

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

CASE NUMBER: 77029/15

In the matter between:

**MOBILE TELEPHONE NETWORKS (PTY) LTD**

Applicant

and

**MS KATHARINA PILLAY NO**

First respondent

**MS KATHARINA PILLAY NO**

Second respondent

**INDEPENDENT COMMUNICATIONS AUTHORITY OF  
SOUTH AFRICA**

Third respondent

**NEOTEL (PTY) LTD**

Fourth respondent

**VODACOM (PTY) LTD**

Fifth respondent

**TELKOM SA SOC LIMITED**

Sixth respondent

**CELL C (PTY) LTD**

Seventh respondent

**INTERNET SERVICE PROVIDERS' ASSOCIATION**

Eighth respondent

**THE WIRELESS ACCESS PROVIDERS' ASSOCIATION**

Ninth respondent

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

Tenth respondent

**CRYSTAL WEB (PTY) LTD**

Eleventh respondent

**MINISTER OF COMMUNICATIONS**

Twelfth respondent

**MINISTER OF TELECOMMUNICATIONS AND POSTAL  
SERVICES**

Thirteenth respondent

**SEPCO COMMUNICATIONS (PTY) LTD**

Fourteenth respondent

**VSNL SNOSPV PTE LIMITED**

Fifteenth respondent

**NEXUS CONNEXION SA (PTY) LTD**

Sixteenth respondent

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NOTICE OF MOTION

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**TAKE NOTICE** that the applicant ("MTN") intends to make application to this Honourable Court at 10h00 on 10 November 2015, or at such other time as may be assigned by the Honourable Deputy Judge President or by the Registrar, for an order in the following terms:

- 1 Reviewing and correcting or setting aside the decision of the third respondent ("ICASA") published in General Notice 684 on 2 July 2015, in which ICASA purported to approve the application by the fourth respondent ("Neotel"), the fifth respondent ("Vodacom"), the fourteenth respondent, the fifteenth respondent and the sixteenth respondent for approval in respect of the proposed acquisition by Vodacom of the entire issued share capital of Neotel;
- 2 *In the alternative to paragraph 1:* reviewing and correcting or setting aside the decision of ICASA published in General Notice 684 on 2 July 2015, to the extent that ICASA purported to give permission in terms of section 31(2A) of the Electronic Communications Act 36 of 2005 for the transfer of control of Neotel's radio frequency spectrum licences in the 850 MHz, 1800 MHz and 3.5 GHz frequency bands to Vodacom;
- 3 Granting further and/or alternative relief;
- 4 Directing the costs of this application to be paid by the third respondent and by such other respondents as may oppose the relief sought on a joint and several basis.

**TAKE NOTICE FURTHER** that the affidavit of William Graham de Vries (together with the annexures thereto) will be used in support of this application.

**TAKE NOTICE FURTHER** that the applicant has appointed the address below of its attorneys, MacRobert Attorneys (instructed by Webber Wentzel) as the address at which it will accept notice and service of all process in these proceedings.

**TAKE NOTICE FURTHER** that, in terms of the oral directive of the Honourable Deputy Judge President of 10 September 2015:

- (a) any of the respondents that intend opposing this application are required to file their answering affidavit, if any, by Monday 12 October 2015;
- (b) MTN shall thereafter file its replying affidavit by Monday 19 October 2015;
- (c) MTN shall file its heads of argument by Monday 26 October 2015; and
- (d) any of the respondents that intend opposing this application are required to file their heads of argument by Friday 30 October 2015.

**TAKE NOTICE FURTHER** that any of the respondents that oppose this application are required to appoint an address within 15 kilometers of the office of the Registrar at which they will accept notice and service of all process in such proceedings.

Dated at Johannesburg this 21 day of September 2015.



**MacRobert Attorneys**

MacRobert Building  
c/o Justice Mahomed & Jan  
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Brooklyn  
Pretoria  
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Email:

lganie@macrobert.co.za

Ref: Leila Gani

(Instructed by:

**Webber Wentzel**

10 Fricker Road  
Illovo Boulevard  
Illovo

Johannesburg

Tel: 011 530 5300

Email:

debbie.vanrooyen@webberwentzel.com

Ref: Stuart McCafferty/  
3002929)

TO:

The Registrar of the above Honourable Court

Pretoria

AND TO:

**MS KATHARINA PILLAY NO**

Blocks A, B, C and D  
Pinmill Farm  
164 Katherine Street  
Sandton  
Johannesburg

First respondent

**MS KATHARINA PILLAY NO**

Blocks A, B, C and D  
Pinmill Farm  
164 Katherine Street

Second respondent

Sandton  
Johannesburg

**INDEPENDENT COMMUNICATIONS AUTHORITY OF  
SOUTH AFRICA**

Blocks A, B, C and D  
Pinmill Farm  
164 Katherine Street  
Sandton  
Johannesburg

Third respondent

**NEOTEL (PTY) LTD**

4A Old Pretoria Road  
Halfway House  
Midrand

Fourth respondent

**VODACOM (PTY) LTD**

Vodacom Corporate Park  
082 Vodacom Boulevard  
Vodavally  
Midrand

Fifth respondent

**TELKOM SA SOC LIMITED**

61 Oak Avenue  
Highveld  
Centurion

Sixth respondent

**CELL C (PTY) LTD**

The Waterfall Campus  
Corner Maxwell Drive and Pretoria Main Road  
Midrand

Seventh respondent

**INTERNET SERVICE PROVIDERS' ASSOCIATION**

c/o Elaine Zinn  
85 Allen Road  
Glen Austin  
Midrand

Eighth respondent

**THE WIRELESS ACCESS PROVIDERS' ASSOCIATION**

92 McGillivray Road  
Glenferness AH  
Midrand

Ninth respondent

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

Le Mans Building  
57 Sloane Street  
Bryanston  
Johannesburg

Tenth respondent

**CRYSTAL WEB (PTY) LTD**

Eleventh respondent

7 Masefield Street  
Farrarmere  
Benoni  
Johannesburg

**MINISTER OF COMMUNICATIONS**  
c/o the State Attorney  
Pretoria

Twelfth respondent

**MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES**  
c/o the State Attorney  
Pretoria

Thirteenth respondent

**SEPCO COMMUNICATIONS (PTY) LTD**  
269 Oxford Road  
Illovo  
Johannesburg

Fourteenth respondent

**VSNL SNOSPV PTE LIMITED**  
c/o 39 Ferguson Road  
Corner Rivonia and Ferguson Roads  
Illovo  
Johannesburg

Fifteenth respondent

**NEXUS CONNEXION SA (PTY) LTD**  
30 Waterford Office Park  
Corner Witkoppen and Waterford Drive  
Fourways  
Johannesburg

Sixteenth respondent

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

CASE NUMBER: \_\_\_\_\_

In the matter between:

|                                                             |                       |
|-------------------------------------------------------------|-----------------------|
| <b>MOBILE TELEPHONE NETWORKS (PTY) LTD</b>                  | Applicant             |
| and                                                         |                       |
| <b>DR STEPHEN MNCUBE NO</b>                                 | First respondent      |
| <b>MS KATHARINA PILLAY NO</b>                               | Second respondent     |
| <b>INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA</b> | Third respondent      |
| <b>NEOTEL (PTY) LTD</b>                                     | Fourth respondent     |
| <b>VODACOM (PTY) LTD</b>                                    | Fifth respondent      |
| <b>TELKOM SA SOC LIMITED</b>                                | Sixth respondent      |
| <b>CELL C (PTY) LTD</b>                                     | Seventh respondent    |
| <b>INTERNET SERVICE PROVIDERS' ASSOCIATION</b>              | Eighth respondent     |
| <b>THE WIRELESS ACCESS PROVIDERS' ASSOCIATION</b>           | Ninth respondent      |
| <b>DIMENSION DATA (PTY) LTD t/a INTERNET SOLUTIONS</b>      | Tenth respondent      |
| <b>CRYSTAL WEB (PTY) LTD</b>                                | Eleventh respondent   |
| <b>MINISTER OF COMMUNICATIONS</b>                           | Twelfth respondent    |
| <b>MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES</b>   | Thirteenth respondent |
| <b>SEPCO COMMUNICATIONS (PTY) LTD</b>                       | Fourteenth respondent |
| <b>VSNL SNOSPV PTE LIMITED</b>                              | Fifteenth respondent  |
| <b>NEXUS CONNEXION SA (PTY) LTD</b>                         | Sixteenth respondent  |

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FOUNDING AFFIDAVIT

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BN  
MG

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**INTRODUCTION**

I the undersigned

**WILLIAM GRAHAM DE VRIES**

do hereby make oath and say as follows:

- 1 I am the Corporate Services Executive of the applicant ("MTN").
- 2 I am duly authorised by MTN to depose to this founding affidavit and to bring this application on its behalf.
- 3 The facts that I depose to are true and correct and are, save where otherwise indicated, within my personal knowledge. Where I make legal submissions, I rely on advice that MTN has received from its legal representatives.
- 4 This is a review, in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), of a decision made by the third respondent ("ICASA"). The decision was made pursuant to applications lodged by the fifth respondent ("Vodacom"), the fourth respondent ("Neotel") and the shareholders of Neotel in terms of section 13(1) and section 31(2A) of the Electronic Communications Act 36 of 2005 ("the ECA") for permission to transfer control of certain licences held by Neotel to Vodacom. For reasons that will be fully set out below, MTN submits that ICASA misdirected itself when it approved the applications and that ICASA's decision should be reviewed and set aside.



**PARTIES**

- 5 The applicant is MOBILE TELEPHONE NETWORKS (PTY) LTD. MTN is a company incorporated in terms of the company laws of South Africa with its principal place of business at 216 14<sup>th</sup> Avenue, Fairland, Roodepoort.
- 6 The first respondent is MS KATHARINA PILLAY who is cited in her official capacity as the acting Chairperson of ICASA. It is for this reason that she is cited as the first respondent in terms of Rule 53(1). I invite ICASA to inform the parties if another person has been appointed as Chairperson of ICASA or is acting in that position, in which event MTN will take steps to substitute that person for Ms Katharina Pillay in terms of rule 15 of the Uniform Rules of Court.
- 7 The second respondent is MS KATHARINA PILLAY ("Councillor Pillay") who is also cited in her official capacity as a councillor of ICASA. ICASA appointed a Special Committee on Market Consolidations ("the Special Committee") to make recommendations in relation to the matter that forms the subject matter of this review application, with Councillor Pillay as its chairperson. Councillor Pillay is cited by virtue of any interest she may have in the relief sought in the present application.
- 8 The third respondent is THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ("ICASA"), which has its principal place of

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business at Blocks A, B, C and D, Pinmill Farm, 164 Katherine Street, Sandton. ICASA made the decision that forms the subject matter of this review, after receiving a recommendation from the Special Committee.

- 9 The fourth respondent is NEOTEL (PTY) LTD ("Neotel"), a company duly incorporated in terms of the company laws of South Africa with its principal place of business at 4A Old Pretoria Road, Halfway House, Midrand.
- 10 The fifth respondent is VODACOM (PTY) LTD ("Vodacom"), a company duly incorporated in terms of the company laws of South Africa with its principal place of business at Vodacom Corporate Park, 082 Vodacom Boulevard, Vodavally, Midrand.
- 11 The sixth respondent is TELKOM SA SOC LIMITED ("Telkom"), a state-owned company with its principal place of business at 61 Oak Avenue, Highveld, Centurion.
- 12 The seventh respondent is CELL C (PTY) LTD ("Cell C"), a company duly incorporated in terms of the company laws of South Africa with its principal place of business at The Waterfall Campus, Corner Maxwell Drive and Pretoria Main Road, Midrand.
- 13 The eighth respondent is THE INTERNET SERVICE PROVIDERS ASSOCIATION with its principal place of business at c/o Elaine Zinn, 85 Allen Road, Glen Austin, Midrand.



- 14 The ninth respondent is THE WIRELESS ACCESS PROVIDERS ASSOCIATION with its principal place of business at 92 McGillivray Road, Glenferness AH, Midrand.
- 15 The tenth respondent is DIMENSION DATA (PTY) LTD t/a INTERNET SOLUTIONS, a company duly incorporated in terms of the company laws of South Africa with its principal place of business at Le Mans Building, 57 Sloane Street, Bryanston.
- 16 The eleventh respondent is CRYSTAL WEB (PTY) LTD, a company duly incorporated in terms of the company laws of South Africa with its principal place of business at 7 Masefield Street, Farrarmere, Benoni.
- 17 The twelfth respondent is THE MINISTER OF COMMUNICATIONS who is jointly vested with the powers to administer the provisions of the Electronic Communications Act 36 of 2005. This application will be served on the twelfth respondent c/o the State Attorney, Pretoria.
- 18 The thirteenth respondent is THE MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES who is jointly vested with the powers to administer the provisions of the Electronic Communications Act 36 of 2005. This application will be served on the thirteenth respondent c/o the State Attorney, Pretoria.
- 19 The fourteenth respondent is SEPCO COMMUNICATIONS (PTY) LTD ("Sepco"), a company duly incorporated in terms of the company laws of South



Africa with its physical address at 269 Oxford Road, Illovo. Sepco is a shareholder in Neotel.

- 20 The fifteenth respondent is VSNL SNOSPV PTE LIMITED ("VSNL"), a company duly incorporated in terms of the company laws of South Africa with its physical address at c/o 39 Ferguson Road, Corner Rivonia and Ferguson Roads, Illovo. VSNL is a shareholder in Neotel.
- 21 The sixteenth respondent is NEXUS CONNEXION SA (PTY) LTD ("Nexus"), a company duly incorporated in terms of the company laws of South Africa with its physical address at 30 Waterford Office Park, Corner Witkoppen and Waterford Drive, Fourways. Nexus is a shareholder in Neotel.
- 22 The second and fourth to sixteenth respondents are cited by virtue of any interest they may have in the relief sought in this application. No relief is sought against them, save for a cost order in the event of opposition.

#### THE TELKOM REVIEW

- 23 On 16 July 2015, Telkom launched an application out of this Honourable Court under case number 55311/15 in which it seeks to review and set aside the same decision of ICASA that forms the subject matter of the present application. Telkom's application has two parts. Part A seeks an order on an urgent basis that ICASA's decision "is suspended and that no effect may be given thereto in any form or shape" pending the final determination of Part B. Part B seeks to review and set aside ICASA's decision.

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- 24 I shall refer to the application brought by Telkom as "the Telkom application" or the "Telkom review", and to the present application as "the MTN application" or the "MTN review".
- 25 MTN has been cited as the sixth respondent in the Telkom application.
- 26 On 22 July 2015, MTN's attorney addressed a letter to Telkom's attorney, a copy of which is annexed as **GDV1**. The letter stated that MTN did not intend opposing Part A of the Telkom application or the relief in Part B. The letter also indicated that MTN was considering its position as to the nature and extent of its participation going forward and reserved its rights to initiate such proceedings or deliver such papers as it deemed to be appropriate in due course.
- 27 Subsequent to the launch of the Telkom application, correspondence was exchanged between the parties about when the matter may be heard. Telkom also approached the Deputy Judge President ("the DJP") to seek a special allocation. I do not wish to lengthen the papers in this application unduly by annexing all of the correspondence to this affidavit. It suffices to say that the correspondence culminated in a letter from the DJP calling all the parties involved in the Telkom application to a meeting in his chambers on 10 September 2015.
- 28 In advance of that meeting, MTN's attorneys wrote to the DJP on 31 August 2015 to inform him of MTN's intention to discuss, at the meeting held on 10 September, a timetable to consolidate Part B of the Telkom application with the

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MTN application and a similar review which Cell C had indicated it intended to launch ("the Cell C review"). This letter is annexed as **GDV2**.

- 29 The meeting with the DJP took place on 10 September 2015. I am informed that, at the meeting, the DJP heard representations from the legal teams representing the main parties to the reviews (being Telkom, MTN, Cell C, Vodacom and Neotel [who were represented by the same legal team] and ICASA). Having heard the parties, the DJP indicated that he would make the following directive:

- 29.1 The three review applications would be heard together on 10, 11 and 12 November 2015. In other words, the hearing will deal with Part B of the Telkom review, the MTN review and the Cell C review on a consolidated basis. (As I understand it, Part A of the Telkom application has fallen away.)
- 29.2 The non-confidential Rule 53 record in the Telkom review would stand as the review record in all three review applications. (I return to discuss the review record in more detail below.)
- 29.3 ICASA would provide all of the parties with the confidential review record by Monday 14 September 2015. (I return to discuss why this aspect of the directive was necessary below.)
- 29.4 MTN and Cell C would launch their reviews by Monday 21 September 2015.

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- 29.5 Because MTN and Cell C would have access to the review record before launching their reviews, the time periods and processes envisaged by rule 53 of the Uniform Rules would not be applicable.
- 29.6 ICASA, Vodacom and Neotel would file their answering affidavits by Monday 12 October 2015.
- 29.7 Telkom, MTN and Cell C would file their replying affidavits by Monday 19 October 2015.
- 29.8 Telkom, MTN and Cell C would file their heads of argument by Monday 26 October 2015.
- 29.9 ICASA, Vodacom and Neotel would file their heads of argument by Friday 30 October 2015.
- 30 The notice of motion in the MTN application refers to the time periods contained in the DJP's directive.

## THE RECORD OF DECISION

### *The Telkom Record*

- 31 By the time of the meeting with the DJP, ICASA had already filed the Rule 53 Record in the Telkom review ("the Telkom Record"). It runs to more than 1000 pages and is in the possession of all the parties to the Telkom review. The parties to the Telkom review are also the parties to the MTN review.



- 32 Since the Telkom review and the MTN review are directed at the same decision, the Telkom Record is also the record of the decision that forms the subject matter of the MTN review.
- 33 I ask that the Telkom Record be treated as a notional annexure to this affidavit and incorporated into MTN's founding papers as a result. At the meeting with the DJP, it was agreed that the Telkom Record would constitute the record in the MTN review and the Cell C review (and that the existing index and pagination would apply to all three reviews). It was agreed that it would therefore not be necessary for the Telkom record physically to be attached to this affidavit. MTN will make a copy of the Telkom Record available to any party on request.

***The Telkom Supplementary Record***

- 34 MTN's attorney of record, Webber Wentzel, received the Telkom Record on 14 August 2015. On 17 August 2015 Webber Wentzel addressed an email to Mkhabela Huntley Adekeye Inc ("MHA"), acting for ICASA. It is annexed here as **GDV3**. As may be seen from the email, it listed a series of documents that were not included as part of the Telkom Record. Webber Wentzel called on MHA to provide those documents.
- 35 On 24 August 2015, Telkom's attorneys ("Werksmans") wrote a letter to MHA in which additional documentation was sought. I annex it as **GDV4**. On the same day, MHA replied to Webber Wentzel's email to say that ICASA would respond formally in due course. This response is **GDV5**.

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- 36 On 26 August 2015, Webber Wentzel sent a further email to MHA to ask that all additional documents provided to Telkom also be provided to MTN. That email is **GDV6**.
- 37 On 31 August 2015, Werksmans addressed a further letter to MHA. In addition to dealing with the fact that a supplementary record had been promised to Telkom, the letter deals with a telephone conversation that appears to have taken place between Mr Corlett Manaka, acting for Telkom, and Mr Lesley Mkhabela of MHA. The letter records that MHA had indicated that it would not provide legal opinions furnished to ICASA that are mentioned in the Telkom Record but do not form part of it and recordings or transcripts of meetings held by the Special Committee. Werksmans took the view that it was impermissible for ICASA to refuse to provide that documentation and threatened interlocutory proceedings in the event of ICASA failing to hand over that material. The letter is annexed as **GDV7**.
- 38 On 1 September 2015, MHA replied to Telkom. Its reply is annexed as **GDV8**. MHA attached an annexure to its letter, providing a breakdown of ICASA's responses to Telkom's requests for documentation. As may be seen from the annexure, the responses may be divided into: first, indications that certain requested documents do not exist; secondly, refusals to provide certain documents because they are alleged to be privileged and; thirdly, indications that the requested documents form part of the supplementary record furnished by MHA. MHA also informed Werksmans that it had embarked on the process of preparing a confidential record by asking for all of the affected parties to sign

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confidentiality undertakings. MHA undertook to revert to Telkom once it had received responses from those parties.

39 Together with MHA's letter of 1 September 2015, MHA provided a supplementary record to Telkom (and to MTN and Cell C, which were copied on the letter). The supplementary record was indexed and paginated. I shall refer to it below as the "Telkom Supplementary Record".

40 I record that the Telkom Supplementary Record is to be treated in the same way as the Telkom Record and everything that I have said above (see paragraph 33 above) in respect of the Telkom Record applies equally to the Telkom Supplementary Record (including the fact that, at the meeting with the DJP, it was agreed that the Telkom Supplementary Record would form part of the review records in the MTN and Cell C reviews).

### ***The Telkom Confidential Record***

41 At the meeting with the DJP, the representatives of MTN and Cell C explained that the failure of ICASA to provide the confidential record was prejudicing the efficient conduct of the matter. The representatives of MTN and Cell C indicated that they were willing to forgo reliance on Rule 53 because most of the review record had been supplied to them, but that this would be dependent on ICASA urgently providing the confidential record to the parties (all of whom recorded a willingness to sign the normal confidentiality undertakings). It was in this context that ICASA agreed to provide the confidential record to the parties by 14 September 2015.

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- 42 I am advised that, at the meeting with the DJP, ICASA explained that the reason why it had not provided the confidential record to date was that it was awaiting the consent of Vodacom. I am at a loss to understand this explanation because the consent of Vodacom was irrelevant to ICASA's obligation to make available the confidential record in terms of Rule 53(4) subject to the normal confidentiality regime. For example, ICASA's prior failure to furnish the report of Acacia Economics can obviously not be explained on the basis that Vodacom had not given its consent, since the Acacia Report had been obtained by ICASA and not by Vodacom.
- 43 I am advised that, on 15 September 2015, ICASA's attorneys made available to Webber Wentzel an indexed and paginated bundle styled as a confidential record in the Telkom review. I shall refer to it as "the Telkom Confidential Record".
- 44 I note that the Telkom Confidential Record was made available to Webber Wentzel one day later than required by the DJP's directive.
- 45 I record that the Telkom Confidential Record is to be treated in the same way as the Telkom Record and everything that I have said above (see paragraph 33 above) in respect of the Telkom Record applies equally to the Telkom Confidential Record.
- 46 I have not had sight of the Telkom Confidential Record. I am informed that its contents will be addressed in a separate affidavit to be deposed to by MTN's attorney of record, Mr Stuart McCafferty.

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## BACKGROUND TO THE IMPUGNED DECISION

47 I turn now to describe the events that gave rise to the decision that forms the subject matter of this application.

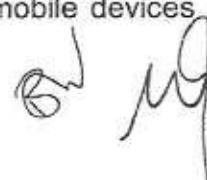
### *Mobile telecommunications*

48 MTN is a company that is predominantly a mobile network operator. It offers fixed-line telecommunication services and mobile telecommunications services (colloquially known as "cell-phone services") to its customers in South Africa. MTN is licensed to do so in terms of the ECA.

49 Vodacom, Cell C and Telkom are the other entities that provide mobile telecommunications services in South Africa. They are all licensed to do so in terms of the ECA. (Telkom provides mobile telecommunications services through a division known as Telkom Mobile. Telkom Mobile is not a juristic person; it is merely an operating division of Telkom. Where it is necessary to distinguish the mobile business of Telkom from the fixed-line business, I shall refer to "Telkom Mobile".)

50 Vodacom is the largest of the four mobile network operators (whether size is measured in terms of number of subscribers, number of sites or revenue). MTN is the second largest of the four mobile network operators. Cell C is the third largest, and Telkom Mobile the smallest.

51 Each mobile network operator might apply a number of different mobile communication technologies simultaneously, in order to accommodate the different forms of information that are communicated between mobile devices.

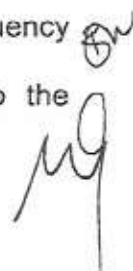


and the network (such as voice calls, text messages and internet data). The different mobile communication technologies include Second Generation (2G), Third Generation (3G) and Long Term Evolution (LTE, sometimes also referred to as "4G"). These can be used on any of the assigned bands in the radio frequency spectrum, although the nature of radiofrequency spectrum will sometimes dictate which frequencies are preferable for particular technologies. Frequency is inversely proportional to coverage area (i.e. higher frequencies achieve smaller coverage areas from a given antenna location). 2G, the earliest technology which is primarily used for voice communications and was rolled out when a primary goal was to maximise coverage, is typically implemented over lower frequency spectrum. LTE, the newest technology which is primarily used for data communications and is being rolled out with a primary goal to provide high data capacity, is typically (but not exclusively) implemented over higher frequency spectrum.

### ***Spectrum***

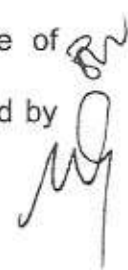
52 "Radio frequency spectrum" is defined in the ECA as "the portion of the electromagnetic spectrum used as a transmission medium for electronic communications and broadcasting." The electromagnetic spectrum is commonly divided into seven broadly defined groups: radio spectrum, terahertz, infrared, visible light, ultraviolet, X-rays and gamma rays. Radio spectrum is the lowest portion of the electromagnetic spectrum, having a frequency below 3000 GHz.

53 ICASA follows a process, in terms of the ECA, to allocate radio frequency bands to different radio communication services. The ECA refers to the



allocation of frequency bands and defines "allocation" as "the entry in the Table of Frequency Allocations of a given frequency band for the purpose of its use by one or more terrestrial or space radio-communication services or radio astronomy service under specified conditions". Section 34 of the ECA speaks of the "radio frequency plan". It provides that the Minister of Communication "must approve the national radio frequency plan developed by [ICASA], which must set out the specific frequency bands designated for use by particular types of services, taking into account the radio frequency spectrum bands allocated to the security services." The term "radio frequency plan" is defined to make clear that it includes the Table of Frequency Allocations.

- 54 The current version of the National Radio Frequency Plan was published by ICASA in the Government Gazette on 28 June 2013 ("the radio frequency plan"). The main purpose of the radio frequency plan is to show which radio communication services may operate in the different frequency bands.
- 55 The International Telecommunications Union ("the ITU") is the United Nations agency that deals with the allocation of spectrum at an international level. It has divided the world into regions (South Africa is in Region 1) and allocates frequency for the use of different forms of radio-communication in terms of the ITU Radio Regulations, 2012 (an international treaty). In terms of the definition of "radio frequency plan" in the ECA, ICASA is obliged to take account of the ITU's allocations when preparing the national frequency plan.
- 56 The term "International Mobile Telecommunications ("IMT") Systems" is defined by the ITU as "mobile systems that provide access to a wide range of telecommunication services including advanced mobile services, supported by



mobile and fixed networks, which are increasingly packet-based". GSM, HSPA and LTE are international standards for the provision of mobile voice and data services. In other words, they are IMT standards.

57 The ITU allocates particular frequency bands to IMT standards. One of the reasons for this is that mobile handset devices are manufactured internationally and must be capable of receiving radio signals in different countries. In the absence of IMT standardisation, mobile handsets would function in some countries but not in others.

58 The IMT standards of the ITU are, in turn, included in ICASA's radio frequency plan. The radio frequency plan indicates that the following frequency bands may be used for IMT:

- **Below 1 GHz:** 450 MHz, 700 MHz, 800 MHz, 850 MHz; and 900 MHz.
- **Above 1 GHz:** 1800 MHz, 2100 MHz, 2100 MHz (TDD), 2300 MHz, 2600 MHz and 3.5 GHz.

59 In short, the position is as follows:

59.1 The ITU determines which frequency bands may be used for which forms of radio communication (including IMT communication).

59.2 ICASA then applies that determination to allocate frequency for IMT communication in South Africa.

59.3 Once the frequency has been assigned to IMT communication, ICASA assigns bands of that frequency to the different mobile operators.



- 60 Attached to this affidavit is a confirmatory affidavit of Mr Geoffrey Blake, MTN's Senior Manager: Technical Regulation and Mandated Provisioning, who confirms the correctness of the facts set out in paragraphs 51 to 59 above.

***The Neotel/Vodacom Application***

- 61 In June 2014, Neotel, Vodacom, Nexus, Sepco and VSNL applied to ICASA for various permissions in terms of the ECA. I shall refer to these applications collectively as "the Neotel/Vodacom Application". The non-confidential part of the Neotel/Vodacom Application is included in the Telkom Record at page 15ff.

- 62 The Neotel/Vodacom Application had several components:

62.1 In the first instance, the parties sought ICASA's permission in terms of section 13(1) of the ECA to transfer control of Neotel's individual electronic communications network service (IECNS) licence and individual electronic communications service (IECS) licence to Vodacom. Although these were separate applications, I shall refer to them collectively as "the EC application".

62.2 In the second instance, the parties sought ICASA's permission in terms of section 31(2A) of the ECA to transfer control of Neotel's radio frequency spectrum licences to Vodacom. Some of the spectrum licences allowed Neotel to use spectrum that is allocated for IMT. Insofar as the application in terms of section 31(2A) related to spectrum assigned to Neotel for IMT (i.e. spectrum in the 850 MHz, 1800 MHz



and 3.5 GHz frequency bands), I shall refer to it as "the IMT spectrum application".

63 I point out that the 850 MHz band is sometimes referred to as the 800 MHz band in documents contained in the Telkom Record. However, my understanding is that the 800 MHz band is currently used by analogue terrestrial television broadcasters (for example, e.tv and the SABC) and will be made available for mobile communication in due course (once the conversion to Digital Terrestrial Television is complete). In accordance with my understanding of the correct position, I shall refer to the relevant band of Neotel's spectrum as the 850 MHz band in this affidavit. References in my affidavit and in the notice of motion to the 850 MHz band should be taken to include the 800 MHz band that is referred to in some documents in the Telkom Record.

64 I have not had sight of the commercial agreement that gave rise to the Neotel/Vodacom Application, but have been informed that it forms part of the Telkom Confidential Record.

***MTN's opposition to the Neotel/Vodacom Application***

65 On 15 October 2014, MTN made written submissions to ICASA in opposition to the Neotel/Vodacom Application. MTN's submissions are included in the Telkom Record at page 105ff.

66 On 16 January 2015, MTN appeared at the public hearing that had been convened by ICASA to consider the Neotel/Vodacom Application:

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- 66.1 The oral representations made by MTN appear at pages 579 to 631 of the Telkom Record.
- 66.2 The PowerPoint presentation that formed part of MTN's representations is included in the Telkom Record at page 253 to 262 ("the MTN Presentation"). I was present when MTN gave its presentation, and was one of the people who made submissions. I confirm the contents of the MTN Presentation.
- 67 In its oral submissions at the public hearing, MTN objected to the approval of the IMT spectrum application on grounds that may be summarised as follows:
- 67.1 Section 2(f) of the ECA provides that one of the objects of the ECA is to "promote competition within the ICT sector". MTN submitted that it would undermine this object if ICASA were to permit Vodacom, an already dominant firm in the mobile market, to acquire control of Neotel's IMT spectrum licences.
- 67.2 This control would permanently remove an independent competitor (Neotel) and would gift Vodacom with an unmatched structural cost and time-to-market advantage that is not derived from Vodacom's investment or innovation, but rather from the private commercial reallocation of the scarce resource of spectrum.
- 67.3 The strengthening of an already dominant firm in this manner:
- would significantly and permanently discourage competition by smaller rivals;



- would reduce the bargaining power of smaller operators in gaining access to the dominant Vodacom network;
- would give Vodacom the freedom to compete less vigorously; and
- would give Vodacom the unique discretion to dictate whether consumers should see any portion of the value created by the Neotel IMT spectrum.

67.4 This would irreparably harm competition in the mobile telecommunications market, and therefore the interests of consumers.

68 MTN contended at the public hearing that the proposed transaction should only be allowed to proceed if Neotel's IMT spectrum were to be returned for future allocation in accordance with Government policy and ICASA regulations. MTN submitted that ICASA might achieve the return of Neotel's IMT spectrum in one of two ways:

68.1 *First:* ICASA might grant the EC application but refuse the IMT spectrum application. In such an event, Vodacom would be permitted to acquire control of Neotel's IECNS and IECS licences, but would not be permitted to acquire control of Neotel's IMT spectrum licences. This would mean that, if Neotel wished to implement the proposed transaction, it would have to return its IMT spectrum licences to ICASA. Unless Neotel were to do so, the implementation of the transaction would contravene section 31(2A) of the ECA.



68.2 *Second*: ICASA might approve the EC Application subject to a condition that Neotel voluntarily returns its IMT spectrum licences to ICASA. In such an event, the need for ICASA to approve the IMT spectrum application would fall away but Vodacom would be prohibited from acquiring control of the IECNS and IECS licences until such time as Neotel were to return its IMT spectrum licences to ICASA.

69 After the public hearing, MTN lodged written submissions with ICASA on 30 January 2015. A copy of the submissions is included in the Telkom Record at pages 717 to 722.

***The impugned decision***

70 On 11 June 2015, the Council of ICASA resolved that "the transaction be and is hereby approved", and that "the letter of approval be drafted, circulated to members, for Chairperson's signature" (page 968 of the Telkom Record).

71 On 2 July 2015, ICASA published General Notice 684 of 2015 in Government Gazette No. 38951 ("Notice 684"). Notice 684 forms part of the Telkom Record at page 976ff:

71.1 Notice 684 states that application had been made to ICASA in terms of section 13(1) and section 31(2A) of the ECA for approval in respect of the proposed acquisition by Vodacom of the entire issued share capital in Neotel. Notice 684 refers to this as "the Application".

71.2 Notice 684 goes on to state that ICASA "has approved the Application" (para 4).

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71.3 Notice 684 then states that ICASA's approval of the Application is subject to what is described as "the BEE Requirement" and "the USA Roll-out Condition" (paragraph 4). The Notice invites interested parties to lodge representations regarding the period that should be allowed for compliance with the BEE Requirement as well as the target and deadlines that should be imposed for the USA Roll-out Condition.

72 I shall refer to the decision described in Notice 684 as "the impugned decision".

73 In response to the invitation contained in Notice 684, MTN made written representations to ICASA on 30 July 2015. MTN's representations have not been included in the Telkom Record and I therefore attach a copy as **GDV9**.

74 On 13 August 2015, ICASA published reasons for the impugned decision. The reasons are included in the Telkom Record at pages 991 to 1037 ("the Reasons Document").

#### **THE IMPUGNED DECISION WAS IRREGULAR**

75 MTN submits that the impugned decision should be reviewed and set aside for the reasons that follow.

#### ***ICASA misunderstood the approval that it purported to give***

76 The Telkom Record contains (at page 968) a minute of a meeting held by ICASA on 11 June 2015. Item 2 of the minute is entitled "acquisition of Neotel by Vodacom", and records that "the transaction be and is hereby approved".



- 77 The minute indicates that ICASA purported to approve "the acquisition of Neotel by Vodacom". However, ICASA had never been asked to approve "the acquisition of Neotel by Vodacom" and had no power in law to give such approval.
- 78 ICASA's confusion had arisen months earlier at the commencement of the process. On 15 September 2014, ICASA had published a notice in Government Gazette 37998 inviting interested parties to make representations on the application. It forms part of the Telkom Record at page 46. As may be seen from the notice, ICASA invited interested parties to comment on an "Application for approval of the acquisition of Neotel (Pty) Ltd by Vodacom SA (Pty) Ltd".
- 79 ICASA's error was perpetuated when Notice 684 was published:
- 79.1 Notice 684 (Telkom Record page 976) correctly records that the Neotel/Vodacom Application had been made in terms of section 13(1) and section 31(2A) of the ECA. Section 13(1) provides for ICASA to give permission for transfer of control of an individual licence. Section 31(2A) provides for ICASA to give permission for transfer of control of a radio frequency spectrum licence.
- 79.2 ICASA was therefore required to consider whether it should give permission for the transfer of control of Neotel's IECS, IECNS and spectrum licences to Vodacom in terms of section 13(1) and section 31(2A).



- 79.3 However, ICASA misunderstood this since it stated in Notice 684 that it had made a decision to give approval "in respect of the proposed acquisition by Vodacom of the entire issued share capital of Neotel" (para 1). In other words, ICASA made the impugned decision on the basis that it was being asked to approve Vodacom's acquisition of the share capital in Neotel. This was a gross irregularity: ICASA had no power to approve Vodacom's acquisition of shares in Neotel and had never been asked to approve such an acquisition.
- 80 It is the competition authorities that were required (and are still required) to approve Vodacom's acquisition of the share capital in Neotel, since it amounts to a large merger in terms of the Competition Act 89 of 1998 ("the Competition Act"):
- 80.1 At the time when the impugned decision was made (and to the knowledge of ICASA), Neotel and Vodacom had already applied to the Competition Commission ("the Commission") for their merger to be approved in terms of the Competition Act.
- 80.2 A Memorandum of Agreement has been concluded between ICASA and the Commission in order to regulate how the two bodies are required to interact with one another in circumstances of overlapping jurisdiction (Telkom Record at page 1ff). The Telkom Record indicates that the Commission and ICASA did indeed engage with one another in relation to the Vodacom/Neotel matter. I shall make reference to that interaction below.

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- 80.3 On 30 June 2015, the Commission made a final recommendation that the Neotel/Vodacom merger should be approved subject to conditions. I attach a non-confidential version of the Commission's recommendation as **GDV10**.
- 80.4 The Neotel/Vodacom merger is set down for hearing before the Competition Tribunal in November 2015.
- 80.5 It is the Competition Tribunal – not ICASA – that is required to decide whether to approve the proposed acquisition by Vodacom of the entire issued share capital of Neotel. ICASA misunderstood this when it made the impugned decision.
- 81 The Neotel/Vodacom Application was quite clear about the scope of the approval sought from ICASA. Paragraph 3 of the application, which appears on page 16 of the Telkom Record, set out the approvals sought. It accords with the summary of Notice 684 in paragraph 79.1 above. The position was also made clear in the oral presentation made on behalf of Vodacom and Neotel in the ICASA public hearing (see pages 183 and 186 of the Telkom Record). There was no reason, therefore, for ICASA to be confused about what it had been asked to approve.
- 82 In sum, ICASA entirely misconceived the decision that it was required to make when it purported to approve "the acquisition of Neotel by Vodacom". The impugned decision should therefore be reviewed and set aside on the grounds that:

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- 82.1 it was not authorised by the empowering provision (within the meaning of section 6(2)(f)(i) of PAJA);
- 82.2 it was not rationally connected to the purpose of the empowering provision (within the meaning of section 6(2)(f)(ii)(bb) of PAJA); and
- 82.3 it was materially influenced by an error of law (within the meaning of section 6(2)(d) of PAJA).

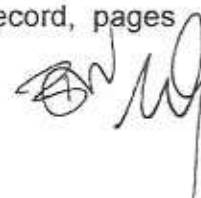
***ICASA failed to apply the 2015 Spectrum Regulations***

- 83 On 30 March 2015, ICASA published the Radio Frequency Spectrum Regulations, 2015 ("the 2015 Spectrum Regulations"). They are annexed as **GDV11**.
- 84 The 2015 Spectrum Regulations came into force on 1 April 2015. They were therefore in operation when the impugned decision was made. I submit that ICASA was required to apply the 2015 Spectrum Regulations when it made the impugned decision.
- 85 Regulation 15(8) of the 2015 Spectrum Regulations provides that ICASA will not approve "the assignment, ceding or transfer of control of a radio frequency spectrum licence . . . [i]f such transaction will not promote competition." I shall submit below that, far from promoting competition, the Vodacom/Neotel transaction will impede competition. The Telkom Record makes it plain that ICASA failed to apply its mind to Regulation 15 of the 2015 Spectrum Regulations when it made the impugned decision.

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86 More generally, ICASA misdirected itself on the question whether the 2015 Spectrum Regulations were applicable to the Neotel/Vodacom Application at all:

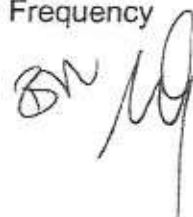
- 86.1 In the Telkom Supplementary Record at page 130ff, there is an internal memorandum written by certain members of the Special Committee entitled "Analysis of Spectrum Issues – Neotel/Vodacom Transaction". Its purpose appears to be to assess the different representations made by interested parties on the issue of Neotel's spectrum allocation and to make a recommendation on the issue of spectrum. This would appear to be consistent with a statement made in the minutes of a meeting of the Special Committee that took place on 22 April 2015 (see Telkom Record at page 894) in which it is recorded that the Special Committee requested the "spectrum team to review their submission to address issues related to spectrum sharing and the potential impact of the [2015 Spectrum Regulations] if any" (Telkom Record at page 898).
- 86.2 The concluding paragraph of that memorandum states that "[i]n terms of the [2015 Spectrum Regulations] there are no sufficient grounds for the disapproval of the application for the transfer of control of Neotel's radio frequency spectrum licenses to Vodacom. It is therefore recommended that the application be approved" (Telkom Supplementary Record at page 148).
- 86.3 Attached to the memorandum is a summary entitled "The impact of the amendment of Radio Frequency Spectrum Regulations on the Neotel/Vodacom transaction" (Telkom Supplementary Record, pages



149-150). The summary includes a discussion of various legal provisions that are relevant to the Neotel/Vodacom transaction. There is a designated section of the document, in paragraph 1.2, which deals with the 2015 Spectrum Regulations. It purports to set out, and discuss, the relevant provisions of the regulations. Remarkably, there is no mention of Regulation 15 at all. Even more remarkably, the document concludes that the 2015 Spectrum Regulations "will have no effect in the current transaction [sic]" (Telkom Supplementary Record, page 150).

- 86.4 In the Telkom Record, there is a memorandum from Councillor Pillay to the ICASA council (see Telkom Record at page 913). The introduction to that memorandum explains that its purpose is to "recommend that Council approve" the Neotel/Vodacom Application. In the memorandum, there is a section that deals with the question of whether ICASA can "consider the application in the absence of regulations" (see Telkom Record at page 915). There is then a specific discussion of whether the "Radio Frequency Spectrum Regulations" are applicable to the Neotel/Vodacom Application. Because of its importance to this review, I quote the relevant extract here in full (see Telkom Record at pages 915-6):

"The Authority also considered whether – given that the Radio Frequency Spectrum Regulations apply to transfer of licences – they also apply to transfer of control of spectrum licences. This question arises because section 31(2A), which regulates the transfer of control of spectrum licences, as opposed to the transfer of spectrum licences, came into force in 2014 (May 2014 amendment to the ECA), after the Radio Frequency Spectrum Regulations were promulgated.



The [Special] Committee concluded that the Radio Frequency Spectrum Regulations therefore do not apply to transfer of control of spectrum licences as the legislative amendment supersedes the regulation."

- 86.5 Although it is not entirely clear, the reference in Councillor Pillay's memorandum to the "Radio Frequency Spectrum Regulations" would appear to be a reference to the 2011 Regulations. If that were not the case, then it would have made no sense to say that section 31(2A) of the ECA came into force after the promulgation of the regulations. If that is correct, then Councillor Pillay failed to have regard to the 2015 Spectrum Regulations when she made her recommendation to the ICASA council to approve the Neotel/Vodacom Application.
- 86.6 The memorandum of the spectrum team is undated. The memorandum of Councillor Pillay is dated 15 May 2015. I assume that the memorandum of the spectrum team was finalised sometime between 22 April 2015 (the date when the request was made by the Special Committee to the spectrum team to review its recommendation on spectrum) and 15 May 2015 (when Councillor Pillay's memorandum was finalised). This is because Councillor Pillay's memorandum makes a final recommendation to the council of ICASA, which presumably would have taken into account all of the research and work done by members of the Special Committee.
- 86.7 In the Telkom Record, there is a further memorandum by Councillor Pillay in which she updated the council of ICASA on "the status of the application for acquisition of Neotel by Vodacom" (Telkom Record at



page 942). It is dated 5 June 2015. That memorandum confirms that Councillor Pillay failed to have regard to the 2015 Spectrum Regulations because she states that there is "[n]o regulatory framework outlining the process, form and criteria for application [sic]" (Telkom Record at page 949). Further on in the memorandum, she describes one of the "limitations" of the spectrum-approval process as being the "[a]bsence of comprehensive regulatory framework [sic]" (Telkom Record at page 955).

86.8 The three memoranda referred to above give rise to the following conclusions:

86.8.1 The spectrum team was aware of the existence and applicability of the 2015 Spectrum Regulations but completely overlooked Regulation 15, which was the crucial provision.

86.8.2 Councillor Pillay overlooked the existence of the 2015 Spectrum Regulations when making her recommendation to the council of ICASA.

86.8.3 ICASA failed to have regard to the 2015 Spectrum Regulations when it made the impugned decision.

87 It may be seen from the discussion above that the impugned decision was vitiated by total confusion on the part of ICASA about the applicability of the 2015 Spectrum Regulations. The Special Committee was the body that was specifically appointed to advise ICASA on how to respond to the

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Neotel/Vodacom Application. Part of that Committee – crucially, the part mandated to deal with spectrum – was aware of the existence of the 2015 Spectrum Regulations but failed to take account of the regulation that was directly applicable to the Neotel/Vodacom Application. The chairperson of that Committee appears to have been oblivious to the existence of the 2015 Spectrum Regulations.

88 In the result, I submit that the impugned decision should be reviewed and set aside on the grounds that:

88.1 it was materially influenced by an error of law as envisaged by section 6(2)(d) of PAJA because ICASA incorrectly formed the view that the 2015 Spectrum Regulations were not applicable to the Neotel/Vodacom Application;

88.2 since it is clear from the memoranda discussed above that the applicability of Regulation 15 was entirely overlooked by ICASA, the decision was vitiated by the failure of ICASA to consider a relevant consideration (as envisaged by section 6(2)(e)(iii) of PAJA);

88.3 because the impugned decision was characterised by total confusion on the part of ICASA about the applicability of the 2015 Spectrum Regulations, it was a decision that no reasonable decision-maker could have made (as envisaged by section 6(2)(h) of PAJA).

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*The conditions purportedly imposed by ICASA*

89 Notice 684 states that ICASA "has approved the Transaction subject to" the "BEE Requirement" and the "USA Roll-out Condition" as described in paragraphs 4(a) and 4(b). It goes on to state that ICASA "wishes to determine a reasonable period within which the Applicants should be permitted to ensure compliance with the BEE Requirement" (para 4(a)) and that ICASA was "considering the imposition of" the USA Roll-out Obligation" (para 4(b)). ICASA invited representations from interested parties in relation to these matters.

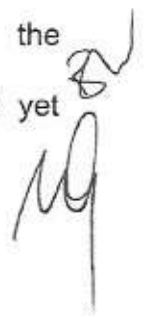
90 I submit that ICASA's approach to the imposition of conditions was irregular for two reasons.

91 The first reason is that it was irrational for ICASA to "approve the Transaction" subject to conditions that it had not finalised:

91.1 If ICASA was of the view that the Neotel/Vodacom Application did not raise any concerns, then it should have given unconditional approval. The fact that ICASA did not do so indicates that it was of the view that the Neotel/Vodacom Application did indeed raise concerns.

91.2 The purpose of the conditions that ICASA purported to impose, was to ameliorate the concerns identified by ICASA. However, the contents of those conditions had not been finalised when the impugned decision was taken (and, indeed, have still not been finalised).

91.3 It was irrational and unreasonable for ICASA to approve the Neotel/Vodacom Application in circumstances where it had not yet



finalised the content of the conditions intended to address its concerns. Unless and until the wording of those conditions is finalised, it would be impossible for ICASA to assess whether the conditions will indeed ameliorate the concerns that it has identified.

91.4 In short, ICASA approved the Neotel/Vodacom Application in circumstances where it was unable to determine whether the imposition of conditions would remove the concerns that it had identified. This meant that the impugned decision was arbitrary within the meaning of section 6(2)(e)(vi) of PAJA; was not rationally connected to the purpose for which it was taken (within the meaning of section 6(2)(f)(ii) of PAJA); and was unreasonable within the meaning of section 6(2)(h) of PAJA.

92 The second reason is that ICASA did not approve the conditions that are referred to in Notice 864:

92.1 Notice 684 states that ICASA "has approved the Application subject to" the "BEE Requirement" and the "USA Roll-out Condition" as described in paragraphs 4(a) and 4(b).

92.2 However, the minute of ICASA's meeting on 11 June 2015 records that "the transaction be and is hereby approved" (page 969 of the Telkom Record). The minute does so after "noting" that "the Council can approve the matter subject to the following conditions: a prerequisite that the BEE requirement be met [and] a rollout obligation subject to public consultation process". It is therefore plain that the Council had no intention of giving unconditional approval for the Neotel/Vodacom

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Application, but nevertheless resolved to do so. In other words, the resolution of the Council failed to reflect the intention of the Council.

- 92.3 This meant that the impugned decision was arbitrary within the meaning of section 6(2)(e)(vi) of PAJA; was not rationally connected to the purpose for which it was taken (within the meaning of section 6(2)(f)(ii) of PAJA); and was unreasonable within the meaning of section 6(2)(h) of PAJA.

***Councillor Batyi's failure to participate in the Special Committee***

- 93 The Telkom Record contains a resolution of ICASA on the Establishment of a Special Committee on Market Consolidations (at page 126). This is the resolution that established the Special Committee. The preamble to the resolution read with clause 2.4 makes it clear that the resolution constituted a delegation by ICASA of its decision-making powers to the Special Committee in terms of section 4(4) of the Independent Communication Authority of South Africa Act 13 of 2000 ("the ICASA Act").
- 94 Section 17 of the ICASA Act deals with standing and special committees. It empowers ICASA to establish special committees such as the Special Committee established in this case. Section 17(2)(a) provides that a Special Committee established in terms of section 17 must, amongst others, consist of "one or more councillors or any member of staff designated by the Council".
- 95 It may be seen from the resolution establishing the Special Committee that ICASA resolved that the Committee would consist of Councillor Pillay and

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Councillor Nomvuyiso Batyi ("Councillor Batyi"). However, Councillor Batyi did not participate in the deliberations of the Special Committee after 19 November 2014:

95.1 The Telkom Record reveals that Councillor Batyi participated in the meeting held on 19 November 2014 (see Telkom Record at page 142) but then did not attend the meetings of 18 December 2014 (Telkom Record at page 157), 14 January 2015 (Telkom Record at page 160) or the public hearings held on 15 and 16 January 2015.

95.2 Councillor Batyi then attended meetings of the Special Committee on 2 and 3 February 2015 and 5 March 2015 but only in the capacity of an observer (Telkom Record at pages 723 and 797).

95.3 Councillor Batyi then appears not to have attended the meetings of 25 March 2015 (see Telkom Record at page 797, in which no mention is made of her whatsoever), 22 April 2015 (Telkom Record at page 894) or 11 May 2015 (Telkom Record at page 909).

96 It is not apparent why Councillor Batyi did not attend the meetings of 18 December 2014 and 14 January 2015. However, the reason for her failure to participate in the deliberations of the Special Committee from 15 January 2015 onwards appears from a minute of the meeting of the Special Committee of 11 May 2015. There, it is explained that Councillor Batyi had been unable to attend the public hearings on 15 and 16 January 2015 and, as a result, ICASA had taken advice from senior counsel to the effect that she should not participate in the deliberations of the Special Committee (Telkom Record at page 914).



97 I am mindful of the fact that, in terms of the resolution described above, a quorum of the Special Committee was one councillor and 50% of the additional members (see clause 2.4.5, Telkom Record at page 128). I do not suggest, therefore, that the Special Committee was not quorate when it made its decision. The proceedings of the Special Committee were nevertheless irregular for the following reasons:

97.1 It was open to ICASA, in terms of section 17(2)(a) of the ICASA Act, to appoint only one councillor to participate in the Special Committee. However, ICASA deliberately chose to appoint two councillors to the Special Committee. It must have done so because it considered both of the councillors to be necessary participants in the process because of their expertise.

97.2 At the level of substance, therefore, it must be accepted that ICASA considered Councillor Batyi to be an essential member of the Special Committee. Once ICASA had taken that decision, it was necessary for Councillor Batyi to participate in the deliberations of the Committee. Her failure to do so deprived the Special Committee of the participation of a member who ICASA wished to participate and to whom ICASA had delegated its decision-making powers. Put differently, ICASA delegated its decision-making powers to two councillors, Councillor Pillay and Councillor Batyi, but only the former in fact acted as ICASA's delegate.

97.3 Although the advice given by senior counsel does not form part of the Telkom Record, I can only assume that the decision was made to exclude Councillor Batyi because of her unavailability for the public

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hearings held on 15 and 16 January 2015. I assume that senior counsel took the view that, because she had not attended the public hearings, it would be improper for her to participate in the deliberations of the Special Committee. This line of reasoning is incorrect:

97.3.1 It is unclear why the public hearings were scheduled at a date and time when one of the two members of the Special Committee was unavailable. It surely would have been possible for the diaries of the relevant members to be coordinated to ensure their attendance.

97.3.2 But even assuming that there were some or other unexpected reason for Councillor Batyi's absence, the advice is still flawed. As may be seen from the Telkom Record, the entire public hearing was transcribed. The record of the hearing is immaculate and I have drawn from it heavily in preparing this affidavit. It is difficult to understand, therefore, why Councillor Batyi could not have read the transcript and then participated in the deliberations of the Special Committee.

97.3.3 There was, therefore, no rational basis for Councillor Batyi to be excluded from the decision-making process of the Special Committee.

98 As a result of what has been said above, I submit that the impugned decision is vitiated because:

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- 98.1 a mandatory and material condition prescribed by an empowering provision (in this case, contained in the delegation of ICASA to the Special Committee) was not complied with, as envisaged by section 6(2)(b) of PAJA;
- 98.2 to the extent that the Special Committee and/or ICASA was labouring under the impression that Councillor Batyi ought to have been excluded from the decision-making processes because she did not attend the public meetings, it was vitiated by an error of law (see section 6(2)(d) of PAJA);
- 98.3 the decision of the Special Committee to exclude Councillor Batyi from its deliberations was unreasonable within the meaning of section 6(2)(h) of PAJA.

### ***Conclusion***

- 99 For the reasons given above, I submit that the impugned decision should be reviewed and set aside on the following grounds:

- 99.1 it is irrational and therefore violates the principle of legality and the rule of law entrenched in section 1(c) of the Constitution;
- 99.2 a mandatory and material condition prescribed by an empowering provision was not complied with (as envisaged by section 6(2)(b) of PAJA);

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- 99.3 it was not authorised by the empowering provision (within the meaning of section 6(2)(f)(i) of PAJA);
- 99.4 it was materially influenced by errors of law (as envisaged in section 6(2)(d) of PAJA);
- 99.5 ICASA failed to take account of relevant considerations (as envisaged in section 6(2)(e)(iii) of PAJA);
- 99.6 ICASA had regard to irrelevant considerations (within the meaning of section 6(2)(e)(iii) of PAJA);
- 99.7 the impugned decision was not rationally connected to the information before ICASA, the purpose of the empowering provision or the reasons given for it by ICASA (within the meaning of section 6(2)(f)(ii) of PAJA);
- 99.8 the impugned decision was unreasonable within the meaning of section 6(2)(h) of PAJA;
- 99.9 the impugned decision was taken arbitrarily within the meaning of section 6(2)(e)(vi) of PAJA;
- 99.10 the impugned decision is otherwise unconstitutional or unlawful within the meaning of section 6(2)(i) of PAJA.

100 This is the relief sought in prayer 1 of the notice of motion.

**THE IMT SPECTRUM DECISION WAS IRREGULAR**



101 If this Honourable Court were not minded to set aside the impugned decision in its entirety, then MTN contends in the alternative that ICASA's decision should be set aside to the extent that it purports to authorise the transfer of control of Neotel's IMT spectrum licences (i.e. the licences dealing with spectrum in the 850 MHz, 1.8 GHz and 3.5 GHz frequency bands) to Vodacom. I shall refer to this as "the IMT spectrum decision".

102 This is the relief sought in prayer 2 of the notice of motion.

103 For the reasons that follow, I submit that the IMT spectrum decision was vitiated by material irregularities.

***ICASA was required to consider whether its decision would promote competition***

104 Section 31(2A) of the ECA provides as follows:

"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."

105 Section 31(2A) confers a discretion on ICASA. When it comes to exercising that discretion, ICASA must have regard to all relevant considerations. This was accepted by Vodacom and Neotel in the legal opinion they furnished to ICASA (see page 1126 of the Telkom Record, paras 20 to 22).

106 One of the relevant considerations is contained in section 2(f) of the ECA. It provides that an object of the ECA is to "promote competition within the ICT sector".



107 In their written submissions to ICASA, Vodacom and Neotel therefore accepted that ICASA "must consider competition, as one factor among many, in order to promote the goals of the ECA" (page 298 of the Telkom Record, para 19.1.5).

108 I have already annexed the 2015 Spectrum Regulations as GDV11 above. Those Regulations came into operation on 1 April 2015 – that is, before the IMT spectrum decision was taken. Regulation 15(5) provides that an application for permission to transfer control of a spectrum licence will be evaluated on the basis of various criteria, including "promotion of competition and interests of consumers". Regulation 15(8) provides that ICASA will not approve the transfer of control of a radio frequency spectrum licence "if such transaction will not promote competition".

109 I therefore submit that, when it considered the Neotel/Vodacom Application, ICASA was obliged to have regard to whether its decision would promote competition and would serve the interests of consumers. As I have already indicated, Neotel and Vodacom accepted that this was the position in law. Remarkably, ICASA took a different view as will become apparent below.

***Facts that were relevant to ICASA's assessment***

110 ICASA's assessment as regards whether approval of the Neotel/Vodacom Application would promote competition and would serve the interests of consumers, was required to occur against the factual backdrop that I describe below. None of the facts set out in this section was the subject of any real dispute.

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Vodacom is dominant in the mobile telecommunications market

111 I have already indicated that there are four mobile network operators in South Africa: Vodacom, MTN, Cell C and Telkom Mobile. Vodacom is the largest of the four mobile network operators and is dominant in the mobile telecommunications market.

112 Vodacom has a greater market share than the other mobile network operators.

Table 1 shows each mobile network operators' shares for subscribers:

Table 1: Subscribers and revenues, 2014 / 2015

|         | Subscribers <sup>(1)</sup><br>(m) | Share of subscribers<br>(2014) | Revenue <sup>(2)</sup><br>(2014, R bn) | Share of revenue<br>(2014) |
|---------|-----------------------------------|--------------------------------|----------------------------------------|----------------------------|
| Vodacom | 32.9                              | 39.9%                          | 62                                     | 54%                        |
| MTN     | 27.92                             | 33.9%                          | 39                                     | 34%                        |
| Cell C  | 19.6                              | 23.7%                          | 12.4                                   | 10.8%                      |
| Telkom  | 2                                 | 2.5%                           | 1.2                                    | 1.2%                       |

Source

1. Cell C numbers are based on estimates. There are no legal obligations for Cell C to disclose their numbers in South Africa. However, in July 2013 it was disclosed to the press that their customer base is 11.7m customers and in October they disclosed their customer base is 12.3m customers. In May 2014 they disclosed that their customer base is 16.6m and in May 2015 they disclosed that their customer base is 20.4m. Telkom Mobile numbers are based on disclosed results during interim (September) and year-end (March). All other info is therefore based on estimates. Active (not total) subscriber numbers is used. Vodacom numbers are as per their June 2015 year-end released results.
2. <http://mybroadband.co.za/news/wp-content/uploads/2015/07/Revenue>

113 Vodacom has a larger geographical coverage than any of its competitors.

Table 2 below shows the population coverage of each mobile network operator in relation to different technologies:

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Table 2: Sites and coverage by mobile network operators, 1st Quarter 2015

|         | 2G Voice coverage<br>(sites) | 3G coverage<br>(sites) | LTE coverage (sites)   |
|---------|------------------------------|------------------------|------------------------|
|         | 99.5%                        | 95.6%                  | 34.8%                  |
| Vodacom | (9,348)                      | (8,802)                | (2,610) <sup>(1)</sup> |
|         | 98.19%                       | 93.26%                 | 24.42%                 |
| MTN     | (8169)                       | (7003)                 | (1472)                 |
|         |                              | 79%                    |                        |
| Cell C  | (4,000)                      | (3,500)                | (100) <sup>(2)</sup>   |
|         | 57.2%                        | 56.8%                  | 9.5%                   |
| Telkom  | (2,406)                      | (2,510)                | (1,317) <sup>(3)</sup> |

Source –

1. <http://www.vodacom.co.za/cs/groups/public/documents/digitalmedia/announcement-180515.pdf>
2. <http://mybroadband.co.za/news/cellular/74533-cell-c-network-problems-and-growth-update.html>
3. <http://mybroadband.co.za/news/cellular/126490-good-news-about-telkom-mobile-and-its-lte.html>

114 Table 2 makes it plain that Vodacom has by far the largest population of sites. As shown in Table 3 below, Vodacom is also increasing its network of sites more rapidly than its competitors, both at the level of total sites and LTE sites in particular:

Table 3: Total number of sites 2014

|         | Total sites 2014 | LTE sites 2014     | LTE sites 1 <sup>st</sup> Quarter 2015 |
|---------|------------------|--------------------|----------------------------------------|
|         |                  | 1,900              |                                        |
| Vodacom | 10,200           | (10,200 LTE ready) | 2,610 <sup>(1)</sup>                   |
| MTN     | 8169             | 746                | 1,465                                  |
| Cell C  | 4,524            | n/a                | 100 <sup>(2)</sup>                     |
| Telkom  | 2,600            | 1,300              | 1,317 <sup>(3)</sup>                   |

Source

1. <http://www.vodacom.co.za/cs/groups/public/documents/digitalmedia/announcement-180515.pdf>
2. <http://mybroadband.co.za/news/cellular/74533-cell-c-network-problems-and-growth-update.html>
3. <http://mybroadband.co.za/news/cellular/126490-good-news-about-telkom-mobile-and-its-lte.html>

115 Table 4 shows the state of current LTE network deployment in South Africa:

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Table 4: Status of current LTE deployment in South Africa

|         | Share of broadband<br>capable connections (3G<br>and LTE) | LTE sites 1 <sup>st</sup> Quarter<br>2015 | LTE spectrum<br>deployment   | LTE<br>subscribers |
|---------|-----------------------------------------------------------|-------------------------------------------|------------------------------|--------------------|
| Vodacom | 52.3%                                                     | 2,610                                     | 1800MHz<br>(5-10 Mhz refarm) | 1 013 187          |
| MTN     | 39.7%                                                     | 1,465                                     | 1800MHz<br>(5-10 Mhz refarm) | 513 235            |
| Cell C  | 6.5%                                                      | 100                                       | -                            | -                  |
| Telkom  | 1.5%                                                      | 1,317                                     | 2300MHz<br>(60Mhz)           | 37 519             |

Source: MTN estimates.

116 The Vodacom network is 100% LTE-ready. If Vodacom were to acquire control of Neotel's IMT spectrum, Vodacom would therefore be able to create a national LTE network at a time when its competitors are unable to do so.

117 ICASA accepted that Vodacom was dominant in the retail market for mobile telecommunication services. In response to a letter from the Competition Commission identifying Vodacom as a dominant firm in the retail market (page 791 of the Telkom Record, para 4.1), ICASA stated that it "preliminarily agrees with the Commission's view about Vodacom's dominance in respect of the retail supply of mobile services" (page 841 of the Telkom Record, para 6.1.2).

#### The current position regarding spectrum allocation

118 Table 5 shows the spectrum allocations that are currently licensed for mobile telephony:

Table 5: Spectrum licensed for mobile telephony

| Band (MHz)      | 850 | 900 | 1800             | 1900       | 2100 | 2100<br>TDD** | 2300<br>TDD | 2600      | 3500      | TOTAL incl.<br>unsupported<br>for mobile | TOTAL excl.<br>unsupported<br>for mobile |
|-----------------|-----|-----|------------------|------------|------|---------------|-------------|-----------|-----------|------------------------------------------|------------------------------------------|
| Telkom          |     |     | 24               | <u>40*</u> | 30   |               | <u>60</u>   |           | <u>56</u> | 210                                      | 210                                      |
| Neotel          | 10  |     | 24               |            |      |               |             |           | <u>56</u> | 90                                       | 90                                       |
| Vodacom         |     | 22  | 24               |            | 30   | <u>5</u>      |             |           |           | 81                                       | 76                                       |
| MTN             |     | 22  | 24               |            | 30   | <u>10</u>     |             |           |           | 86                                       | 76                                       |
| Cell C          |     | 22  | 24               |            | 30   |               |             |           |           | 76                                       | 76                                       |
| WBS             |     |     | 24<br><u>+10</u> |            |      |               |             | <u>15</u> |           | 49                                       | 49                                       |
| Total Allocated | 10  | 66  | 154              | 40         | 120  | 15            | 60          | 15        | 112       | 592                                      | 577                                      |

*Italics* represent TDD (Time Division Duplex) allocations.

\* Currently used for DECT

\*\* not supported for mobile access purposes

The name of each spectrum band (eg 1800 MHz) and the spectrum allocated to an individual operator (eg 24 MHz allocated to Telkom) are both measured in megahertz ("MHz"). The name of each spectrum band is typically taken from the wavelength within the relevant range of wavelengths (the spectrum band). By way of illustration, the 1800 MHz spectrum band refers to allocations that might range from around 1,710 to 1,880 MHz (which might be further subdivided so that some spectrum 1,710-1,785 MHz is used to send information from the mobile device to the antenna (uplink) and some spectrum (1,805-1880 MHz) is used to send 12 MHz of uplink spectrum, and 12 MHz of downlink spectrum (a total of 24 MHz).

119 Neotel has not used its IMT spectrum in any meaningful way. It appears from the Telkom Record that Neotel currently uses its IMT spectrum to provide fixed wireless services over the last mile to "around 250 000 customers" (page 1101 of the Telkom Record, para 11). The fact that 250 000 Neotel subscribers are served from a few hundred sites using Neotel's IMT spectrum, means that the current use of Neotel's IMT spectrum portfolio is nothing more than an advanced market trial. In other words, Neotel has made little attempt to use the significant public asset awarded to it in the form of IMT spectrum.

#### The growth in demand for mobile data

120 Although mobile telecommunication originated as a way of making voice calls, the global mobile telephony industry is facing increasingly strong demand from

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consumers for mobile data. The global mobile traffic grew by 69% in 2014 compared to 2013, reaching 2.5 exabytes<sup>1</sup> per month by the end of 2014. The annual mobile data traffic, at 30 exabytes, is nearly 30 times as large as the total internet traffic (both fixed and mobile) in 2000. Looking forward, the global mobile data traffic is expected to increase nearly 10-fold by 2019, at a compound annual growth rate of 57%. This equates to over 24 exabytes of monthly mobile data traffic by 2019.<sup>2</sup>

121 Against this global backdrop, South Africa is also experiencing significant growth in mobile data traffic. It is projected to grow at a compound annual growth rate of 63% over the next five years, resulting in an 11-fold increase between 2014 and 2019.

122 MTN has seen its own data traffic increase by a compound annual growth rate of 107% between 2009 and 2012. The trend is projected to continue at a compound annual growth rate of 64% between 2012 and 2017, such that data use in 2017 will be over 20 times the levels of 2012.

123 A significant and growing number of consumers use smart phones and other smart devices such as tablets, i.e. devices with extensive mobile data capacity. While the growth in the number of mobile users is expected to be modest, many South African mobile users are switching to smart devices with extensive

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<sup>1</sup> An Exabyte is one billion gigabytes.

<sup>2</sup> [http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white\\_paper\\_c11-520862.html](http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white_paper_c11-520862.html)



data traffic capacity, with a projection that 62% of mobile devices will be "smart" by 2019, up from 21% in 2014.<sup>3</sup>

- 124 Responding to such levels of growth requires substantial investment in network capacity. It also requires spectrum. Without access to new spectrum, it would be impossible for MTN to keep up with the growing demand for mobile data. Network capacity and infrastructure expansion will provide for more efficient use of available spectrum and increased capacity. However, infrastructure cannot be expanded on a limitless basis which means that additional spectrum is required to allow for increased usage by customers.

***The IMT spectrum decision will harm competition and consumers***

- 125 Against the background of the facts set out above (which are largely common cause), I submit that the impact of the IMT spectrum decision is clear: it permits an already dominant firm in the mobile market to acquire control of Neotel's IMT spectrum licences. This control will permanently remove an independent competitor (Neotel) and will gift Vodacom with an unmatched cost and time-to-market advantage that is not derived from Vodacom's investment or innovation, but rather from the private commercial reallocation of the scarce resource of spectrum. The result will be an undermining of competition in the mobile telecommunications market. I elaborate below upon the reasons for this submission.

- 126 Spectrum is a scarce resource. There is a limit to the amount of spectrum that is available for IMT purposes, and additional spectrum cannot be created by a

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<sup>3</sup> <http://www.cisco.com/web/ZA/press/2014/022114.html>



mobile network operator. A licence to use spectrum is an assignment from the regulator allowing a network operator to use a scarce public resource in the public interest. It is no exaggeration to say that access to spectrum is the critical constraint in the mobile telecommunication sector at the current time.

- 127 ICASA has publicly echoed what I have said in paragraph 126 above. As noted above, the proposed merger between Vodacom and Neotel is the subject of pending merger proceedings in the Competition Tribunal. Several parties, including MTN and Telkom, have intervened in the proceedings and oppose the merger. On 10 September 2015, ICASA (which has also intervened in the proceedings before the Tribunal) brought an interlocutory application. It is annexed as **GDV12**. The purpose of the application is to gain access to certain confidential material and it is not necessary for me to discuss it in any detail here. What is noteworthy is that Councillor Pillay deposed to the affidavit that supports the interlocutory application and stated the following (at paragraph 59.3):

'Spectrum is a critical resource that ought to be used in the public interest. It ought not to be "hoarded".'

- 128 Against this background, the IMT spectrum decision allows Vodacom – at the stroke of a regulatory pen – to more than double its spectrum holdings. In doing so, the IMT spectrum decision provides the already dominant mobile operator with an additional cost, capacity and time-to-market advantage relative to its competitors:

- 128.1 At ICASA's public hearing, Vodacom's CEO stated:

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- 128.1.1 that Vodacom was "severely constrained by a lack of spectrum" (page 313 of the Telkom Record);
- 128.1.2 that the Neotel/Vodacom transaction would "enable the spectrum assets of Neotel to be used to enhance [Vodacom's] mobile data services" (Telkom Record page 312);
- 128.1.3 that "essentially access to spectrum will help you to reduce your cost base" (pages 402 to 403 of the Telkom Record); and
- 128.1.4 that "your cost base goes down, which allows you to continue to reduce pricing as you go forward" (page 403 to 404 of the Telkom Record).
- 128.2 Vodacom also accepted that the proposed transaction would "provide Vodacom with an improved cost, capacity and time-to-market position for its LTE services" (page 1086 of the Telkom Record, para 30.2.6.6). In other words, Vodacom "accept[ed] that there are likely to be costs synergies arising from the transaction" (page 1103 of the Telkom Record, para 18).
- 128.3 The only point of contestation is how substantial the cost advantage to Vodacom is likely to be.
- 128.4 At the public hearing before ICASA, MTN estimated that access to Neotel's 1800 MHz spectrum alone would give Vodacom a 50% cost advantage relative to MTN. I refer in this regard to what is stated in slide 6 of the MTN Presentation.



128.5 Vodacom disputes the scale of the cost advantage available to it as a result of the IMT spectrum decision (pages 282, 1102 and 1112 of the Telkom Record). It does so on the basis that MTN's contention – that Vodacom will save 50% of the costs that it would have spent investing in sites by obtaining Neotel's spectrum – is based on UK-specific modelling that ignores the coverage layer. While the study is indeed UK-specific (and, as such, only looks at the effect of an operator acquiring 20MHz of incremental spectrum rather than the full 90MHz of spectrum that will be transferred as a result of the IMT spectrum decision), the trade-off between spectrum and sites for capacity relief is not country-specific or coverage-dependent: faced with a full LTE site, an operator can either (a) deploy more LTE spectrum on the existing site and duplicate its capacity at close to no incremental cost or (b) build an incremental LTE site (with its associated capital expenditure and operational expenditure) if it has no more spectrum to apply to the original site. The IMT spectrum decision uniquely enables the dominant SA operator to implement option (a) and to obtain its associated cost advantage.

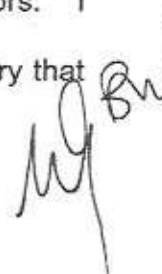
128.6 Using Neotel's prime 1800 MHz spectrum, Vodacom will be able to launch a national LTE network with minimal additional investment. Vodacom's radio access network already supports 1800 MHz spectrum (the most widely-used LTE band globally), and is fully LTE-ready. As Vodacom's CEO put it at the public hearing, once Vodacom has access to Neotel's spectrum "we can almost overnight switch on [LTE] countrywide" (page 422 of the Telkom Record).



128.7 The IMT spectrum decision means that Vodacom will control twice the amount of prime LTE 1800 MHz spectrum as the rest of the market and, uniquely, will gain access to spectrum in the 850 MHz band. The 850 MHz band provides a significant advantage over 1800 MHz in providing geographic coverage and in-building penetration. This combination provides an un-replicable advantage of LTE coverage and capacity since both frequency spectrum bands can readily be used across all of Vodacom's 10,000 sites.

128.8 Access to Neotel's 1800 MHz spectrum will enable Vodacom to double its existing LTE network capacity at almost no additional cost. Vodacom would thus have a considerable advantage over its competitors, and this is an advantage that would continue in perpetuity. The advantage would not be a product of Vodacom's entrepreneurial efforts, but would merely be the result of Vodacom's purchase of a scarce public resource (in the form of spectrum) from Neotel. Vodacom would benefit from a cost and capacity advantage relative to its competitors as this additional spectrum would mean that significantly less radio sites need to be built and maintained in order to serve demand. Moreover, significantly more demand can be served out of the same number of radio sites.

129 As I understand it, Vodacom has suggested that its higher customer numbers mean that the IMT spectrum decision will not grant it a competitive advantage because Vodacom is more "spectrum-constrained" than its competitors. I dispute this. It is not the total number of users spread across the country that

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creates network congestion; it is the number of simultaneous users attaching to the network in the same area (networks are dimensioned for the "busy hour" or "peak-throughput") that creates network congestion. As such, a very large subscriber base spreading its calls/data sessions evenly during the day and across the country will cause significantly less strain on a network than a smaller customer base making all of its calls at the same time in, say, Sandton. Customer base size alone is not, therefore, an adequate indication of spectrum constraint. Indeed, Vodacom's claim that it is more spectrum-constrained and congested than other players in the market is belied by its own statements that it is "the best network in SA" with the "fastest and widest coverage", "best call quality rates" and "fastest speeds" while at the same time growing data traffic by 63% year-on-year.

130 For all of these reasons, I submit that the IMT spectrum decision will lead to an entrenchment of Vodacom's dominant position in the mobile market as the network, market and cost advantage available to Vodacom would become unassailable. It will take a considerable period of time for a competitor of Vodacom to be awarded spectrum, and indeed there is no guarantee that this will ever occur. Vodacom's first-mover advantage will therefore be cemented in perpetuity.

131 In sum, the IMT spectrum decision will have the following harmful consequences for competition and for consumers:

131.1 It will entrench the already dominant position of Vodacom in the mobile telecommunications market.

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- 131.2 It will confer on Vodacom an advantage that cannot be replicated by any of Vodacom's competitors.
- 131.3 It will significantly and permanently discourage competition by smaller rivals to Vodacom.
- 131.4 It will reduce the bargaining power of smaller operators in gaining access to the dominant Vodacom network.
- 131.5 It will give Vodacom the freedom to compete less vigorously.
- 131.6 It will give Vodacom a unique discretion to dictate whether consumers should see any portion of the value created by the Neotel IMT spectrum.
- 131.7 It will irreparably harm competition in the mobile market, and therefore the interests of consumers.

***ICASA misdirected itself in relation to the competition issues***

- 132 All of the concerns described above were voiced by MTN (as well as by other parties) at ICASA's public hearing. For the reasons that follow, I submit that ICASA misdirected itself by failing to have proper regard to those concerns when it made the IMT spectrum decision.

The views of the Competition Commission

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133 The Record indicates that the Commission shared MTN's concerns regarding the likely harm to competition if Vodacom were permitted to obtain access to Neotel's IMT spectrum.

134 On 28 February 2015, the Commission addressed a letter to ICASA which stated as follows (page 780 of the Telkom Record):

134.1 If the Neotel/Vodacom merger were to be implemented, it would give Vodacom access to Neotel's IMT spectrum. The Commission explained that "Vodacom would therefore be the only MNO with spectrum in the 800 MHz band<sup>4</sup> and will have double the amount of spectrum in the 1800 MHz when compared to other MNOs" (para 4.2 on page 781 of the Telkom Record).

134.2 The Commission's "preliminary finding is that 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" (para 5.1 on page 782 of the Telkom Record).

134.3 It is "therefore the Commission's preliminary view that the 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 on page 782 of the Telkom Record).

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<sup>4</sup> As noted above, this should be a reference to the 850 MHz band.



- 135 In order to avoid harm to competition, the Commission was at one stage of the view that Neotel's spectrum should be divested to an independent third party (page 120 of the Supplementary Telkom Record).
- 136 On 20 May 2015, the Commission addressed a letter to ICASA stating that its findings reveal "a likely substantial lessening of competition arising as a result of the proposed merger" and that "it does not appear that the proposed merger is good for the mobile industry in South Africa in general" (page 928 of the Telkom Record, para 3).
- 137 On 26 May 2015, the Commission wrote a further letter to ICASA in which it referred to "the advantage Vodacom will gain by acquiring the 1800MHz" from Neotel (page 124 of the Supplementary Telkom Record).
- 138 In a strongly-worded letter to ICASA dated 18 June 2015, the Commission reiterated that it had "placed on record the concerns that it had identified in the proposed transaction, particularly the likely negative effect on competition in the sector" (page 970 of the Telkom Record, para 4).
- 139 On 30 June 2015, the Commission made a final recommendation that the Neotel/Vodacom merger should be approved subject to conditions. I have already attached a non-confidential version of the Commission's recommendation as **GDV10**. I draw attention to the following aspects of the Commission's recommendation:


- 139.1 The Commission found that "rivals such as MTN are also experiencing significant growth in data demand and are also capacity constrained in terms of current spectrum holdings" (para 9.3).
- 139.2 The Commission found that "in spectrum designated for mobile use particularly in the 1800 MHz band, Vodacom will post-merger hold double the amount of spectrum available to each of the MNOs namely MTN, Cell C and Telkom" (para 9.1). Moreover, "the additional spectrum from Neotel will result in lower costs for Vodacom that is unlikely to be matched by rival MNOs" (para 9.4). In the result, the Commission found that "the advantages that will accrue to Vodacom having more spectrum than its rivals are likely to further entrench Vodacom's current dominant position in the retail markets" (para 11).
- 139.3 The Commission found that "in the long term, consumers are likely to be faced with higher prices and reduced choice as Vodacom will unlikely have any incentives to pass on cost savings to consumers given that it will unlikely face strong competitive constraints" (para 13). Moreover, "Vodacom has no incentive to reduce prices now as rivals are also capacity constrained" (para 13).
- 139.4 The Commission concluded that "the acquisition and access to additional spectrum by Vodacom relative to its rivals is likely to result in a substantial lessening of competition in the provision of mobile services in South Africa" (para 15).

- 140 The Reasons Document states that ICASA had briefed Acacia Economics to provide a position paper on the Neotel/Vodacom Application, and had "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" (page 1034 of the Telkom Record, para 21.43).
- 141 The Report of Acacia Economic does not form part of the Telkom Record or the Telkom Supplementary Record and I have therefore not had sight of it. I am informed that the Acacia Report is included in the Telkom Confidential Record, and that its contents will be dealt with in the affidavit of Mr McCafferty.

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ICASA found that Neotel's spectrum would give Vodacom a competitive advantage

142 The Telkom Record indicates that there were at least three respects in which ICASA misunderstood the effect on competition if the Neotel/Vodacom Application were to be approved:

142.1 *First:* on the persistent urging of Vodacom and Neotel, the Special Committee found that "Vodacom will only have indirect access to Neotel's spectrum" (page 873 of the Telkom Record). In other words, the Special Committee was of the view that "the important distinction to note is that Vodacom will in fact have indirect control over Neotel's spectrum by virtue of their control of the Neotel Board" (page 917 of the Telkom Record). I make the following observations regarding this distinction:

142.1.1 It is difficult to understand the relevance of the distinction since it is a well-accepted tenet of antitrust policy that nothing turns on whether the control exercised by firm X over firm Y is "indirect" or "direct". It is for this reason that section 12(1)(a) of the Competition Act provides that "a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm".

142.1.2 A holding company controls a subsidiary in which it owns 100% of the shares. Vodacom and Neotel conceded this: they stated that "Vodacom, of course, will control Neotel in the

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sense of the company law sense [sic]" (page 405 of the Telkom Record).

142.1.3 In light of this concession, it is difficult to comprehend how counsel for Neotel and Vodacom could credibly suggest at the public hearing that MTN had advanced "no basis" for its contention that Neotel would be removed as an independent competitor if the transaction were to be implemented (Telkom Record at page 697 lines 8 to 11). It is a truism of antitrust law and competition policy that, if Neotel were to become a wholly-owned subsidiary of Vodacom, Neotel would cease to exist as an independent competitor. No further "basis" was needed for this trite proposition.

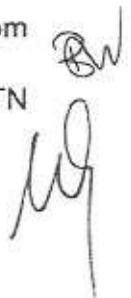
142.1.4 I note that, although Neotel and Vodacom made much of the fact that so-called "commercial arrangements" would have to be put in place to regulate the use of spectrum if the Neotel/Vodacom Application were to be approved, they declined to furnish any such "commercial arrangements" to ICASA despite ICASA's requests (see pages 955 to 956 of the Telkom Record).

142.2 *Second:* ICASA stated to the Commission that "the proposed merger would not necessarily provide Vodacom with market power which would allow it to behave in a unilateral manner and impede competition in mobile services and that it would not be able to do so without facing any significant competitive constraint" (page 843 of the Telkom Record, para



6.1.5). This statement makes little sense in circumstances where ICASA had endorsed the Commission's assessment that Vodacom was a dominant firm in the retail market (page 841 of the Telkom Record, para 6.1.2), since a dominant firm is one that is able to behave independently of its competitors to an appreciable extent. The same illogicality informs ICASA's statement that allowing Vodacom to have access to Neotel's 1800 MHz spectrum would merely assist Vodacom "in remaining competitive or allowing it to exercise a competitive constraint on Telkom Mobile and MTN" (page 842 of the Telkom Record).

142.3 *Third:* in assessing the competition consequences of the Neotel/Vodacom Application, ICASA enjoined the Commission to have regard to a proposed RAN-sharing agreement between MTN and Telkom Mobile (page 842 of the Telkom Record para 6.1.3). ICASA stated that the Neotel/Vodacom Application "should not be assessed in isolation as spectrum concentration may be applicable to the MTN/Telkom Mobile transaction, should such transaction be approved" (page 843 of the Telkom Record, para 6.1.6). ICASA's approach made no sense because the proposed MTN/Telkom Mobile RAN-sharing was not capable of implementation unless it were to receive approval from the competition authorities. On 18 August 2015, the Commission recommended that the proposed MTN/Telkom Mobile merger should not be approved and the transaction was then abandoned. It is difficult to understand how ICASA could have assessed the Neotel/Vodacom Application by having regard to a proposed transaction between MTN



and Telkom Mobile in circumstances where that proposed transaction was never implemented.

143 Notwithstanding these errors, it appears that ICASA ultimately accepted that Vodacom would gain a significant competitive advantage if it were to secure access to Neotel's IMT spectrum. I say so for the following reasons:

143.1 In a letter to the Commission, ICASA pointed out that Vodacom's "entire network is LTE Advanced ready, however, the network is held back by a lack of spectrum" (page 841 of the Telkom Record).

143.2 The Special Committee's recommendation to ICASA dated 15 May 2015 stated that, if the Neotel/Vodacom Application were to be approved, this would "result in Vodacom having access to twice the 1800 MHz spectrum capacity as its competitors and being the only mobile licensee with access to 3500 MHz today to enable LTE" (page 917 of the Telkom Record).

143.3 The Special Committee's recommendation to ICASA dated 5 June 2015 stated that "the largest mobile operator with the biggest subscriber base and greatest market share [i.e. Vodacom] will gain access to additional spectrum in the sweet spot which will give it a competitive advantage by allowing it to rollout and launch LTE services before any other operator/competitor in the South African market (page 956 of the Telkom Record, para 4.3.2). The Special Committee was therefore "concerned that Vodacom will have access to the high demand

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spectrum post the transaction, even if indirectly ahead of other licensee” (Telkom Record pages 956 to 957).

143.4 In its letter to the Commission dated 28 May 2015, ICASA stated that Vodacom's “first mover advantage may not be limited to the use of the 1800 MHz spectrum only” and that “post-merger Vodacom will have the first mover advantage in” other frequency bands as well (page 934 of the Telkom Record). The Special Committee's recommendation to ICASA dated 5 June 2015 confirmed that “the Committee is of the preliminary view that the first mover advantage [of Vodacom] may not be limited to the use of 1800 MHz spectrum only” (Telkom Record page 959).

143.5 Notice 684 records that ICASA “has established that the implementation of the proposed transaction will result in consolidation of spectrum” (para 4(b)).

144 ICASA has subsequently confirmed its view. I have already made reference to the pending merger proceedings in the Competition Tribunal. In August 2015, Vodacom and Neotel brought an interlocutory application to compel the intervening parties to disclose the theories of harm that they intend to advance at the hearing of the matter. It is unnecessary for me to discuss the substance of that application here and it was subsequently abandoned. What is relevant is that ICASA filed an answering affidavit in that interlocutory application, and the affidavit was deposed to by Councillor Pillay. In paragraph 45 of her affidavit, Councillor Pillay stated as follows:



"If Vodacom is assigned Neotel's spectrum, it will gain an irrevocable advantage in the market and further delay the full benefits that would result from there being competitive markets for information and communication technology services in South Africa."

The relevant extract is annexed as **GDV13**.

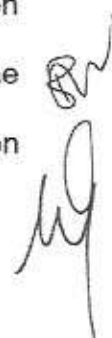
ICASA nevertheless failed to have regard to the impact on competition and consumers

145 I have indicated above that ICASA was of the view that Vodacom would gain a significant competitive advantage if it were to secure access to Neotel's IMT spectrum. ICASA nevertheless proceeded to approve the IMT spectrum application without having regard to the fact that such an advantage would be harmful to competition and to consumers. Simply put, ICASA washed its hands of the consequences that its decision would have for competition and for consumers.

146 The Telkom Record suggests that ICASA did so for two reasons, both of which were wrong in law.

147 The first reason was that ICASA apparently took the view that it was the Commission's responsibility to have regard to competition issues:

147.1 It appears from the Telkom Record that ICASA had 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 [sic] when considering competition matters." The opinion was apparently to the effect that "the Authority cannot assess the application on competition



grounds" but "can only ask the Competition Commission to do so" (page 918 of the Telkom Record).

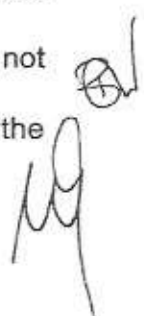
147.2 The opinion does not form part of the Telkom Record. However, the conclusion in the opinion would appear to correspond with a submission made by counsel for Vodacom and Neotel at the ICASA public hearing. As part of his oral presentation, he referred to section 4B(8)(b) of the ICASA Act (as recently amended) and argued that this provision "makes it clear that the Competition Commission has primary authority to review mergers within any industry or sector in terms of the Competition Act" (page 365 of the Telkom Record). ICASA made specific reference to this submission when providing reasons for the impugned decision (see Telkom Record at page 1000, para 12.15).

147.3 I submit that the advice received by ICASA, and the submission made by counsel for Vodacom and Neotel, were manifestly wrong in law. Section 31(2A) of the ECA required ICASA to exercise a discretion when deciding whether to give permission for the transfer of control of Neotel's IMT spectrum to Vodacom. For the reasons set out above, ICASA was required to exercise that discretion by having regard to whether the transfer of control would lead to a consolidation of spectrum in a manner that would be harmful to competition and detrimental to the interests of consumer. ICASA's exercise of discretion was not dependent on the existence of Regulations in terms of section 13(3)(b) or section 31(3) of the ECA (as referred to on pages 918 to 919 of the Telkom Record).



147.4 To the extent that ICASA was labouring under the impression that section 4B(8)(b) of the ICASA Act requires it to defer competition matters to the Commission, this too was an error of law. Section 4B deals with inquiries that ICASA may conduct into certain matters listed in section 4B(1) of the Act. Section 4B(8)(b) provides that ICASA must take into account the Commission's primacy in relation to approving mergers when ICASA exercises or performs "any of its powers and duties in terms of this section" (my underlining). Section 4B(8)(b) says nothing about the manner in which ICASA must exercise its power to approve transfer of control of licences under the ECA. Section 4B(8)(b) merely constrains the scope of the power of ICASA to convene inquiries in terms of section 4B of the ICASA Act. Since ICASA was not conducting an enquiry in terms of section 4B, the provisions of section 4B(8)(b) were irrelevant.

147.5 The Reasons Document states that ICASA's view was that "the Competition Commission was best placed to adequately assess and regulate the potential effects on competition arising from the Proposed Transaction" (page 1034 of the Telkom Record para 21.45) since it was "the primary authority responsible to regulate competition effects of mergers" (page 1035 of the Record, para 21.45). This statement is clearly wrong in law. ICASA was required to exercise its discretion in terms of section 31(2A) of the ECA by having regard to the impact on competition, and it could not slough off this obligation by making it the problem of the Commission. It is revealing that the Commission did not share ICASA's view, since it accused ICASA of acting contrary to the

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Memorandum of Understanding concluded between the Commission and ICASA (page 970 of the Telkom Record).

147.6 In the affidavit in the interlocutory matter that I have described in paragraph 127 above, ICASA seeks access to various confidential documents that are relevant to the pending proceedings in the Competition Tribunal. ICASA's justification for asking for that information is as follows (at paragraph 18 of the affidavit deposed to by Councillor Pillay):

"Upon a proper construction of section 67 of the ECA, as amended by Act 1 of 2014, read inter alia in light of the provisions of the Competition Act, 1998 while ICASA does itself have jurisdiction over issues relating to competition in its sector, such jurisdiction does not include calling for documents and data relating to the competitive effects of a merger at the stage when ICASA undertakes the process envisaged in section 13 read with section 9(2) of the ECA. For this reason, ICASA refrained from doing so." (my underlining)

147.7 This remarkable statement reveals that ICASA was labouring under a misapprehension regarding the scope of its powers under section 13 of the ECA and that it therefore "refrained from" interrogating the impact of its decision on competition and on consumers. Councillor Pillay repeats the point in paragraph 49 of the same affidavit, where she states that "owing to the provisions of section 67(4) of the ECA, read with section 4B(8) of the ICASA Act, ICASA could not previously have requested the merging parties to provide the documents and data now sought in relation to competition issues".



147.8 In short, ICASA abdicated its responsibility to consider the impact of its decision on competition and on consumers. The result of this abdication was that ICASA approved the IMT spectrum application on the basis that "any negative anti-competitive conduct by the dominant player [i.e. Vodacom] will be addressed through the respective legislative framework and the Competition Act" (page 919 of the Telkom Record). This was a material misdirection.

147.9 I therefore submit that the IMT spectrum decision was materially influenced by an error of law (within the meaning of section 6(2)(d) of PAJA) and was not rationally connected to the purpose of the empowering provision (within the meaning of section 6(2)(f)(ii) of PAJA).

148 The second reason is that ICASA apparently took the view that it could not have regard to competition issues without following the process envisaged by chapter 10 of the ECA:

148.1 Councillor Pillay's recommendation to Council dated 5 June 2015 stated that "the Authority's assessment is restricted to following a section 67 process in terms of the ECA" (page 955 of the Telkom Record). Section 67 forms part of chapter 10 of the ECA.

148.2 The Council endorsed this view. Notice 684 states as follows (para 5):

"During evaluation of the Application, the Authority has considered the potential impact that the consolidation of valuable and substantial spectrum under the control of Vodacom may have on the various markets. The Authority recognises that it cannot regulate the effects of such consolidation on competition in the various markets until it has

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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 [sic] such an enquiry in due course." (my underlining)

148.3 The Reasons Document confirmed ICASA's view (page 1035 of the Telkom Record para 21.47):

"... 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, recognises that it has the power to hold an enquiry in terms of section 67 at any time in the future, should the Authority deem it necessary to do so."

148.4 I submit that ICASA erred in law and misdirected itself when it made these findings:

148.4.1 Chapter 10 of the ECA provides that ICASA must follow the prescribed procedure if it wishes to impose "appropriate and effective pro-competitive licence conditions on licensees where there is ineffective competition and if any licensee has significant market power" (section 67(4)).

148.4.2 What this means is that ICASA cannot impose "pro-competitive licence conditions" unless it has followed the prescribed procedure in chapter 10.

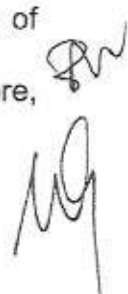
148.4.3 However, ICASA was not being asked to impose "pro-competitive licences conditions" on Vodacom or Neotel in terms of chapter 10 of the ECA. ICASA was being asked to

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give its permission in terms of section 31(2A) for control of Neotel's IMT spectrum licences to be transferred to Vodacom.

148.4.4 ICASA took the view that it would have to follow the process in chapter 10 of the ECA before it could assess the competition consequences of authorising a transfer of control of Neotel's IMT spectrum licences to Vodacom. This was manifestly wrong in law. Section 31(2A) required ICASA to exercise a discretion when deciding whether to give permission for the transfer of control of Neotel's IMT spectrum to Vodacom. In exercising that discretion, ICASA was required to consider whether the transfer of control would lead to a consolidation of spectrum in a manner that would be harmful to competition and detrimental to the interests of consumer. ICASA was entitled – and indeed obliged – to have regard to that issue without conducting an enquiry in terms of chapter 10 of the ECA.

148.4.5 The 2015 Spectrum Regulations (annexure GDV11 above) make this plain. Regulation 15(5) provides that an application for permission to transfer control of a spectrum licence, will be evaluated on the basis of various criteria – including “promotion of competition and interests of consumers”. Regulation 15(5) requires ICASA to have regard to these considerations without conducting an enquiry in terms of chapter 10 of the ECA. Regulation 15(9), furthermore,



precludes ICASA from approving an application to transfer control over a spectrum licence if the proposed transaction will not promote competition.

148.4.6 ICASA relied on Section 4B of the ICASA Act (which cross-refers to section 67 of the ECA) to support its view of its limited power to consider competition matters. However, section 4B offers no support for ICASA's position. It is a permissive provision, which entitles ICASA to conduct inquiries into the matters listed there (including a chapter 10 inquiry under the ECA). It does nothing to interfere with the power of ICASA to approve applications in terms of section 31(2A) of the ECA and says nothing about the factors that ICASA must take into account when considering such applications.

148.4.7 ICASA therefore made a material mistake of law when it found that it could not consider the competition consequences of the Neotel/Vodacom Application without conducting an inquiry in terms of chapter 10 of the ECA. But even if it were to be assumed for the sake of argument that ICASA's finding were correct, as a matter of logic this would mean that ICASA should have initiated an inquiry in terms of chapter 10 and should have declined to make a decision in relation to the Neotel/Vodacom Application until such time as its chapter 10 inquiry had been completed. Remarkably, ICASA did nothing

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of the sort but simply approved the Neotel/Vodacom Application. In other words, ICASA approved the Neotel/Vodacom Application in circumstances where it had not considered the effect on competition of the consolidation of spectrum. This was irrational, irregular and a dereliction of ICASA's statutory responsibility. In effect, ICASA approved the Neotel/Vodacom Application by stating that there was no "evidence of ... anti-competitive effects" (Telkom Record page 918) in circumstances where ICASA had declined to investigate whether such evidence existed.

148.4.8 I therefore submit that the IMT spectrum decision was materially influenced by an error of law (within the meaning of section 6(2)(d) of PAJA) and was not rationally connected to the purpose of the empowering provision (within the meaning of section 6(2)(f)(ii) of PAJA).

The USA Roll-out Condition does not ameliorate the concern regarding spectrum concentration

149 I have referred, in paragraph 127 above, to an affidavit filed by Councillor Pillay in interlocutory proceedings in the Competition Tribunal. In that affidavit, Councillor Pillay explained that the purpose of the USA Roll-out Condition was to "mitigate the concentration of spectrum as a result of the transaction" and to address "the concerns raised by the inevitable concentration of spectrum pursuant to the proposed transaction" (at paragraph 20.2 of her affidavit). This suggests that ICASA regarded the USA Roll-out Condition as addressing the

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anti-competitive consequences that would flow from its decision to approve the Neotel/Vodacom Application.

- 150 Other documents in the Record are to the same effect. In a letter dated 18 June 2015, the Commission pointedly asked ICASA how it had addressed "the spectrum concentration concerns arising from the merger" (page 970 of the Telkom Record). ICASA responded as follows on 25 June 2015 (page 973 of the Telkom Record):

"Accordingly, the Authority sought to include a condition that addresses the primary concern in respect of the concentration of spectrum and the potential negative effects resulting from the first mover advantage. The Authority is of the view that the first mover advantage and economic benefits that arise therefrom arise primarily from service provision to key metropolitan areas, therefore the condition seeks to delay the rollout to these areas and prioritize rollout to rural areas. This is likely to limit the negative effects arising from the first mover advantage.

...

Accordingly the Authority reasoned that a rollout to rural areas first is likely to reduce the first mover advantage and align the urban rollouts to that of the IMT licensing process. The quantum of the rollout will be the subject of the public consultation and may change." (my underlining)

- 151 ICASA's view was wrong and misdirected. For the reasons that follow, compliance with the USA Roll-out Condition will do nothing to prevent the occurrence of the anti-competitive consequences that I have identified above:

- 151.1 I annex, as **GDV14**, GNR 734 of 10 September 2012 (appearing in Government Gazette 35675). It contains the Under-Serviced Areas Definition Regulations ("the USA Regulations"). (The reference in Notice 684 to the Under-Serviced Areas Definition Regulations of 2011 appears to be an error, since the regulations were made in 2012 and

not 2011. Draft Under-Serviced Areas Definition Regulations were published for public comment in Notice 715 of 2011.)

151.2 Annexure A contains a list of all of the municipalities in South Africa considered to be under-serviced when it comes to ECN services (see regulation 2).

151.3 It may be seen from this list that a vast proportion of South Africa is considered to be "under-serviced" for regulatory purposes. Many of the local municipalities listed in Annexure A are in urban, developed areas. The Westonaria Local Municipality, for example, is on the West Rand in Gauteng. The list also includes Mafikeng and Polokwane, which are relatively large urban centres. It also includes the Buffalo City Local Municipality, which includes the whole of East London and King William's Town. Remarkably, it even includes the Nelson Mandela Bay Metropolitan Municipality (which includes the whole of Port Elizabeth) and the Mangaung Local Municipality (which includes the whole of Bloemfontein). Port Elizabeth and Bloemfontein are two of the larger cities in South Africa.

151.4 Vodacom would therefore be able to comply with the USA Roll-out Condition by ensuring that 25 percent of any broadband roll-out following the implementation of the transaction occurs in major centres such as Port Elizabeth and Bloemfontein. This would do nothing to prevent the harm to competition that I have described above. On the contrary, it would give rise to the very anti-competitive consequences that I have already referred to.

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151.5 It should be noted, in this regard, that the success of the roll-out of a broadband network is dependent, to a large extent, on the quality of devices used by people in the areas covered by the network. It would make little sense for Vodacom to be forced to roll-out a broadband network in remote rural areas of South Africa, where the handheld devices are mainly what are known as feature phones, as opposed to smart phones enabled to access data. This strengthens the likelihood that Vodacom would focus on major centres such as Bloemfontein and Port Elizabeth in order to comply with the USA Roll-out Obligation.

151.6 It is, furthermore, important to emphasise that this condition relates only to 25% of the broadband that is rolled out after the transaction is approved. Even if it were to be assumed for the sake of argument that this occurs in areas in which there is not much of a market for broadband (and therefore that it would not be commercially appealing to Vodacom/Neotel to comply with this condition), the financial implications of complying with this condition would be insignificant. When compared with the major advantage that Vodacom would gain from the acquisition of control over Neotel's spectrum, Vodacom would have every incentive to invest the modest resources that compliance with this condition requires, in exchange for the extremely lucrative approval of the Neotel/Vodacom Application. It would, in doing so, not be constrained in the least in the prompt and affordable roll-out of its LTE network in the major urban areas.

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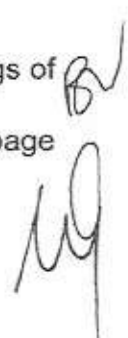
ICASA's decision would be irregular even if ICASA failed to find that Vodacom would acquire a competitive advantage

152 I have indicated above that, having found that Vodacom would gain a significant competitive advantage if it were to secure access to Neotel's IMT spectrum, ICASA misdirected itself by failing to have regard to the fact that such an advantage would be harmful to competition and to consumers. However, the outcome would be the same even if it were to be found that ICASA failed to consider whether Vodacom would gain a competitive advantage by securing access to Neotel's IMT spectrum. In such an event, I submit that ICASA would have misdirected itself by failing to consider whether access to Neotel's spectrum would give Vodacom a competitive advantage and by failing to have regard to the impact of that advantage on competition and on consumers. Everything that I have stated above regarding ICASA's abdication of its statutory responsibility would apply equally in such an event.

***Failure to investigate the spectrum issue***

153 At a meeting of the Special Committee on 25 March 2015, consideration was given to the submissions of the parties on the question of Neotel's spectrum. It was recorded that "EM was requested to investigate the capacity of spectrum currently being used by Neotel and the amount of capacity in excess to enable other operator's [sic] access" (Telkom Record at page 874). EM is a reference to Mr Edward Maphalala, a member of the Special Committee.

154 It is apparent that this issue was of critical importance. Subsequent meetings of the Special Committee were held on 22 April 2015 (see Telkom Record at page



894), 11 May 2015 (Telkom Record at page 909), 19 May 2015 (Telkom Record at page 925), 11 June 2015 (Telkom Record at page 968) and 30 and 31 July 2015 (Telkom Record at page 989; this meeting took place after the impugned decision had been made).

155 There is no indication that Mr Maphalala ever reported back to the Special Committee on this issue or that this issue was ever revisited. As a result, ICASA took a decision in relation to the IMT spectrum application without considering the critical question of the use by Neotel of its spectrum. This was an issue that had been raised by all of the parties opposing the granting of the applications. A proper consideration of this issue would have enabled ICASA to impose practical conditions on the granting of the EC application that would have facilitated the surrender by Neotel of its IMT spectrum.

156 In the result, I submit that the IMT spectrum decision was vitiated by ICASA's failure to consider relevant information (as contemplated by section 6(2)(iii) of PAJA); was not rationally connected to the purpose of the empowering provision (as contemplated by section 6(2)(f)(ii)(bb) of PAJA) and was unreasonable (as contemplated by section 6(2)(h) of PAJA).

***ICASA's failure to appreciate the decision-making options available to it***

157 As already indicated, MTN contended at the public hearing that the proposed transaction should only be allowed to proceed if Neotel's IMT spectrum were to be returned for future allocation in accordance with Government policy and ICASA regulations. MTN submitted that one of the ways in which ICASA might achieve the return of Neotel's IMT spectrum, would involve the grant of the EC



application but the refusal of the IMT spectrum application. In such an event, Vodacom would be permitted to acquire control of Neotel's IECNS and IECS licences, but would not be permitted to acquire control of Neotel's IMT spectrum licences. This would mean that, if Neotel wished to implement the proposed transaction, it would have to return its IMT spectrum licences. Unless Neotel were to do so, the implementation of the transaction would contravene section 31(2A) of the ECA.

158 Neotel and Vodacom described this submission as "imaginative" (page 268 of the Telkom Record) and suggested that MTN deserves "credit for ingenuity" (page 683 of the Telkom Record). But such smarminess is misplaced because there is nothing remotely "imaginative" about a submission that ICASA should decline to grant the very approval that had been sought by Neotel and Vodacom. Since Neotel and Vodacom at no stage contended that the EC application and the IMT spectrum application amounted to a "package deal", they necessarily conceded that it would be permissible for ICASA to give different decisions in relation to different applications.

159 The only point of substance raised by Vodacom and Neotel involved their contention that Neotel would contravene section 31(2)(a) of the ECA if it were to transfer control of its EC licences while giving up its spectrum licences. But that contention was entirely misdirected: section 31(2)(a) does not prohibit licensee X from transferring control of its service licence to Y whilst leaving it to Y to obtain the necessary spectrum licence.

160 The Telkom Record makes it plain that ICASA failed to give any consideration to the possibility that it might give different decisions in relation to the EC

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application and the IMT spectrum application. The fact that ICASA overlooked this possibility is evident from its statement in the Reasons Document that there was no "sound legal basis to withdraw or cede Neotel's spectrum" (page 1028 of the Record, paragraph 21.21).

161 ICASA appears to have misunderstood MTN's position regarding spectrum:

161.1 The minutes of a meeting of the Special Committee on 25 March 2015 contain an attempt to describe MTN's position. ICASA records that:

"MTN is of the view that the [sic] Neotel's spectrum was unutilised [sic] hence it must be returned to the Authority. MTN conceded that it had no legal basis for its comments, hence it suggested that Neotel voluntarily return the spectrum." (Telkom Record at page 874)

161.2 Later, in the same minute, it is stated that:

"Withdrawal of spectrum can be done in terms of section 31(8), (9) & (10) of ECA, which is not applicable to this transaction, as the Authority has no evidence to believe that Neotel is not using its spectrum." (Telkom Record at page 876)

161.3 In a memorandum prepared by Councillor Pillay in support of her recommendation that ICASA approve the Neotel/Vodacom Application, she stated as follows (Telkom Record at page 917):

"Some of the interested parties proposed that Neotel's spectrum be withdrawn as a measure to prevent Vodacom from using it, however, [sic] they did not provide sufficient legal basis for Neotel's spectrum to be withdrawn or ceded. When dealing with a withdrawal of a radio frequency spectrum licence, the Authority has to act in terms of section 31(8); (9) and (10), of the ECA.

...



The [Special] Committee did not find any reason to conclude that this transaction will not ensure efficient use of radio frequency spectrum nor did it find any reason to withdraw the spectrum from Neotel. Therefore the [Special] Committee resolved that there are no sufficient technical or regulatory grounds for the disapproval of the Application for the transfer of control of Neotel's radio frequency spectrum licences to Vodacom."

161.4 In its reasons for its decision, ICASA once again mischaracterised MTN's argument when it said the following:

"The Authority received submissions from MTN and Cell C that the spectrum be withdrawn first if the Application is to be considered. However, upon due consideration of these submissions, the Authority could not find a sound legal to withdraw or cede Neotel's spectrum. To this end the ECA is clear that when dealing with a withdrawal of a radio frequency spectrum licence, the Authority must act in terms of section 31(8); (9) and (10) of the ECA." (Telkom Record at pages 1028-9)

161.5 ICASA once again showed its misunderstanding of the relevant provisions when it incorporated, verbatim, the reasoning reproduced in paragraph 161.3 above into its Reasons Document (Telkom Record at pages 1030 to 1031).

161.6 It is apparent from these extracts that ICASA was labouring under the mistaken apprehension that the only basis on which it could refuse the IMT spectrum application was in terms of sections 31(8) to (10) of the ECA. This issue had been expressly raised at the public hearing when ICASA posed a question about the legal basis on which it was suggested that Neotel should "return" its spectrum. In response, MTN explained that it was not necessary to invoke section 31(8) of the ECA in support of MTN's proposal. The two possibilities summarised in



paragraph 68 above were explained. It was made clear that, if ICASA were to refuse the IMT spectrum application (or grant the EC Application subject to a condition relating to the surrender of the IMT Spectrum), it would be exercising its powers in terms of section 13 and/or section 31(2A) of the ECA, and not in terms of section 31(8) (see Telkom Record at pages 593-4).

161.7 It would appear that ICASA's confusion relating to section 31(8) stems from the submission made by counsel for Neotel and Vodacom at the public hearing that MTN's proposed remedy should be regarded as an attempt to introduce a "rabbit-out-of-the-hat" by "circumventing" the requirements of section 31(8) "via the backdoor" (Telkom Record at pages 683-5; see also Telkom Record at page 1155, para 9.7.2 and the further references given there). This curious submission was long on mixed metaphors but short on legal substance. It simply disregarded the factors that must be taken into account by ICASA when exercising its discretion in terms of sections 13(1) and 31(2A).

161.8 Lastly, I should mention that, in the Telkom Supplementary Record, there is a document entitled HDI and BBBEE Presentation (Telkom Supplementary Record at page 151ff). It is not immediately apparent who drafted the document, but it is clear that it served before ICASA when it made the IMT spectrum decision. In that memorandum, the following statement is made (Telkom Supplementary Record at pages 160-1):

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"The spectrum matter is not a possibility in our jurisdiction [sic] due to already existing Regulation [sic] that govern Spectrum. The South African context governs spectrum licence [sic] and service licence [sic] separately thus consideration of the existing Regulation is paramount [sic]. It is not necessarily correct nor justifiable to request giving up spectrum without following or giving due regard [sic] of Regulation and Spectrum Licencing."

161.9 To the extent that these remarks are intelligible at all, they appear to confirm that ICASA misunderstood the legal position and formed the view that there was some unspecified and non-elucidated regulatory barrier to ICASA upholding MTN's arguments on spectrum.

162 In the result, I submit that the IMT spectrum decision was materially influenced by an error of law (within the meaning of section 6(2)(d) of PAJA) and was not rationally connected to the purpose of the empowering provision or the reasons given for the decision (within the meaning of section 6(2)(f)(ii) of PAJA).

***ICASA's approval of an undeserved windfall to the shareholders of Neotel***

163 My understanding is that that the purchase price for the acquisition of Neotel's shares includes a premium relating to the acquisition of the Neotel IMT spectrum. I invite Vodacom to indicate in its answering affidavit whether my understanding is correct.

164 The effect of the IMT spectrum decision is that, although Neotel's IMT spectrum has been left largely unutilised for seven years, Neotel's shareholders are now being permitted to obtain a significant windfall from its sale. I submit that ICASA acted arbitrarily and unreasonably in allowing Neotel's shareholders to "cash in" Neotel's IMT spectrum in such circumstances.

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***The Reasons Document***

165 I submit that there is no rational connection between the Reasons Document and the IMT spectrum decision (within the meaning of section 6(2)(f)(ii) of PAJA). I refer to what I have stated above in support of this submission.

***Conclusion***

166 For the reasons given above, I submit that the IMT spectrum decision should be reviewed and set aside on the following grounds:

166.1 it is irrational and therefore violates the principle of legality and the rule of law entrenched in section 1(c) of the Constitution;

166.2 the IMT spectrum decision was influenced by material mistakes of fact which results in unlawfulness in terms of section 6(2)(i) of PAJA and is contrary to the principle of legality, which forms part of the rule of law in section 1(c) of the Constitution;

166.3 the IMT spectrum decision was materially influenced by errors of law (as envisaged in section 6(2)(d) of PAJA);

166.4 ICASA failed to take account of relevant considerations (as envisaged in section 6(2)(e)(iii) of PAJA);

166.5 ICASA had regard to irrelevant considerations (within the meaning of section 6(2)(e)(iii) of PAJA);

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166.6 the IMT spectrum decision was not rationally connected to the information before ICASA, the purpose of the empowering provision or the reasons given for it by ICASA (within the meaning of section 6(2)(f)(ii) of PAJA);

166.7 the IMT spectrum decision was unreasonable within the meaning of section 6(2)(h) of PAJA;

166.8 the IMT spectrum decision was taken arbitrarily within the meaning of section 6(2)(e)(vi) of PAJA;

166.9 the IMT spectrum decision is otherwise unconstitutional or unlawful within the meaning of section 6(2)(i) of PAJA.

167 This is the relief sought in prayer 2 of the notice of motion.

#### PRAYER

168 For the reasons set out above, MTN prays for the relief set out in the notice of motion to which this affidavit is attached.

  
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DEPONENT

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at



ILLOVO on this 18<sup>th</sup> day of September 2015, the regulations contained in Government Gazette Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

  
**COMMISSIONER OF OATHS**

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