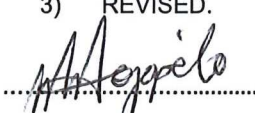




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 039586/2023

1) REPORTABLE: NO	
2) OF INTEREST TO OTHER JUDGES: NO	
3) REVISED.	
	<u>13 January 2026</u>
SIGNATURE	DATE

In the matter between:

OCTOTEL (PTY) LTD

Applicant

and

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

First Respondent

**INDEPENDENT COMMUNICATIONS AUTHORITY OF
SOUTH AFRICA**

Second Respondent

COMPLAINTS AND COMPLIANCE COMMITTEE

Third Respondent

TELKOM SA SOC LTD

Fourth Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties/their legal representatives by email and by uploading to Caselines. The date and time of hand-down is deemed to be 10:00am on 13 January 2026.

MOJAPELO AJ

INTRODUCTION

1. This is a review under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") of a decision by the Council of the Independent Communications Authority of South Africa ("ICASA" or "the Authority") to approve the recommendations of its Complaints and Compliance Committee ("CCC") in *Telkom SA SOC Ltd v Octotel (Pty) Ltd* (CCC Case 344/2019).
2. In its complaint to ICASA, Telkom alleged that Octotel had contravened s 43 of the Electronic Communications Act 36 of 2005 ("ECA"), read with Regulation 3 of the Electronic Communications Facilities Leasing Regulations, 2010 ("Leasing Regulations"), by installing its fibre optic cables in certain underground passive infrastructure, ducts, manholes and related facilities at three residential estates in the Western Cape, without first leasing those facilities from Telkom.
3. The CCC upheld Telkom's complaint and recommended extensive relief against Octotel, including interdicts, a duty to negotiate and conclude a facilities lease with Telkom, and, failing agreement, an obligation to remove Octotel's fibre from "Telkom's infrastructure" in each estate. On 31 October 2022, the ICASA Council approved all of these recommendations save for the administrative fine proposed in para 105.5 of the CCC judgment.
4. Octotel seeks an order:

- 4.1. Reviewing and setting aside ICASA's decision taken under ss 17D–17E of the ICASA Act 13 of 2000 ("ICASA Act") to approve the CCC's recommendations;
 - 4.2. to the extent necessary, reviewing and setting aside the CCC's findings and recommendations as the reasons for ICASA's decision; and
 - 4.3. substituting ICASA's decision with an order dismissing Telkom's complaint in its entirety.
5. Octotel relies primarily on PAJA s 6(2)(d), (e)(iii), (f)(ii), (h) and (i); in the alternative, on the constitutional principle of legality.
6. The central questions are:
 - 6.1. What is the proper interpretation of s 43 of the ECA, read with the Leasing Regulations?
 - 6.2. Did ICASA (acting through the CCC) err in law in treating s 43 as imposing a positive obligation on a newcomer ECNS licensee to lease facilities from an incumbent ("facility seeker" obligation), and in its treatment of ownership and control of the facilities?
 - 6.3. Were the CCC's factual findings, particularly on who owned the facilities, who had the right to control access, whether Telkom "established" the infrastructure, and the position in Sandown, materially wrong on uncontentious and objectively verifiable facts?
 - 6.4. If reviewable irregularities are established, what is the appropriate remedy: remittal or substitution?

THE PARTIES AND FACTUAL BACKGROUND

7. Octotel is an ECNS licensee which operates an open-access fibre network in Cape Town, serving in excess of 180 000 homes and businesses.
8. Telkom is an incumbent ECNS and ECS licensee, historically the dominant fixed-line operator (*Telkom SA SOC Ltd v Chairperson, ICASA and Others* [2020] ZAGPPHC 443 ("*Telkom v ICASA*") paras 3–4).
9. The estates concerned are Kleinbron Park (Brackenfell), Sandown Estate (Big Bay) and Dune Ridge Estate (Big Bay Boulevard, Bloubergstrand).
10. Between about 2004 and 2007, underground ducts and manholes were installed at these estates for multiple purposes: telecommunications, electricity and water. Two installation models were used:
 - 10.1. Under the "Supply and Deliver" model, Telkom supplied certain materials (e.g. Telkom-branded 110mm green ducts and manhole covers) at its cost, while the developer bore the trenching, installation and maintenance costs.
 - 10.2. Under the "Developer Installation" model, the developer procured and installed all the infrastructure, at its own cost, albeit to Telkom's specifications.
11. It was common cause that in both models, the construction work, trenching and installation were "at no cost to Telkom"; the developers carried those costs and the ongoing maintenance obligations.
12. After installation and certification, Telkom installed its copper cables in Kleinbron Park and Dune Ridge and used the existing infrastructure there to provide fixed-line services. In Sandown, it likewise installed copper and used certain existing ducts; later, Octotel installed its own parallel network in that estate.

13. In 2017–2018, Octotel, with the consent of the relevant homeowners' associations ("HOAs"), installed its fibre network:
 - 13.1. In Sandown, by trenching and constructing its own ducts and manholes, a handful of "last-mile" links (5 out of 149) were initially run through Telkom's existing last-mile connections by subcontractors in error, but this was corrected when brought to Octotel's attention. By the time of the CCC hearing, all Octotel's fibres ran exclusively through its own ducts.
 - 13.2. In Dune Ridge and Kleinbron Park, Octotel used the pre-existing ducts and manholes in common with Telkom, having obtained HOA consent. There was no allegation that Octotel interfered with Telkom's services or imposed costs on Telkom.
14. Telkom first objected in 2019, long after Octotel had completed or substantially completed its installations: about 13 months after commencement in Dune Ridge and 16 months in Kleinbron Park.
15. Telkom's complaint, lodged in May 2019, alleged that Octotel had unlawfully accessed and installed its fibre in Telkom's ducts and related infrastructure in all three estates, in contravention of s 43 of the ECA and Regulation 3 of the Leasing Regulations, by failing to submit a leasing request, conclude a lease, or follow the s 43 dispute resolution process.

THE IMPUGNED CCC JUDGMENT AND ICASA'S DECISION

16. The CCC's judgment is set out in detail in the record and is attached to ICASA's decision letter.
17. For present purposes, the key findings are:
 - 17.1. Trigger and duty under s 43: The CCC held that although on a "plain reading" s 43(1) appears to place the obligation on the "electronic

communications facilities provider” to lease “on request”, the “actual trigger” for s 43 is the decision by any ECNS licensee to gain access to existing facilities, and that once such a decision is made the facility seeker is obliged to approach the licensee “who established the infrastructure” and request a lease. Gaining access without following that process was held to be a contravention by the facility seeker.

- 17.2. Ownership “irrelevant”: The CCC repeatedly stated that ownership of the underground passive infrastructure is not relevant to the application of s 43, relying inter alia on *Telkom v ICASA* and on the assertion that s 43 does not mention ownership.
- 17.3. Right to control access / “established the infrastructure”: The CCC held that Telkom “established the right to control access to the infrastructure irrespective of the model adopted” because (a) the infrastructure was built to its plans and specifications; (b) Telkom supervised, tested and certified the works; and (c) Telkom installed and used its copper within the ducts, and recorded the assets on its Netplan system. From this, it is inferred that Telkom had the right to control access and was thus the relevant facility provider for s 43 purposes.
- 17.4. HOAs’ ownership rejected: Despite stating that ownership was irrelevant, the CCC went on to hold that the HOAs were not the owners of the underground passive infrastructure. It rejected common-law accession, held that Telkom’s role and the alleged hand-over from developers meant Telkom remained the owner, and treated the HOAs’ limited participation in the CCC proceedings as corroboration that they did not own the infrastructure.
- 17.5. Dennegeur distinguished: The CCC held that *Dennegeur Estate Home Owners Association and Another v Telkom SA SOC Ltd and Another* [2019] ZASCA 37; 2019 (4) SA 451 (SCA) (“*Dennegeur*”) was irrelevant because it concerned the *mandament van spolie* under s 22

of the ECA, and possession, whereas the present matter concerns the regulatory framework of s 43 and not possession.

- 17.6. Sandown: The CCC accepted that Octotel had constructed its own ducts and manholes in Sandown, and that the use of Telkom's last-mile facilities in 5 of 149 cases had been an error by subcontractors which Octotel had rectified. Nevertheless, it held that Octotel "should be held liable" for this error and treated Sandown as part of a contravention of s 43, warranting the full suite of orders in para 105.
18. ICASA's letter of 3 November 2022 records that the Council:
 - 18.1. Approved all of the CCC's recommendations save for para 105.5 (the fine); and
 - 18.2. Attached the CCC judgment as Annexure A and gave no separate reasons, thereby engaging Rule 10(2) of the CCC Rules with the result that, absent other reasons, "the reasons put forward by the CCC are deemed to also be the reasons of Council".
19. It is therefore common cause that the lawfulness of ICASA's decision stands or falls with the lawfulness of the CCC's reasons.

THE LEGAL FRAMEWORK

The ECA and the Leasing Regulations

20. Section 2 of the ECA sets out the Act's objects, which include promoting universal access, competition, efficient use of resources, and the interests of consumers in price, quality and variety of services (*Telkom v ICASA* para 34).
21. Section 43 provides:

"43 Obligation to lease electronic communications facilities

(1) Subject to section 44(5) and (6), an electronic communications network service licensee must, on request, lease electronic communications facilities to any other person licensed in terms of this Act ... in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.

...

(4) For purposes of subsection (1), a request is reasonable where the Authority determines that the requested lease

...

(a) is technically and financially feasible; and

(b) will promote the efficient use of electronic communication network and services."

22. Section 44(3)–(5) makes clear that the Leasing Regulations may, among other things, require an ECNS licensee "to negotiate and enter into an electronic communications facilities leasing agreement with an applicant for an individual licence", and may exempt certain licensees (with <25% market share) from the obligation to lease in terms of s 43(1).
23. Regulation 3 of the Leasing Regulations prescribes the content of a request for facilities (Reg 3(1)), the timeframe for the provider's response (7 days: Reg 3(2)), and the timeframe for concluding an agreement (45–60 days: Reg 3(3))
24. In *Telkom v ICASA*, Tuchten J analysed the scheme of s 43 and the Regulations, emphasising that:
 - 24.1. Section 43 is "a radical departure from the common law" in that an incumbent may no longer "hug its infrastructure to its corporate breast" but must lease facilities to competitors where reasonable and feasible, because that is "good for the country" (para 35);
 - 24.2. Section 43(1) makes it mandatory "for any licensee to lease ... to any other person who qualifies ... and requests such a lease unless such

request is unreasonable. The default position is therefore that a licensee asked for a lease must in principle ... conclude a lease with a qualified person" (para 36);

24.3. The statute contemplates a two-stage process: a reasonableness stage under s 43(2)–(4), followed, if the request is reasonable, by a negotiation stage under s 43(5) (paras 6, 39–42); and

24.4. ICASA's role at the reasonableness stage is to determine whether the request is technically and economically feasible and whether granting it will promote efficient use; the review court's role is not to decide the merits anew but to ask whether ICASA's determinations were made on reasonable grounds (paras 39, 46–54).

25. *Telkom v ICASA* thus confirms that the primary obligation created by s 43 is on the requested licensee (the facility provider) to lease, upon a reasonable request from a facility seeker, and does not itself expressly impose a free-standing statutory duty on the seeker to request or to lease.

ICASA Act and PAJA

26. The CCC is established under s 17A of the ICASA Act. Under s 17B(a), it must investigate and, where appropriate, hear complaints and allegations of non-compliance with the ECA. After a hearing, it must submit its findings and recommendations, together with the record, to the Authority for decision (s 17D). Under s 17E, ICASA must make the decision and must consider all relevant matters, including the CCC's recommendations.

27. The decision of ICASA Council approving the CCC's recommendations is an administrative action under PAJA. PAJA s 6(2)(d), (e)(iii), (f)(ii), (h) and (i) permit review where, inter alia:

27.1. The action "was materially influenced by an error of law";

- 27.2. Relevant considerations were not taken into account, or irrelevant ones were;
 - 27.3. The action is not rationally connected to the information before the administrator, or is unreasonable; or
 - 27.4. Mandatory procedures were not complied with, or the action is otherwise unconstitutional or unlawful.
28. As explained in *Hirt & Carter (Pty) Ltd v Arntsen NO and Others* [2021] ZASCA 85 paras 29–30, a material error of law arises where a statutory criterion is wrongly interpreted and, on the correct approach, the facts do not support the decision; similarly where the administrator asks itself the wrong question or bases its decision on matters not prescribed by the statute.
29. Material mistakes of fact are likewise reviewable where the decision-maker fails to consider “uncontentious and objectively verifiable” facts that are material, and which would probably have led to a different outcome: *Pepcor Retirement Fund v FSB* 2003 (6) SA 38 (SCA) paras 47–48; *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs* 2020 (4) SA 453 (SCA) paras 23–24; *Airports Company SA v Tswelokgotso* 2019 (1) SA 204 (GJ) para 12.
30. The Constitutional Court has stressed that judicial deference does not require courts to “rubber-stamp” decisions that are not reasonably supported by the facts or that are not reasonable in light of the reasons given: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 44–48; *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) paras 38–40.

ISSUES FOR DETERMINATION

31. Against that framework, the principal issues are:

31.1. First: Did ICASA (through the CCC) commit material errors of law in its interpretation of s 43 and the Leasing Regulations, in particular by:

- 31.1.1. Reading s 43 as imposing a positive obligation on the facility seeker to lease;
- 31.1.2. Treating ownership as irrelevant and effectively displacing common-law accession;
- 31.1.3. Equating Telkom's role in "establishing" infrastructure with a right to control access, absent proof of contractual or statutory rights; and
- 31.1.4. Treating *Dennegeur* as irrelevant?

31.2. Second: Did the CCC make material mistakes of fact concerning who owned the infrastructure, who in fact controlled access, whether Telkom "established" the facilities and incurred costs, and the factual position in Sandown, which render ICASA's decision reviewable under PAJA s 6(2)(e), (f) and (h)?

31.3. Third: If reviewable irregularities are found, what relief is just and equitable: remittal to ICASA, or substitution by this Court under PAJA s 8(1)(c)(ii)(aa) as discussed in *Trencon Construction (Pty) Ltd v IDC* 2015 (5) SA 245 (CC) paras 47, 51–52?

I turn to the main grounds.

INTERPRETATION OF SECTION 43 AND THE "OBLIGATION TO LEASE"

The principles of interpretation

32. The settled approach to interpreting legal documents whether contracts, statutes, or other instruments requires a unitary exercise considering the triad of text, context, and purpose. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), the Supreme Court of Appeal established

that interpretation is an objective process of attributing meaning to words used, read in light of the document as a whole and the circumstances attendant upon its coming into existence. A sensible, businesslike meaning is to be preferred over one that leads to insensible results or undermines the document's apparent purpose.

33. This triad must not be applied mechanically. As clarified in *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA), the interpretative enterprise relies on the relationship between the words used, the concepts expressed, and the place of the contested provision within the scheme of the instrument as a whole to determine a coherent and salient interpretation.
34. Furthermore, where statutory interpretation is concerned, the SCA in *Davids v Minister of Defence and Military Veterans* [2024] ZASCA 105 reiterated that the process must be holistic and conducted in a manner that preserves constitutional validity. Where multiple meanings are possible, the court must privilege the interpretation that best protects and promotes constitutional rights.
35. Modern jurisprudence represents a decisive break from the "golden rule," which previously restricted interpretation to the literal, grammatical meaning unless it yielded an absurdity. Under the current "unitary" approach, text, context, and purpose are weighed from the outset, with no single factor trumping the others.
36. The Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) reaffirmed this shift, criticizing any approach that excludes contextual evidence on the basis that the text is "unambiguous." The Court held that context is always admissible and relevant, as reverting to a literalist approach would set South African law back by decades.

Does s 43 impose a duty on the facility seeker to lease?

37. The CCC's core interpretive move was to treat the "actual trigger" for s 43 as the decision by any ECNS licensee to gain access to existing infrastructure, and to infer a legal obligation on that licensee (the facility seeker) to request and conclude a lease with the licensee "who established the infrastructure", failing which the seeker is in contravention.
38. This reading is not borne out by the text, context, or purpose of the provision.
39. Textually, s 43(1):
 - 39.1. Is framed in the imperative "must ... lease" in relation to the *provider*, not the seeker;
 - 39.2. Is expressly conditioned "on request"; and
 - 39.3. Defines unreasonableness with reference to the provider's refusal or failure to lease where technically and economically feasible (s 43(4); *Telkom v ICASA* paras 5, 39–45).
40. To read into s 43 a free-standing statutory duty on a facility seeker not to access infrastructure at all unless it has first requested a lease from "whoever established the infrastructure" is to ignore and render redundant the words "on request" and to invert the direction of the obligation. That offends the principle that statutory language should, where possible, be given meaning that avoids redundancy: *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC) para 57.
41. Contextually, s 44 confirms that the Leasing Regulations are aimed at the obligation of an ECNS licensee to negotiate and enter into leasing agreements "with an applicant" (s 44(3)(l)) and even provides for exemptions from "the obligation to lease" in s 43(1) (s 44(5)–(6)). That obligation is the obligation of the *incumbent* to make its facilities available, not of the newcomer to lease: *Telkom v ICASA* paras 34–36.

42. In *Telkom v ICASA*, Tuchten J described the purpose of s 43 as follows (paras 34–36):

“Section 43 ... [is] a radical departure from the common law. Before the enactment of the measure, an industry participant might hug its infrastructure to its corporate breast and deploy it solely for its own selfish benefit. Not any longer. Section 43 provides for the promotion of fair competition, equitable access to the industry and the benefit of the public generally ... If it is reasonable to do so ... an industry participant in the position of Telkom must lease out its electronic communications facilities even to its competitors and aspirant competitors. It must do this because ... doing so would be good for the country.

...

Section 43(1) makes it mandatory for any licensee to lease [facilities] to any other person who qualifies ... and requests such a lease unless such request is unreasonable. The default position is therefore that a licensee asked for a lease must in principle ... conclude a lease...” (my emphasis).

43. This passage, consistently with *Endumeni*, places the emphasis squarely on the incumbent’s obligation to lease “on request”. It does not support the CCC’s further step of locating a statutory contravention in the seeker’s omission to request a lease before making *any* use of facilities, irrespective of ownership or control.
44. That is not to say that a newcomer may “barge in” onto another’s infrastructure with impunity. Its conduct remains constrained by s 22 of the ECA and the common law, as explained in *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC) (“*Link Africa*”) paras 166, 189. The landowner and any possessor or rights-holder retain remedies under property and servitude law. But the mere fact of using existing ducts, without having requested a lease from a rival ECNS, does **not**, in my view, by itself constitute a contravention of s 43.

45. The CCC's reasoning at paras 88–91 conflates the policy desirability of routing sharing through a regulated lease with the creation of a statutory crime-like prohibition on any sharing without such a lease. Section 43, properly construed, does not go that far. It creates:
 - 45.1. A duty on a facility provider to lease where reasonably requested;
 - 45.2. A right (but not a duty) on a seeker to request and, where appropriate, to have ICASA determine reasonableness; and
 - 45.3. A framework for ICASA to impose terms or a lease where a provider is unwilling to negotiate (s 43(5)).
46. The CCC thus asked itself the wrong legal question when it framed the issue as whether Octotel, by deciding to share existing underground passive infrastructure and not requesting a lease from Telkom, “contravened” s 43. Under *Hirt & Carter* (paras 29–30), that is a material error of law: the statutory criterion for non-compliance under s 43 was mis-characterised, and on the correct interpretation, the facts do not support a finding of contravention.
47. ICASA's decision, which simply adopts the CCC's reasons, was therefore “materially influenced by an error of law” and is reviewable under PAJA s 6(2)(d).
48. This conclusion is sufficient to dispose of Telkom's complaint on the footing that s 43, as a matter of law, does not render a facility seeker's unauthorised use of facilities a contravention of that section. But given the importance of the issues and the other pleaded grounds, it is also appropriate to address the remaining interpretive and factual complaints.

Ownership, common-law accession and the role of HOAs

49. The CCC paradoxically treated ownership as “not relevant” to s 43, yet nevertheless held that the HOAs were not owners and that Telkom was. It did

so by invoking a supposed “departure from the common law” and by treating statutory policy as displacing accession.

50. Section 43 does not refer to ownership at all. As the CCC and *Telkom v ICASA* correctly note, an ECNS licensee can be obliged to lease facilities it does not own (e.g. those it leases from another or uses under servitudal rights). Ownership is therefore not a jurisdictional requirement for being a facility provider under s 43.
51. But it does not follow that ownership is irrelevant for all purposes. Whether Telkom in fact had “electronic communications facilities” capable of being leased, and whether it had any right to control access to, and to exclude others from, the ducts and manholes in issue, plainly depends on the existing rights of owners and other right-holders. Common-law accession remains the starting point: ducts and manholes installed in and intended to remain part of immovable property accede to the land and are owned by the landowner, absent agreement to the contrary.
52. The CCC’s reasoning at paras 52–55, rejecting accession in this context on the basis that it would require ICASA to “abandon any regulatory powers it has over the underground passive infrastructure” and would lead to a “free for all”, is not persuasive. As Octotel points out:
 - 52.1. ICASA’s regulatory powers are over *licensees* and the *leasing of facilities* between them. Those powers are not dependent on ICASA or licence-holders being owners of the infrastructure.
 - 52.2. Recognising that, by accession, the HOAs are the “default” owners of the ducts and manholes simply means that, unless and until ownership is contractually ceded, an ECNS licensee cannot lease out those facilities to another as if they were its own. It does not deprive ICASA of jurisdiction over licensing, conduct obligations or disputes under ss 22, 43 or 44.

- 52.3. The spectre of a “free-for-all” is addressed by s 22, which requires ECNS licensees to exercise their servitural rights “*civiliter modo*”, with notice and compensation where appropriate (*Link Africa* paras 142, 152, 189). Owners and possessor-licensees retain common-law remedies (interdicts, damages, spoliation).
53. The CCC’s dismissal of accession, and its conclusion that Telkom was the owner of the facilities, rested on evidential foundations which, as I discuss below, were themselves flawed. For present purposes, it suffices to say that:
- 53.1. There is no textual basis in s 43 or s 22 of the ECA for abrogating accession.
- 53.2. The CCC’s attempt to do so was a further material error of law and led it to ask itself who “owned” the ducts for purposes of s 43 on an incorrect legal premise. This, too, is reviewable under PAJA s 6(2)(d), and also colours the rationality of its reasoning under *Democratic Alliance* (paras 38–40) and *Rustenburg Platinum* 2007 (1) SA 576 (SCA) para 34, as endorsed in *Sidumo* 2008 (2) SA 24 (CC).

Right to control access and the notion of “established” infrastructure

54. The CCC further held that Telkom “established the right to control access” to the underground infrastructure by virtue of its role in specifying, supervising and certifying the works, even where it paid none of the construction or maintenance costs.
55. Control of access to property is, at common law, an incident of ownership and, to some extent, possession. Absent:
- 55.1. A contractual cession from the owner (e.g. HOA) to the ECNS licensee;
- 55.2. A statutory vesting (e.g. a statutory servitude in favour of the licensee broader than s 22’s entry rights); or

55.3. Facts establishing possession in the legal sense (actual control with the intention to possess).

A licensee does not acquire a general right to exclude others from infrastructure merely because it participated in specifying or supervising its installation.

56. The CCC, however, expressly declined to require proof of any contractual right to control access, or evidence of Telkom's actual control at the time Octotel sought access. Instead, it treated Telkom's historical involvement in "establishing" the network as sufficient in itself.
57. That again is a misdirection in law. Section 43 does not deem the party that first "established" facilities in the sense of having persuaded developers to install ducts consistent with its specifications, to have perpetual, exclusive control over access to those ducts, to the exclusion of both owners and other ECNS licensees. Nor does it convert engineering oversight and long-past installation into a general right of veto over all subsequent uses of that physical space, especially where:
 - 57.1. The infrastructure was built and is maintained at the developers'/HOAs' cost;
 - 57.2. The HOAs control physical access to the estates and have, in practice, authorised Octotel to use the ducts; and
 - 57.3. Telkom has not manifested ongoing physical control (e.g. locked, marked manholes; prompt response to third-party access), as the evidence here shows.
58. By equating "established the infrastructure" with "has a right to control access" without requiring proof of any underlying legal right, the CCC again applied the wrong legal test. That is a further material error of law under PAJA s 6(2)(d),

and also led it to disregard relevant considerations, namely, the HOAs' rights, the actual patterns of control, and the allocation of costs (PAJA s 6(2)(e)(iii)).

The relevance of *Dennegeur*

59. The CCC held *Dennegeur* to be "clearly distinguishable" and essentially irrelevant because it concerned the *mandament van spolie* and s 22 of the ECA. While the cause of action there was indeed spoliation, the SCA's analysis of Telkom's rights under s 22, and of what constitutes possession of duct "airspace", is plainly relevant to the present dispute about who has rights to control access to unused duct capacity.
60. In *Dennegeur*, the SCA held that:
 - 60.1. Telkom's quasi-possession under s 22 extended only to the space actually occupied by its cables;
 - 60.2. A mere intention to reserve additional duct space for future use did not give Telkom quasi-possession of the entire infrastructure; and
 - 60.3. Telkom was not in possession of the vacant duct space that Vodacom had used.
61. That reasoning undermines, rather than supports, the CCC's conclusion that Telkom enjoyed a general right to control all unused duct space in the estates, merely by virtue of its existing copper cables and its role in planning the infrastructure. While *Dennegeur* does not directly decide issues under s 43, it is highly relevant to the factual and legal assessment of who, as a matter of property and possession, controls access to the ducts and on what basis.
62. The CCC's dismissal of *Dennegeur* as irrelevant was therefore a further legal misdirection. It led the CCC to ignore relevant considerations and to fail to grapple with a closely analogous factual scenario involving Telkom, HOAs,

ducts and rival ECNS licensees. This is reviewable under PAJA s 6(2)(d) and (e)(iii).

MATERIAL MISTAKES OF FACT

63. As indicated, PAJA also permits review where “irrelevant considerations were taken into account or relevant considerations were not considered” (s 6(2)(e)(iii)), or the decision is “not rationally connected to the information” or “is so unreasonable that no reasonable person could have so exercised the power” (s 6(2)(f)(ii), (h)).
64. The present case is not one of weighing contested technical prognoses, as in *Bato Star*. Many of the facts concerning ownership, control, costs and the Sandown position were either common cause or objectively verifiable from contemporaneous documents.
65. In *Tswelokgotso* (para 12) and *South Durban* (paras 23–24), the courts held that where such material, objectively verifiable facts are misconstrued or ignored, the resulting decision is reviewable.
66. In my view, the CCC committed several such material mistakes, which ICASA then adopted as its own:

Who in fact owned the facilities

67. Telkom produced no written agreements with the developers or HOAs for any of the three estates to prove that ownership of the ducts and manholes had been ceded to it. Telkom’s own witness, Mr Hagan, accepted that in prior matters where documentary proof of ownership was lacking, Telkom acknowledged that it could not assert ownership.
68. Yet the CCC inferred ownership in Telkom from:

- 68.1. Telkom's evidence that after certification, the infrastructure was "handed over" to Telkom and recorded in its Netplan assets register; and
 - 68.2. The absence of HOAs' participation in the CCC proceedings, which was taken as an indication that "even the HOA knows that it does not own the infrastructure".
69. That inference is contradicted by the objective record:
- 69.1. Telkom's asset register produced in the CCC proceedings recorded copper cables at Sandown only, under the supply-and-deliver model, and reflected no infrastructure assets in Kleinbron Park or Dune Ridge.
 - 69.2. Telkom expressly acknowledged in its own evidence that it did not own the infrastructure in Dune Ridge, yet the CCC treated it as the owner there too.
 - 69.3. The HOAs' reluctance to participate was equally consistent with a wish to avoid costly litigation and potential friction with service providers and cannot rationally be treated as proof of their lack of ownership.
70. In these circumstances, the CCC's factual conclusion that Telkom "retained ownership" of all the underground passive infrastructure in all three estates lacked any proper evidential basis and conflicted with the contemporaneous asset records. It was a material mistake of fact of the kind described in *Pepcor* and *South Durban*, and it materially informed the CCC's and thus ICASA's conclusions about Telkom's entitlement to "lease" those facilities under s 43.

Who in fact had the right to control access

71. The CCC further concluded that Telkom had the right to control access in each estate, largely on the basis of:

- 71.1. Its role in planning and approving the infrastructure;
 - 71.2. The presence of its copper cables in ducts; and
 - 71.3. Evidence that a Telkom-branded duct was observed at Kleinbron Park in one inspection.
72. The CCC discounted, or ignored, uncontentious facts pointing the other way:
- 72.1. In Kleinbron Park, the manholes (other than one heavy main manhole near an Openserve box) were unmarked and unlocked; they could be opened easily and bore no Telkom branding. Octotel accessed them with HOA consent and without any manifestation of Telkom's physical control; Telkom only complained some 16 months after Octotel commenced work.
 - 72.2. In Dune Ridge, Telkom produced no documentary proof of ownership or control; there was evidence of Telkom's copper cables, but no evidence that Telkom physically controlled the manholes or that it had ever objected to HOA-authorised use before Octotel's arrival.
 - 72.3. In Sandown, it was common cause that Octotel had installed its *own* ducts and manholes and, by the time of the CCC hearing, had entirely ceased to use Telkom's ducts.
 - 72.4. In all estates, HOAs had in practice controlled access to the estates and had authorised Octotel's use of the ducts.
73. The CCC's failure to confront these objective facts, and its willingness to infer a general right of control from limited and historically remote involvement, again constitutes a material mistake of fact and an irrational failure to consider relevant considerations, reviewable under PAJA s 6(2)(e)(iii), (f)(ii) and (h).

Whether Telkom "established" the facilities and incurred costs

74. The CCC held that in all three estates Telkom had “established” the infrastructure and “played a significant role” in doing so, irrespective of the model, and that the costs incurred by Telkom in planning, supervising and certifying works, though not quantified, were such that it could not be said its role was “insignificant”.
75. It is common cause, however, that:
 - 75.1. All trenching, construction and installation costs were borne by the developers;
 - 75.2. Maintenance costs were and are borne by the developers/HOAs; and
 - 75.3. Telkom did not produce evidence of any actual costs incurred in planning, supervision, certification or otherwise in these specific estates.
76. The CCC’s reliance on alleged “incidental costs” that are nowhere quantified or evidenced in the record, to support the conclusion that Telkom “established” the infrastructure in a legally relevant sense, is speculation rather than fact-finding. Under *Tswelokgotso* and *South Durban*, that kind of evidential lacuna cannot support material factual findings adverse to another party.
77. The mischaracterisation of Telkom’s contribution, and the failure to grapple with the developers’ and HOAs’ dominant financial role, are further material mistakes of fact feeding into the misapplication of s 43.

The Sandown orders

78. The position in Sandown is particularly stark. The CCC accepted that:
 - 78.1. Octotel had installed its own ducts and manholes, at its own cost;

- 78.2. The erroneous use of 5 Telkom last-mile connections had been corrected; and
- 78.3. By the time of the hearing, none of Octotel's fibres ran through Telkom's ducts.
79. Nonetheless, the CCC:
- 79.1. Found that Octotel had contravened s 43 in respect of Sandown and "should be held liable"; and
- 79.2. Recommended that ICASA direct Octotel, inter alia, to desist from installing its fibre in Telkom's infrastructure in Sandown (para 105.2), to enter into lease negotiations with Telkom concerning "underground passive infrastructure in the affected estate" (para 105.3), and, failing agreement, to vacate its fibre from "Telkom's infrastructure within each of the above estates" (para 105.4).
80. The text of paras 105.2–105.4 plainly includes Sandown as an "affected estate" (para 105.1) and cites Sandown by name in para 105.2. Attempts in the answering affidavits to re-interpret these orders as inapplicable to Sandown cannot cure their objective meaning.
81. On the common-cause facts, by the time ICASA took its decision there was no continuing shared use of Telkom's ducts by Octotel in Sandown, and thus no conceivable basis for:
- 81.1. A finding that Octotel had contravened s 43 in Sandown on the CCC's own reasoning; or
- 81.2. Forward-looking orders requiring Octotel to desist from installing in Telkom ducts there, to negotiate a lease over Sandown infrastructure, or to vacate its fibre from "Telkom's infrastructure" in that estate.

82. To impose such orders in the face of those uncontentious facts is, in my view, irrational in the *Democratic Alliance* sense: the means (orders) bear no rational relationship to the purpose of addressing any contravention in Sandown; they are not supported by the factual substratum. This alone would justify reviewing and setting aside ICASA's decision as regards Sandown under PAJA s 6(2)(f)(ii) and (h).

Overall assessment under PAJA

83. Putting the pieces together:

- 83.1. ICASA, via the CCC's reasons it adopted, misinterpreted s 43 in several material respects, notably by (a) treating the facility seeker as subject to a statutory duty to lease and as capable of "contravening" s 43 merely by making unauthorised use, and (b) displacing common-law accession and equating "establishing" infrastructure with a right to control access without proof of underlying rights.
- 83.2. Those errors influenced the entire approach to Telkom's complaint, including the characterisation of Octotel's conduct as a breach of s 43 rather than, at most, a matter governed by property law, servitude rights under s 22, and contractual arrangements with HOAs.
- 83.3. The CCC made further material mistakes of fact about ownership, control, cost contribution and Sandown, in circumstances where the relevant facts were largely uncontentious and objectively verifiable.
- 83.4. Taken cumulatively, these errors render ICASA's decision not only materially influenced by errors of law (PAJA s 6(2)(d)), but also unreasonable and irrational in light of the record and the explanatory reasons (s 6(2)(f)(ii), (h)) and tainted by failures to consider relevant considerations (s 6(2)(e)(iii)).

84. In my view, on the correct interpretation of s 43 and on the true facts:

- 84.1. Telkom's complaint that Octotel contravened s 43 in any of the three estates cannot succeed as a matter of law;
- 84.2. At most, Telkom may have recourse under property or servitude law in respect of unauthorised use of infrastructure it genuinely owns or controls, a matter for the ordinary courts, not for ICASA acting on a misreading of s 43; and
- 84.3. ICASA ought, on a proper application of the law to the facts, to have dismissed the complaint.

The question then is appropriate relief.

REMEDY AND SUBSTITUTION

- 85. Under PAJA s 8(1)(c)(ii)(aa), a court may substitute its own decision for that of the administrator in "exceptional cases", having regard to the separation of powers and the factors set out in *Trencon* (paras 47, 51–54): whether the court is in as good a position as the administrator, whether the decision is a foregone conclusion, delay, potential bias or incompetence, and the overall justice and equity of substitution.
- 86. Applying those principles:
 - 86.1. The dispute turns centrally on the interpretation of s 43 and the application of that interpretation to largely uncontentious facts. That is quintessentially a legal exercise in relation to which this Court is as well placed as ICASA; special technical expertise plays little role at this stage (*Trencon* para 47).
 - 86.2. Once s 43 is correctly interpreted as not imposing a free-standing obligation on a facility seeker to lease, and the true facts about ownership, control and Sandown are accepted, the outcome is, in my

view, essentially a foregone conclusion: Telkom's complaint, framed solely as a contravention of s 43 read with Regulation 3, must be dismissed.

86.3. The dispute has been pending since May 2019. To remit the matter to ICASA for reconsideration, after ICASA has already demonstrated a material misreading of its own statute in this context, would cause further delay and costs, contrary to the requirements of just and equitable relief.

86.4. Octotel has also raised legitimate concerns, supported by passages in the record, about ICASA's selective and inaccurate presentation of the evidence and an apparent predisposition in favour of Telkom in its answering affidavit. While I stop short of making any definitive finding of bias or incompetence, these concerns weigh against remittal to the same decision-maker.

87. In these circumstances, I am satisfied that this is an exceptional case warranting substitution, and that a just and equitable order is to set aside ICASA's decision and substitute it with an order dismissing Telkom's complaint.

88. Nothing in this judgment prevents Telkom from asserting whatever rights it may have under the common law or under s 22 of the ECA in appropriate proceedings. This judgment decides only that ICASA's decision, based on the CCC's reasoning, cannot stand as a finding of contravention of s 43.

Order

89. The following order is made:

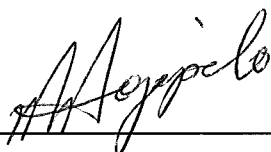
1. The decision of the Council of the Independent Communications Authority of South Africa, taken on or about 31 October 2022 and communicated to Octotel on 3 November 2022, approving the recommendations of the Complaints and Compliance Committee

in *Telkom SA SOC Ltd v Octotel (Pty) Ltd* (CCC Case No. 344/2019), is declared unlawful and is reviewed and set aside.

2. To the extent necessary, the findings and recommendations of the Complaints and Compliance Committee in that matter are likewise reviewed and set aside.
3. In terms of PAJA s 8(1)(c)(ii)(aa), ICASA's decision is substituted with the following:

"Telkom SA SOC Ltd's complaint against Octotel (Pty) Ltd, alleging contraventions of section 43 of the Electronic Communications Act 36 of 2005 read with Regulation 3 of the Electronic Communications Facilities Leasing Regulations, 2010, is dismissed."

4. The first and second respondents (the Chairperson of ICASA and ICASA) and the fourth respondent (Telkom SA SOC Ltd) are ordered, jointly and severally, the one paying the others to be absolved, to pay the applicant's costs, including the costs of two counsel where so employed.



MM MOJAPELO

ACTING JUDGE

HIGH COURT GAUTENG DIVISION, PRETORIA

13 JANUARY 2026

APPEARANCES

Date of Hearing : 06 February 2025

Date of Judgement : 13 January 2026

Applicant : Paul Farlam SC (with him J Bleazard)
Instructed by C & A Friedlander Attorneys,
Claremont

First to third Respondent : Buhle Lekokotla (with her M Ngutla)
Instructed by H M Chaane, Centurion

Fourth Respondent : Benny Makola SC (with him M Lengane)
Instructed by Werksmans, Sandton