made it cannot be rescinded, should the parties refuse to accept*



the conditions”.

- 200.3 The second report said that a procedurally fair process that would enable ICASA to impose conditions and stand up to review “*must include a process of public consultation before conditions are imposed*”.
- 200.4 The second report also outlined the process that had to be followed (Record, page 947). It envisaged a decision by the ICASA Council at the end of August 2015.
- 200.5 On page 948 of the Record, the second report advised that, “... *the most prudent approach is therefore to (a) consult on the conditions, (b) make recommendation to ICASA Council on approval or reject the application for the change in the transfer of shareholding*” (my emphasis).
201. There can be no doubt that the advice of the senior counsel was correct. Incomprehensibly, ICASA failed to follow it, as I detail below.
202. In Part B of the second report, the Special Committee dealt with the issues

relating to the transfer of control of Neotel's radio spectrum licences. It said that in relation to competition matters, "*primary jurisdiction lies with the Competition Commission*" and that "*the Authority's assessment is restricted following a s 67 process in terms of the ECA*".

203. It will be argued that this view was incorrect.
204. Nevertheless, the second report proceeded to correctly identify the competition concern. It noted that Vodacom, "*the largest mobile operator with the big subscriber base and greater market share will gain access to additional spectrum in the sweet spot "which will give it a competitive advantage" by allowing it to roll out and launch LTE services before any other operator/competitor in the South African market*" (Record, page 956).
205. The second report noted that there was some debate about Vodacom's control of the licence but then concluded, in relation to this issue, by saying:

"Notwithstanding the above the Authority is concerned that Vodacom will have access to the high demand spectrum post the transaction, even if indirectly ahead of any other licensee. Accordingly, below are conditions which the Committee is of the view must be consulted on."

206. An ordinary reading of this part of the report indicates that despite the (erroneous) view as to limitations on its powers or ability to consider the competition issues “*the Authority*” was indeed concerned about the potential anti-competitive consequences of the transaction. The second report went so far as to propose relevant remedial conditions (apparently to be suggested to the Commission). ICASA ought to have considered such conditions in its own right. It never did.
207. The conditions which the Special Committee said must be consulted on in order to mitigate the identified concern appear at the foot of page 957 and at the top of page 958 of the Record. The proposed conditions were:
- 207.1 To “*defer Vodacom’s usage of the spectrum until licensed high demand spectrum – IMT band – is made available for use*”.
- 207.2 To “*begin rollouts / usage in rural areas first working towards high-density areas*”. This appears to be a vague reference to a roll-out condition, but it is not the same as the USA roll-out condition actually described in the Notice.

- 207.3 To “*permit a dual rollout obligation – rural areas with equivalent population coverage in tandem with an equivalent urban high-density rollout*”.
- 207.4 “*Roaming with handover at least until the licensing of the high demand IMT spectrum – this is promote national roaming which is a possible scenario for Vodacom’s access to Neotel’s spectrum*”; and
- 207.5 “*An arrangement to enable MVNO and service competition*”.
208. Regarding the HDI equity question, the second report confirmed that ICASA enjoyed no discretion to depart from the 30% requirement, regarding it as a “*pre-qualifying criteria (sic)*” and concluding that a transfer in the absence of compliance would be “*ultra vires*”.
209. That consideration did not result in a refusal of the Application. ICASA instead adopted the approach that such a result would “*likely be deemed to be unreasonable*” (as it said in the second report) and that it should rather impose a timeframe for compliance. It touted a possible period of two years (such a remedy allegedly being its “only” discretion).

210. The ICASA Council met on 5 June 2015. The Minutes of this meeting are at pages 940 – 941 of the Record. Councillor Pillay appears to have presented the second report and there was some discussion in relation to actions that had to be taken. The Minutes also record an “*objection*” by Councillor Mohlaloga.
211. The ICASA Council resolved that the matter be discussed at a special Council meeting.

THE FAILURE TO CONSULT ON THE CONDITIONS

212. On 8 June 2015, Councillor Pillay addressed a letter to the Competition Commission, a copy of which is at pages 962 – 965 of the Record. The Commission was advised that:

“Before the Authority is in a position to make a decision on Vodacom’s acquisition of Neotel, it would need to follow due process, in terms of consulting the industry on any conditions that it intends to impose on the licensee(s) should the application for transfer of control be approved.

In this regard, the Authority would need to publish such proposed conditions for public commentary and allow for written submissions, which may necessitate public hearings. This consultative process is likely to be concluded during August 2015. This process is yet to be discussed with the parties.

The Authority has applied its mind, in terms of regulating the sector in the best interest of the public, and intends to consult on the following



potential conditions:"

213. The letter lists only three conditions. Inexplicably, only one of the five conditions identified in the second report of the Special Committee was mentioned. Equally inexplicably the letter of 8 June 2015 did not refer to the so-called 'USA roll-out condition', even though a form of it had been adverted to in the second report.
214. Also on 8 June 2015, Councillor Pillay wrote to Mr Shameel Joosub, the Chief Executive Officer of Vodacom. A copy of this letter is at pages 966 – 967 of the Record. Councillor Pillay advised Vodacom that:
- "2. The Authority has considered the application and needs to embark upon a public consultative process on conditions to be imposed should the application be approved. We expect to publish the draft conditions in the Government Gazette by mid-June 2015.
 - 3. In this regard, the Authority will follow the process outlined below:
 - a) Publication of a notice with conditions for public comment;
 - b) Public hearings, if necessary; and
 - c) A final recommendation and decision on the transaction."
215. Vodacom and the Commission were thus unequivocally advised that

ICASA would publicly consult (holding public hearings if necessary) on possible conditions to be imposed *before* a final recommendation and decision on the transaction was made.

216. This approach accorded with the advice of senior counsel that the Special Committee had received.

217. Despite this advice, ostensibly solicited by ICASA for the purpose of making an appropriate and fair decision, at the Special Council Meeting on 11 June 2015 a mere three days later, the ICASA Council resolved that "*The transaction be and is hereby approved*".

ICASA'S BREACH OF THE MoU

218. As I have explained above, clause 2.3 of the MoU applies when the two regulators arrive at different determinations on whether to approve the transaction. It sets out a process of consultation that must be followed with a view to resolving the differences between them by the imposition of certain conditions, "*prior to the determinations being made public*".

219. ICASA failed to comply with clause 2.3. This is evident from a letter



addressed by the Commission to ICASA on 18 June 2015, a copy of which is at pages 970 – 971 of the Record. In paragraph 3 of the letter, the Commission said that “*The eventual outcome of the coordination process in this case is however contrary to the operation of the MoU, particularly paragraph 2.3 of the MoU.*” Clearly the Commission was taken aback, in the light of its sharing its views with ICASA, that the latter had in seeming disregard of those views decided to approve the Application.

220. It now appears that there was no proper consultation between ICASA and the Commission on the merits of the competition concerns. Indeed ICASA appears not to have disclosed to the Commission that it regarded itself as lacking the obligation to come to a decision in relation to the competition questions.
221. ICASA’s treatment of the spectrum consolidation, which it found would result from the transfer, and in respect of which it entertained serious concerns, virtually defies understanding. First, it declined to act on the competition concerns that the consolidation would create. Second, it sought to cater for those concerns by the USA Roll-out “condition”. It justified this in a letter to the Commission dated 25 June 2015 (Record page 972–975) by saying that that “condition” would somehow “*address*

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the primary concern in respect of the concentration of spectrum and the potential negative effects resulting from the first mover advantage” on the basis that rollout to rural areas would be prioritised and rollout to urban areas delayed.

222. In the result the USA Rollout “condition” is not a condition, nor does it contain any inkling of a delay in Vodacom rolling out LTE services to urban areas or prioritising rollout of (cheaper) broadband to rural areas. In any event the “condition” is imposed on Neotel and not on Vodacom and it does not in any way actually address the competition issues.

223. Further, there was no consultation on the appropriateness of the so-called USA Roll-out Condition, or other possible conditions that were contemplated by ICASA, before it took the decision to approve the transfer.

ICASA’S REASONS

224. ICASA’s Reasons were issued on 13 August 2015.

225. The issue of competition was addressed in paragraphs 21.29 to 21.47 of



the Reasons (Record, pages 1031 – 1035).

226. After summarising the submissions of various parties (paragraphs 21.29 to 21.41), and referring to the Acacia Economics Report (paragraphs 21.42 and 21.43), ICASA found as follows:

“21.44 The Authority considered sections 2(f), and 13(3)(b) read together with section 67(4) of the ECA in relation to assessment of competition implications of the Proposed Transaction .

21.45 The Authority was of the view that the Competition Commission was best placed to adequately assess and regulate the potential effects on competition arising from the Proposed Transaction. Accordingly, the Authority consulted with the Competition Commission in line with the provisions of sections 67(11) and 67(12) of the ECA and the Memorandum of Understanding of 2002. The Authority submitted the Acacia report to the Competition Commission for consideration by it as the primary authority responsible to regulate competition effects of mergers in line with section 4B(8)(b) of the ICASA Act.

21.46 It is also noteworthy that the Applicants initially submitted to the Authority a report by Frontier Economics on the analysis of the competitive impact of the Proposed Transaction on 04 November 2014. However, the Authority could not consider the content of that report as the Applicants withdrew the entire report after the Authority declined their request for confidentiality on certain sections of the report in terms of section 40 of the ICASA Act. Nonetheless, having taken the decision to defer to the Competition Commission on competition matters, the Authority did not pursue the matter any further.

21.47 In particular, the Authority was of the view that it may be premature to embark on a competition enquiry in terms of section 67(4) of the ECA. The Authority however, recognizes that it has the power to hold an enquiry terms of section 67 at

any time in the future, should the Authority deem it necessary to do so.”

227. I should note that it does not appear (from the Record) to be correct that the Frontier Economics report was withdrawn by the merging parties. While issues relating to confidentiality did arise, a redacted version of the report appears to have been prepared and submitted to ICASA in April 2015.
228. Be that as it may, there can be no doubt that ICASA’s decision was ultimately to not determine what effect the Application would have on competition. It decided to “defer” to the Commission. It thus abdicated its obligation to assess whether the transfer of control of Neotel’s spectrum licences would promote competition.
229. ICASA’s legal basis for having done so is unclear and its cryptic collective reference to sections 2(f), 13(3)(b) and 67(4) of the ECA combined with its later reference to section 4B(8) is unhelpful. Moreover, it is unclear whether ICASA considered that the Commission was “*best placed*” to assess the competition issues because of its status as the “*primary authority*” in regard to such matters or the fact that the Commission had
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conducted a more thorough investigation and was therefore possessed of more relevant information, or both.

230. I am advised that no proper construction of the ECA or the ICASA Act or the MoU can yield the result that ICASA was not itself enjoined to consider and decide upon the competition issues in its own right, whether under the RSFR2015, or failing their applicability, the RFSR2011, and failing that its general functions and powers under the ECA.

231. Because section 13(6) enjoined ICASA to apply sections 9(2) to (6) of the ECA, ICASA was required not only to consider the written and oral representations made to it, but to the extent that it still considered that it lacked any information to reach a decision, ICASA was required to obtain it.

232. Section 4B(8) of the ICASA Act only applies to inquiries undertaken at the discretion of ICASA, not to its powers under section 9 of the ECA, and was thus irrelevant. It could not support any abdication of power to decide the competition issues. The provisions of the MoU underscore the necessity of ICASA having to decide those issues itself.



233. Section 13(3)(b) of the ECA was similarly irrelevant. The absence of regulations thereunder, which do not appear in any event to relate specifically to licence transfers, in no way derogated from ICASA's clear obligations under either the RSFR2015 or the RSFR2011, or under its general functions and powers in terms of the ECA.
234. Section 67(4) of the ECA finds no application at all to the Application before ICASA. It deals with an independent power on the part of ICASA to regulate a relevant market, following an inquiry which it may initiate, by imposing pro-competitive licence conditions on licensees. It has in the past used this power to regulate competition in the market for Mobile Termination Rates. There is no hint in sections 9 or 13 or 31 of the ECA or any relevant regulation that such an inquiry is required in order for ICASA to determine a licence application or an application to transfer a licence or control thereof.

ICASA'S INTERVENTION IN THE COMPETITION TRIBUNAL PROCEEDINGS

235. In a strange turn of events, ICASA has intervened in the large merger proceedings before the Competition Tribunal. It has sought to justify its intervention as being "*incontestably in the public interest*" on the basis



that it as “*sector regulator*” is able to assist the Tribunal, “*through its wealth of sectoral expertise*”. This, and the statements quoted below, appears from an affidavit deposed to by Ms Pillay on or about 10 September 2015 in support of an application to the Tribunal for unrestricted access to be given, to no less than twenty of its personnel, to the full confidential merger record and all the confidential documents and data to be discovered by the merger parties and the interveners (which include Cell C, MTN, Telkom and Internet Solutions). A copy of this affidavit is annexed marked “GM10”.

236. ICASA asserts in this affidavit that it has a “*necessary*” role to play, citing as the basis its “*considerable body of expertise*” to assist the Tribunal in developing whatever conditions might come to be imposed upon the merger.
237. It recognises in no uncertain terms that in terms of section 2 of the ICASA Act, read with the ECA, it has a “*duty to regulate electronic communications in South Africa in the public interest ... which includes but is not limited to making determinations as to the allocation and the use of spectrum*”, which it accepts is “*at the heart of the issues that fall for determination*” in the merger.



238. Remarkably, ICASA states that it needs unrestricted access to the data and documents that will serve before the Tribunal so as to enable it to “*evaluate the impact of the transaction on competition and to provide meaningful input into the Tribunal’s process regarding the likely competition effects of the merger*”. It goes so far as to say that if the Commission’s view on competition harm is correct then the Commission’s proposed condition would only delay but not offset this harm and suggests that other types of conditions may be more appropriate, conditions which it, ICASA, is best poised to advise on.
239. ICASA seeks to explain why it did not, prior to its own decision to approve the Application, seek access to the information, on the basis that it lacked the power to do so upon its understanding of section 67(4) of the ECA read with section 4B(8) of the ICASA Act. As I have submitted above, this is a fundamental misconception on its part that fatally infected its process.
240. ICASA has also filed an extensive request for further discovery of documents from the merging parties and many of the intervenors in the large merger proceedings. There can be no doubt that it could have used its powers under section 9(2) of the ECA to obtain such information.



241. In this regard, I also respectfully draw the Court's attention to paragraphs 5, 6 and 7 of the MoU, which provide for a sharing of resources and an exchange of information, where necessary, to enable ICASA and the Commission to perform their respective mandates. Nothing precluded ICASA from using these processes before taking its decision to approve the Application.

242. The point is that it had the jurisdiction, and on its own version, the competence and capacity, to have undertaken these very enquiries when called upon to approve the transfer of control of Neotel's licenses to Vodacom. It was required to exercise that jurisdiction, and to bring its competence and capacity as a sectoral regulator to bear, in order to lawfully and properly discharge its functions and duties when making its own decision on the Application, but abjectly failed to do so.

THE FIRST GROUND OF REVIEW

243. ICASA considered the RFSR2015 to be inapplicable when it exercised its discretion to permit the transfer of control of Neotel's spectrum licences to Vodacom.



244. In paragraph 21.10 of its Reasons, ICASA said:

“Furthermore, although the 2015 Radio Frequency Spectrum Regulations make provision for the transfer of control of radio frequency spectrum licences, these were only effective from 1 April 2015 and therefore the Authority is satisfied that they could not be applied retrospectively.”

245. The source of that legal conclusion is not identified but in any event I am advised that no question of retrospectivity arises. From 1 April 2015 any pending application for transfer of control of a spectrum licence attracted the application of RFSR2015.

246. The RFSR2015 are clearly intended to give effect to section 31(3) of the ECA. As noted above, section 31(3) of the ECA makes provision for the transfer of control of spectrum licences. Regulation 15 of the RSFR2105 deals with the transfer of control of a spectrum licence. It mirrors the provisions of regulation 12. It provides that the application must be in a specified format, that the Authority must follow certain steps set out in regulation 15(4), and that the application must then be evaluated in accordance with the criteria set out in regulation 15(5), which includes “[p]romotion of competition and interests of consumers”. Similarly, regulation 15(8) stipulates that the Authority may not approve the transfer



of the RFSL “*if such transfer will not promote competition*”.

247. There are no transitional provisions in the regulations. RFSR2015 gave effect to the 2014 amendments to the ECA and repealed RFSR2011. The only conclusion that can be drawn is that ICASA intended RFSR2015 to have immediate effect.
248. With effect from 1 April 2015 then, the RFSR2015 applied to any future exercise of ICASA’s discretion.
249. The ICASA Council exercised its discretion more than two months *after* RFSR2015 became effective.
250. There can be no suggestion that ICASA was obliged to exercise its discretion as if it was doing so on the day the Application was lodged, more than a year earlier. I am advised and it will be argued that the rationale for the presumption that statutes and regulations do not apply or operate retrospectively is the protection of vested rights. Neotel and Vodacom did not, however, have any relevant vested rights either when the Application was lodged or when RFSR2015 came into full force and effect. They had no right to an approval of the Application. They had no



right to expect that ICASA would exercise its discretion in their favour. And decisively, they had no right to expect that ICASA would not consider the question of whether the transfer that they had asked ICASA to permit would “*not promote competition*”. Indeed, they did not even have that expectation.

251. None of the existing substantive rights or obligations of Vodacom or Neotel, or the latter’s shareholders, would have been impaired, or become incapable of enforcement if ICASA had applied RFSR2015, and in particular regulation 15(8), when it exercised its discretion on 11 June 2015.
252. Indeed, there could have been no prejudice at all to those parties if ICASA had applied RFSR2015. As I have identified above in the section describing the ICASA process, Vodacom and Neotel were given every opportunity to submit that the transaction would promote competition. They repeatedly made that submission. They supported it by filing an expert economist’s report which pertinently dealt with the question.
253. In these circumstances, I am advised and it will be argued that ICASA’s finding that RFSR2015 did not apply and accordingly its failure to



exercise its discretion in accordance with regulation 15(8) renders the decision reviewable on the following grounds:

- 253.1 ICASA failed to comply with a mandatory and material procedure or condition prescribed by an empowering provision, as contemplated by section 6(2)(b) of PAJA; and/or
 - 253.2 ICASA's decision was materially influenced by an error of law, as contemplated by section 6(2)(b) of PAJA; and/or
 - 253.3 ICASA failed to take relevant considerations into account when exercising its discretion, as contemplated by section 6(2)(e)(iii) of PAJA.
254. To avoid any further confusion if the Application is remitted back to ICASA by this Court, Cell C seeks an order declaring that regulations 15(5) and (8) of RFSR2015 are applicable when ICASA exercises its discretion.

SECOND GROUND OF REVIEW (IN THE ALTERNATIVE)

255. Even if this Court finds that the RFSR2015 were not of application, it will be argued that ICASA should have applied RFSR2011.

256. RSFR2011 took effect on 1 April 2011. They remained in force until 1 April 2015, when they were repealed by regulation 43 of RFSR2015.

257. In paragraph 21.9 of its Reasons, ICASA found:

“Further, the Authority also considered whether the 2011 Radio Frequency Spectrum Regulations would apply. The Authority came to the conclusion that they too would apply only to transfer of spectrum licences but not the control thereof – as was the case in the Proposed Transaction.”

258. Although not articulated, the reason for this finding is plainly that the word “*transfer*” in regulation 1 is defined as “*assign, cede, or transfer of a license from one person to another*”. I am advised, however, and it will be argued that this narrow interpretation fails to appreciate that our law requires that regulations that remain in force after an amendment to the principal Act in terms of which they were made must be interpreted purposively, in the light of the amendment, to give effect to the statutory scheme as amended. It will be argued that words can, if necessary, be read into the regulations, provided they do not do violence to the Act or other



provisions of the regulations themselves. This gives effect to the rule of law.

259. An interpretation of the definition of “*transfer*” to include “*transfer of control of a licence*” serves to give full effect to the intention of the legislature when it enacted section 31(2A) of the ECA. It is important to note that RSFR2011 were expressly promulgated in terms of ICASA’s general power to promulgate regulations for the “*control of the radio frequency spectrum, radio activities and the use of radio apparatus.*” ICASA’s control of the radio frequency spectrum plainly encompasses the power to consider whether the transfer of beneficial ownership of a firm holding a spectrum licence, and thus the indirect transfer of that licence to a different entity altogether, should be permitted.

260. Accordingly, there is nothing in the statutory scheme which would preclude a purposive interpretation of the definition of “transfer” to include “transfer of control”.

261. With respect, it should also be appreciated that there is no difference in substance between the transfer of a spectrum licence from one person to another and the transfer of control of that licence. They are two sides of



the same coin. This can be illustrated with reference to the description of the transaction provided by Frontier Economics in its report prepared on behalf of Vodacom and Neotel.

261.1 The introduction of the Frontier Report (Supplementary Record, page 24) describes the effect of the acquisition of Neotel by Vodacom as *“Combining the businesses of Neotel and Vodacom will create a service provider with over [redacted] in fixed revenues, long standing customer relationships in key channels, strong capabilities and key skills in fixed line, to compete more effectively and with enhanced credibility under the Vodacom brand. This combined scale will accelerate growth in unified communications products and services and expand and enhance the range of converged services available to South African corporates.”*

261.2 On the following page (Supplementary Record, page 25), the Frontier Report says further that *“Neotel's spectrum assets will enhance the next generation network capabilities in South Africa by accelerating LTE rollout, improving network capacity and availability and reducing the cost to service customers. This will enable Vodacom to remain competitive in the provision of mobile*



broadband and at the same time support an ambitious national broadband policy in South Africa which requires rapid deployment and high coverage levels.”

262. It is clear that Vodacom intends to access Neotel’s spectrum, through its spectrum licences, as if it were its own. Put differently, there is no substantive difference between the direct acquisition of Neotel’s spectrum licences, or their indirect transfer to Vodacom by way of an acquisition of Neotel’s equity, which provides it with the ability to use, control or direct the use of the licensed spectrum.

263. ICASA’s failure to appreciate that RFSR2011 could and should be interpreted to be applicable, renders the decision reviewable on the following grounds:

263.1 ICASA failed to comply with a mandatory and material procedure or condition prescribed by an empowering provision, as contemplated by section 6(2)(b) of PAJA; and/or

263.2 ICASA’s decision was materially influenced by an error of law, as contemplated by section 6(2)(b) of PAJA; and/or



- 263.3 ICASA failed to take relevant considerations into account when exercising its discretion, as contemplated by section 6(2)(e)(iii) of PAJA.

**THIRD GROUND OF REVIEW (IN THE FURTHER ALTERNATIVE TO
GROUNDS 1 AND 2)**

264. In the further alternative, even if *neither* RFSR2015 nor RFSR2011 were applicable, it is submitted and it will be argued that ICASA did not have an unbounded discretion in relation to the application that served before it.
265. As I have highlighted above, there is a duty on ICASA to regulate the assignment and use of spectrum through the award of, transfer of and withdrawal of licences. That duty must be exercised in the light of the objects of the ECA, one of which is to “*promote competition in the ICT sector*” (section 2(f) of the ECA).
266. Accordingly, whenever it is called upon to exercise its discretion under section 31(2A) of the ECA, ICASA is required to independently consider and determine the extent to which the transfer of control of a spectrum



licence would affect competition. It will be argued that this necessarily means that it must ensure that its decision *promotes competition in the ICT sector*.

267. By its own admission in its Reasons, ICASA did not reach that determination. Rather, it decided to defer the determination of the all-important competition issue to the Commission. Thus, in paragraph 21.46 of its Reasons, ICASA said:

“It is also noteworthy that the Applicants initially submitted to the Authority a report by Frontier Economics on the analysis of the competitive impact of the Proposed Transaction on 04 November 2014. However, the Authority could not consider the content of that report as the Applicants withdrew the entire report after the Authority declined their request for confidentiality on certain sections of the report in terms of section 40 of the ICASA Act. Nonetheless, having taken the decision to defer to the Competition Commission on competition matters, the Authority did not pursue the matter any further.” (My emphasis.)

268. ICASA was not entitled to defer the question to the Commission. ICASA entirely abdicated its jurisdiction to consider and determine the competition question.

269. There is nothing in the ECA, the ICASA Act, or the MoU which permitted this.



270. Finally, even if this Court finds that ICASA was entitled to “defer” the competition issue to another regulator (which is denied), it will be argued that it should still have taken the Commission’s conclusion into consideration when exercising its own discretion. Put differently, if “deference” to the Commission was permitted (which is denied), such deference required ICASA to give serious consideration and weight to the Commission’s conclusions when it exercised its own discretion. As noted above, the Commission found that the transfer of control of Neotel’s spectrum licences to Vodacom is indeed likely to substantially lessen or prevent competition. ICASA knew that the Commission had reached that conclusion when it took its decision on 11 June 2015. ICASA, even if entitled to defer, failed to give any weight to the Commission’s determination or even consider it when it took its decision. Given that ICASA is the only regulator with authority to deal with the use and assignment of spectrum, this was a startling failure to take relevant considerations into account.

271. In the circumstances, the decision is reviewable on the following grounds:

271.1 ICASA failed to comply with a mandatory and material procedure or condition prescribed by an empowering provision, as contemplated

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by section 6(2)(b) of PAJA; and/or

271.2 ICASA's decision was materially influenced by an error of law, as contemplated by section 6(2)(b) of PAJA; and/or

271.3 ICASA failed to take relevant considerations into account when exercising its discretion, as contemplated by section 6(2)(e)(iii) of PAJA.

FOURTH GROUND OF REVIEW

272. The Application which served before ICASA was an acquisition transaction involving telecommunication matters. Clause 2.3 of the MoU applies when the two regulators arrive at different determinations on whether to approve the transaction. In summary, it sets out a process of consultation that must be followed with a view to resolving the differences between them by the imposition of certain conditions, "*prior to the determinations being made public*".

273. ICASA failed to comply with clause 2.3. This is evident from the letter addressed by the Commission to ICASA on 18 June 2015. In paragraph 3



of the letter, the Commission said that *"The eventual outcome of the coordination process in this case is however contrary to the operation of the MoU, particularly paragraph 2.3 of the MoU."*

274. There was no consultation between ICASA and the Commission on the appropriateness of the so-called USA Roll-out condition, or any other possible condition, before ICASA took the decision to approve the transfer. Moreover, there is no indication in the Record that ICASA even advised the Commission that it was likely to conclude that the Application should be permitted. This was plainly in breach of the MoU.

275. Accordingly, ICASA's decision falls to be reviewed and set aside on the basis that ICASA failed to comply with a mandatory and material procedure prescribed by the MoU, as contemplated by section 6(2)(b) of PAJA.

FIFTH GROUND OF REVIEW

276. It is not entirely clear what decision was ultimately made by ICASA. The Minute of the 11 June 2015 Special Council meeting records that ICASA resolved that *"the transaction be and is hereby approved."* The Notice



records that ICASA has "*approved the Application, subject to ...*" the "BEE requirement" and the "USA Roll-out condition".

277. The Reasons, at paragraph 21.48, record that ICASA had on 11 June 2015 approved the Application subject to what it termed the "*the HDP Requirement*" (i.e. the "BEE requirement) and the "USA roll-out condition".

278. A consideration of the Notice reveals that only the BEE requirement even purports to be a true condition, i.e. one which if not met would require an undoing of the approval in some manner. The same cannot be said of the so-called USA Roll-out "condition" which is not a condition at all. There is merely an indication by ICASA that it is "*considering the imposition of*" such a condition. The inference is that if such a condition is not ultimately imposed, after the public consultation process envisaged by the Notice, the approval would be unaffected.

279. Paragraph 7 of the Notice states in respect of both "conditions" that insofar as they may necessitate the amendment of the relevant individual licences the Notice itself is deemed to constitute "notice in terms of section 10(1)(f) and (2) of the ECA".

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280. Having found, correctly it is submitted, that the HDI equity requirement was mandatory, it was not open to ICASA to approve the Application at all and the purported condition was itself unlawful.

281. Furthermore, it will be argued ICASA could not competently classify the condition as one which it “may” impose under section 10 of the ECA given its compulsory subject matter (as it did in paragraph 7 of the Notice). Indeed the intention to conduct the type of consultation and process contemplated by section 10 of the ECA is entirely inappropriate in the context in which it is sought to be applied. This is a separate process requiring ICASA to exercise its duties by consideration of the matters set out in section 10 of the ECA. It concerns the issue of whether or not to amend a licence, which cannot be conflated with ICASA’s consideration of an application for the acquisition of control of licences.

282. Accordingly, ICASA’s decision falls to be reviewed and set aside on the basis that:

282.1 The approval of the Application with the imposition of the “BEE condition” was not authorised by the empowering provisions of the ECA, as contemplated in section 6(2)(a)(i) of PAJA; and

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- 282.2 ICASA failed to comply with a mandatory and material procedure, as contemplated by section 6(2)(b) of PAJA

SIXTH GROUND OF REVIEW

283. As noted above, ICASA's decision was that "*the transaction be and is hereby approved*". As the Notice makes plain, the approval was not made subject to the fulfilment of the so-called USA Roll-out condition. ICASA has *ex post facto* indicated that it is "... considering the imposition of the condition that at least 25% (twenty five percent) of any broadband roll out to be undertaken by Neotel following the implementation of the transaction (with the specification of a minimum of 5Mbps), be undertaken in under serviced areas" (paragraph 4.b of the Notice).
284. In short, it has publicly said that it is still considering whether or not to impose the condition. At the same time, it has unconditionally approved the transfer of control of Neotel's licences. As I have highlighted above, the decision to approve the transfer was taken in circumstances where the conditions were not finalised, and it was not clear whether they could or would ever be implemented. If ICASA had concerns about the effect of the proposed transfer, which it believed could be mitigated by imposing
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conditions, it should have properly formulated the proposed conditions *before* taking its decision, and made the approval subject to them.

285. ICASA did not seek or receive any representation from the interested parties, or Neotel and Vodacom for that matter, on whether the USA Roll-out condition is appropriate *before* taking its decision. It has still not done so, limiting its invitation to interested parties to submissions on “*The reasonable target and timelines that the Authority may impose for fulfilment of the USA Roll-Out Condition*” (para 6 of the Notice)

286. ICASA does not have the power to invite written representations after it has made a decision. Section 13(6), read with section 9(2)(a), of the ECA authorises, alternatively obliges, ICASA to invite written representations before it makes a decision. These provisions do not permit ICASA to invite written representations after it has considered an application and made a decision.

287. In addition, for the reasons explained above, the USA Rollout condition does not in any way address the competition issues raised by the consolidation of spectrum and appears now to have some connection, not adequately explained, to universal access considerations.

288. To the extent that this is so, my submissions (under the fifth ground of review) regarding the inappropriate invocation of section 10 of the ECA in the context of a transfer approval application are also germane.

289. Accordingly,

289.1 ICASA failed to comply with a mandatory and material procedure prescribed by the ECA, as contemplated by section 6(2)(b) of PAJA;

289.2 Its action was also procedurally unfair and falls to be reviewed and set aside under section 6(2)(c) of PAJA; and

289.3 ICASA acted arbitrarily and/or irrationally and the decision falls to be reviewed and set aside in terms of sections 6(e)(vi) and/or 6(f)(i) of PAJA.

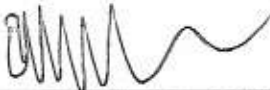
CONCLUSION

290. In the circumstances, Cell C submits the decision of ICASA to permit the transfer of control of Neotel's licences taken on 11 June 2015 is reviewable and falls to be set aside.



291. It is clearly appropriate that the Application be remitted to ICASA for reconsideration. To avoid any confusion about the manner in which ICASA must deal with the Application, Cell C seeks an order declaring that ICASA must apply regulations 15(5) and (8) of RFSR2015 when it exercises its discretion.

WHEREFORE I pray for the relief set out in the Notice of Motion


 GRAHAM NEIL MACKINNON

I certify that this affidavit was signed and sworn to before me at ~~SANDTON~~ ^{Melrose Arch} on this the ~~23rd~~ ^{24th} day of **SEPTEMBER 2015** by the deponent who acknowledged that he/she knows/knew and understands/understood the contents of this affidavit, has/had no objection to taking this oath, considers/considered this oath to be binding on his/her conscience and uttered the following words: 'I swear that the contents of this affidavit are both true and correct, so help me God.'


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