IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 20002/08

31 October 2008

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
31/10/08
SIGNATURE

ALTECH AUTOPAGE CELLULAR (PTY) LTD	Applicant
and	
THE CHAIRPERSON OF THE COUNCIL OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	1st Respondent
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	2nd Respondent
THE MINISTER OF COMMUNICATIONS	3rd Respondent
AMOBIA COMMUNICATIONS (PTY) LTD	4th Respondent
AUTUMN STAR CC t/a ENTIATIV	5th Respondent
BNR CONSULTING CC	6th Respondent
CDP AUTOMATION CC t/a 24	7th Respondent
CONNECTION TELECOM (PTY) LTD	8th Respondent
CYBERSMART (PTY) LTD	9th Respondent
EASYCOMS (PTY) LTD	10th Respondent
ECN TELECOMMUNICATIONS (PTY) LTD	11th Respondent
FIRST RAND BANK LTD	12th Respondent
FROGFOOT NETWORKS CC	13th Respondent
GOAL TECHNOLOGY SOLUTIONS (PTY) LTD	14th Respondent
GATEWAY COMMUNICATIONS (PTY) LTD	15th Respondent
GLOBALSTAR SATELLITE (PTY) LTD	16th Respondent
IMPERIAL GROUP (PTY) LTD t/a	

IMPERIAL ONLINE	17th Respondent
INFOVAN (PTY) LTD	18th Respondent
INTERNET SOLUTIONS (PTY) LTD	19th Respondent
ISOGO INTERNET SOLUTIONS	20th Respondent
MULTICHOICE SUBSCRIBER MANAGEMENT SERVICES (PTY) LTD t/a MWEG	21st Respondent
Q DIGITAL (PTY) LTD t/a SMILE TELECOMS	22nd Respondent
SKYGISTICS (PTY) LTD	23rd Respondent
SPESCOM SPECIAL RESOURCES (PTY) LTD	24th Respondent
TELFREE COMMUNICATIONS (PTY) LTD	25th Respondent
TRUSC TECHNOLOGIES (PTY) LTD	26th Respondent
VOX TELECOM LTD	27th Respondent
GLOBAL WEB INTACT (PTY) LTD	28th Respondent
VERIZON (PTY) LTD	29th Respondent

JUDGMENT ON THIRD RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

DAVIS, AJ:

INTRODUCTION:

[1] As already stated in the judgment on the merits of the application, the matter initially came before Court as an urgent application on

16 May 2008. Thereafter, pursuant to certain directions, the matter was specially enrolled for hearing on 29 to 31 July 2008 when it was argued for the full three days. Judgment was reserved and delivered on 29 August 2008. The subject matter of the application principally concerns the conversion process of licences issued under the Telecommunications Act, No. 103 of 1966 ("*the TA*") to "*new*" licences as provided for by the Electronic Communications Act, No. 36 of 2005 ("*the ECA*"). In terms of the provisions of the ECA, the extended period for finalisation of the conversion process expires on 19 January 2009. There remains therefore, some measure of urgency in the matter and a need for finality to be reached. It is for this reason I ordered that the matter stand down only for a day for judgment on the application for leave to appeal, which I give herewith.

AD THE APPLICATION FOR LEAVE TO APPEAL:

[2] In the application for leave to appeal, delivered on the last day prescribed for the delivery of such applications, the following seven points have been raised:

2.1 That I had erred in setting aside paragraph 3 of the Ministerial Policy Directions;

2.2 That I should only have set aside paragraph 3 of the Policy Directions to the extent that that paragraph purported to regulate the conversion process;

2.3 That I had erred in setting aside said paragraph 3 to the extent that it regulated new licences;

2.4 That I should only have set aside paragraph 3 to the extent that it was *ultra vires* and that I should have referred it back to the Third Respondent to rectify the "*unlawful part*";

2.5 That I had erred in declaring that the Applicant was entitled to self-provide its own telecommunication facilities with effect from 1 February 2005;

2.6 That I had erred in making the above declaration without declaring the "*May 2005 Regulations*" unlawful and that I had in this extent ventured into the area of policy-making. It is alleged that the effect of this Court's judgment was that I had "*... defined the scope and content of the 'managed liberalisation policy' which is greatly contested in the market*". It is alleged that this constitutes a violation of the principle of separation of powers.

2.7 That I had erred in finding that the Ministerial Policy Directions constituted administrative action in terms of PAJA and consequently erred in granting an extension of the period in terms of Section 9(1) of PAJA.

[3] At the hearing of the application for leave to appeal, Mr Mtshaulana SC who appeared with Ms Platt for the Third Respondent handed up heads of argument which, on the one

hand did not deal with all the issues raised in the notice of application for leave to appeal and on the other hand went wider than the aforesaid grounds. On behalf of the Applicant, in opposition to the application for leave to appeal, it was argued, in terms of Rule 49(1) of the Uniform Rules that the grounds on which leave to appeal are to be sought must be clearly and succinctly set out in clear and unambiguous terms and, if not, the notice of application for leave to appeal is fatally defective. In this regard reference was made to **Songono v Minister of Law and Order** 1996(4) SA 384 (E) and **Xayemphi v Chairman of the White Commission** [2006] 2 All SA 442 (EC). To this can be added **Soller v Soller** [2000] 3 All SA 531 (C). I agree with this submission and I am furthermore in respectful agreement with the case law quoted. Insofar as the arguments raised in the heads of argument can still be fitted in or seen to be an extension of the grounds raised in the notice of application for leave to appeal, I will deal with them hereunder, but only to that limited extent.

[4] I now deal with the grounds relied on in the application for leave to appeal with reference to the numbered paragraphs thereof which accord with those referred to in paragraph [2] *supra*.

AD PARAGRAPH 1: THE SETTING ASIDE OF THE MINISTERIAL POLICY DIRECTIONS:

[5] This ground for leave to appeal appears to be a blanket formulation of the Third Respondent's objection against the judgment. Without particularity it in itself is without substance. It appears that the grounds referred to in paragraphs 2.2 to 2.4

supra are in fact the individual grounds relied on in this regard, which I will deal with hereunder *seriatim*.

AD PARAGRAPH 2: SETTING ASIDE IN RELATION TO CONVERSION ONLY:

[6] 6.1 Mr Mtshaulana SC was forced to concede on behalf of the Third Respondent that the Ministerial Policy Directions, if they were to be read as relating only to the issuing of new licences, contains elements of what he called "*confusion*". This "*confusion*" relates to the use of wording referring to conversion. It was argued that the Minister should be excused for having used "*confusing*" language if one has regard to the "*environment of convergence*" during which the Directions had been issued. In order to save the day, it was argued that there is a reasonable prospect that another court might come to the conclusion that sufficient parts of the Ministerial Directions may be excised from the remainder and that only these excised parts be struck out so that what is left, will be applicable to the issuing of new licences.

6.2 The Ministerial Policy Directions have been referred to and quoted in full in paragraph 5.3 of the judgment in the main application.

6.3 Upon a reading thereof, it is clear that the Directions contain numerous references to the conversion of VANS licences.

6.4 As set out in paragraph 5.4 of the said judgment, it is clear that the introductory paragraph of the Directions constitute nothing more than a virtual repetition of the statutory obligation contained in Section 93(4) of the ECA. This section clearly and expressly deals with the issue of conversion.

6.5 In similar fashion therefore the introductory paragraph of paragraph 3 of the Ministerial Policy Directions also clearly and expressly refers to the process of conversion.

6.6 Insofar as the second paragraph of paragraph 3 of the Ministerial Policy Directions contains a direction to ICASA to consider the issue of licences in terms of the ECA and insofar as it has been argued that this does not relate to the same conversion process as presupposed in the introductory paragraph of paragraph 3, this argument must fail when the remainder of paragraph 3 is considered: The Honourable Minister has in paragraphs (a) to (e) suggested various categories of prioritisation of VANS licensees. It is firstly to be questioned if one were to have envisaged Directions regarding the issuing of new licensees to "*new*" applicants, why any reference to existing VANS licensees have been made in this paragraph at all. Irrespective of the aforesaid, the Honourable Minister, in paragraph (d) of the said paragraphs to which I have made reference, in so many words and with reference to the ability to satisfy the requirements of whatever fixed licence fee which may be

applicable, again makes reference to the converting of VANS licensees into I-ECNS licences. Having regard to this express wording and that contained in the directive portion of the paragraph, I cannot find any reasonable prospect that another court might come to a different conclusion than that paragraphs (a) to (e) of paragraph 3 of the Ministerial Directions refer to anything else but part of the conversion process.

6.7 I have previously alluded thereto that the third paragraph of paragraph 3 might conceivably lend itself to the interpretation of dealing with the issuing of new licences to existing VANS licensees as a separate process to that of conversion. This argument however stumbles over the Honourable Minister's own wording when she introduced the abovementioned paragraphs (a) to (e). In this regard she expressly and unequivocally linked the "*prioritisation process*" created by her to the implementation process of the urgent consideration process directed by her in the second paragraph of paragraph 3. In so doing, she linked the conversion process referred to in paragraph (d) to her own direction.

6.8 I am therefore unable to find any reasonable prospect that another court can come to a different conclusion than I have done and come to a conclusion that paragraph 3 did not as a whole refer to a conversion process.

6.9 I am of the view that the whole paragraph is tainted by the repetitive reference to conversion as opposed to the issuing of new licences. I am further fortified in this view if regard is had to the emboldened caption and heading of paragraph 3 which reads as follows (and I quote again):

> "***Increasing competition through conversion of VANS licences***"

with the emphasis on the use of the word "*conversion*".

6.10 Having reached the aforesaid conclusion and having both attempted to and debated the issue with Mr Mtshaulana SC, I find it impossible to accede to his suggestion of excision from the paragraph of the "*offending*" portions contained therein in an attempt to have the remainder survive in a coherent fashion. This exercise, if not impossible, is so fraught with difficulties, that I cannot find that there is a reasonable prospect that a different court can reasonably be expected to perform the suggested exercise.

AD PARAGRAPH 3: REGULATION OF NEW LICENCES:

[7] 7.1 At the risk of repetition, it follows from what I have found above that the whole of paragraph 3 can only be interpreted as having been intended to apply to a conversion process. Insofar as the Minister might have intended to direct that, in the consideration of the issuing of new licences, ICASA should prioritise applicants for

such licences in the fashion as directed, the whole direction has so been tainted by the repeated references to conversion, that a contrary intention simply does not appear from the paragraph.

7.2 It is therefore not for this Court to find that, for example, paragraphs (a), (b) and (c) may constitute relevant considerations for the issuing of new licences, when this had not formed part of the intention expressed in paragraph 3, despite the suggested "*excision exercise*".

7.3 There is also no dire need to have the paragraph remain as the sole source of policy directions regarding the issue of new licences. Provided that the Minister acts *intra vires* and does not exceed the boundaries as I have previously found, there is nothing which either in 2007 or later barred the Minister from issuing untainted directions regarding the issue of new licences.

7.4 Reference has also been made to the need not to upset the already initiated processes and the importance of finality or certainty in the industry. Insofar as the process which has been found to be a conversion process may involve applicants which were either not VANS licence holders or, even if they were, did not seek conversion but the issue of new licences, I can see no reason why such a process cannot continue. I need not speculate on this issue however. The simple fact of the matter is that paragraph 3 is tainted by repeated references to a

conversion process and was clearly intended to regulate such process. I am unable to find that there is a reasonable prospect that another court can differ from this interpretation.

AD PARAGRAPH 4: LIMITED SETTING ASIDE/REFERRAL:

[8] 8.1 The fourth point made in the application for leave to appeal reads as follows:

> "*The learned judge should have set aside paragraph 3 to the extent it was ultra vires and should have referred it back to the Third Respondent to rectify the unlawful part.*"

8.2 Insofar as this paragraph stated that I should have set aside paragraph 3 to the extent that it was *ultra vires*, that I have done. I do not understand this paragraph to mean that the direction was only partially *ultra vires* and I cannot find that such a type of act can exist. The issuing of the Directions was as an act either *ultra vires* or it was not but there is no scope for it only being partially *ultra vires*.

8.3 In similar vein it is difficult to understand why a decision such as the Policy Direction should be referred back to the Honourable Minister to "*rectify*" it. If it was found to be *ultra vires*, as it has been, then it is simply struck down. Any further or later or substituting decision can be independently taken without anything having to be referred back to the Minister.

8.4 The only issue of a referral or substitution of a decision claimed in the Applicant's notice of motion in the main application was contained in paragraph 2.2 of the amended notice of motion. This however dealt with the substitution of a decision of the Second Respondent to the effect that it was not obliged to convert the Applicant's VANS licence into an I-ECNS licence. That issue has separately been addressed in the judgment and is not attacked in the application for leave to appeal.

8.5 I am therefore unable to find any reasonable prospect that another court can come to a different conclusion on this ground contained in the application for leave to appeal.

AD PARAGRAPH 5: THE DECLARATION OF AN ENTITLEMENT BY A VANS LICENSEE TO SELF-PROVIDE:

[9] 9.1 No detail has been set out in the application for leave to appeal as to why a finding of this regard should not have been made. I have listened to the oral arguments presented during the application for leave to appeal and I have revisited the various heads of argument delivered in the main application. Nothing new has been presented on the merits and I am unconvinced that sufficient grounds have been alleged on which I should find that there is a reasonable prospect that another court can come to a different conclusion.

9.2 During argument, Mr Mtshaulana SC argued that due regard should be had to the various differences of opinion which preceded the main application. References were, *inter alia*, made to prior points of view and submissions to ICASA by, *inter alia*, the 19th and 22nd Respondents in the main application. It was argued that all the players in the market or at least the parties to the present application were all experts in their field and were assisted by further experts including "*expert*" attorneys. It was argued that the divergent points of view are indicative of the existence of a possibility that another court might come to a different conclusion. It was, however, conceded that although various lay parties or various sets of attorneys might hold different opinions, once a court of law is called upon to adjudicate a matter and give an interpretative judgment on statutory provisions, the test should not be whether the parties (or in this instance, only the Third Respondent) differ from the Court, but whether there is a reasonable prospect that a different court of law might come to a different conclusion than the court *a quo*.

9.3 Reliance was also placed on the fact that the Applicant had initially only applied for the issuing of an I-ECS licence and did not initially apply for nor rely on a right of conversion to an I-ECNS licence. Apart from the fact that this differing view is to be treated the same as those of the other opinions as referred to in 9.2 *supra*, it has been pointed out on behalf of the Applicant that the initial application for the issue of an I-ECNS licence was made

based on the Applicant's then business or economic decisions or capability. Such an application did not constitute a waiver nor a concession of any of the later stances taken by the Applicant in this application.

9.4 I am unconvinced that the differing views of parties or various attorneys representing them can or should be elevated to a level which satisfies the test to be applied in consideration of an application for leave to appeal.

AD PARAGRAPH 6:

[10] 10.1 Initially, during argument on behalf of the Third Respondent, all but the first sentence of this paragraph referring to the prior regulations, was abandoned. In reply, this "*abandonment*" was withdrawn. I therefore gave the Applicant's counsel, Mr Cockrell who appeared with Ms Budlender an additional opportunity to respond thereto and became obliged to deal with the whole of this paragraph, which I do hereunder.

10.2 The first point of criticism under this paragraph was that I had erred in having declared VANS licensees entitled to self-provision without also having declared the "*May 2005 Regulations*" unlawful. I have in paragraph 3.10 of the judgment in the main application found that the VANS Regulations published on 20 May 2005 in Regulation Gazette No. 8223 in Government Gazette No. 27608 were

silent on the right of VANS licensees to self-provide their own facilities or networks.

10.3 The abovementioned finding was not attacked in the application for leave to appeal. Neither has it been pointed out that the VANS Regulations preclude either self-provision or a finding of self-provision. A re-reading thereof confirmed this. There was accordingly no need to have declared the May 2005 Regulations unlawful. They are simply irrelevant to the issue considered Accordingly this ground for leave to appeal as applied for must also fail.

10.4 It has furthermore been suggested on behalf of the Third Respondent that, in not having declared the May 2005 Regulations unlawful, I have ventured into the area of policy-making. Having regard to the reasoning set out in the preceding paragraph this contention is a *non sequitur*.

10.5 There appears to be an attempt to bolster the contention of entering into the area of policy-making by the statement in the application for leave to appeal that the "*effect*" of the judgment had been to define the scope and content of the "*managed liberalisation policy*". I have again perused the judgment and cannot find any policy statements contained therein or any expression on what a managed liberalisation policy should be or should contain. In my view the judgment is based on the pure application of legal principles to the facts as presented by the parties.

10.6 I find no scope to find that there is a reasonable prospect that another court might find that the judgment had overstepped the bounds of the principle relating to the separation of powers between judicial and executive spheres of government. In making this finding, I also had regard to the principles set out by the Constitutional Court in **Doctors for Life International v Speaker of the National Assembly** 2006(6) SA 416 (CC).

10.7 During argument it was sought to extend this ground relied on by the Third Respondent on the basis that I should have interpreted the "*silence*" contained in the said regulations, namely the absence of any aspect dealing with self-provision as a manifestation of the Honourable Minister's intention as expressed by her in the media statements referred to in the chronology section of the judgment. It was argued that, in not interpreting the "*silence*" in favour of the Minister, I have made decisions as to what the "*managed liberalisation policy*" amounts to. I cannot agree with this argument. The conclusions reached in the judgment were done by way of application of the customary and applicable rules of interpretation. Mr Mtshaulana SC argued that, even if the customary rules of interpretation had correctly been applied, the "*environment*" in the industry at the time was not sufficiently taken into account. I am unable to find that this argument presents a principle of law or that it carries with it such a reasonable prospect that another court

might, with reliance thereon, come to a different conclusion than that expressed in the judgment.

AD PARAGRAPH 7: ADMINISTRATIVE ACTION:

[11] 11.1 I have again had regard to the Constitutional Court's pronouncement regarding the permissible exercise of executive authority as stated in **Minister of Health v New Clicks (Pty) Ltd and Others** 2006(2) SA 311 (CC) and the extensive annotations to this case. Applying the principles enunciated therein, it is clear that the Ministerial Policy Direction involved the taking of a decision of an administrative nature where it expressly dealt with specific instances for consideration or prioritisation of VANS licensees in administering the conversion and issuing process prescribed by the ECA. Had the Minister for example rather decreed broad policy statements for the industry as a whole, it could have been argued that such type of policy statements or directions did not amount to decisions of administrative nature. This was, however, not the case. Lest I again be accused of the overstepping of boundaries, I reiterate that I mention this possibility purely as a hypothetical example as illustration of the argument.

11.2 In contrast with pure policy directions, it is clear that Section 4(1) of PAJA contemplates that administrative action that materially affects the rights of the public, even if part of legislative administrative action, would be subject to review. To find otherwise, would be to usurp the

"*coherent and over-arching system for the review of all administrative action*" (in the words of the Constitutional Court) and would not give effect to the rights contained in Section 33 of the Constitution of the Republic of South Africa.

11.3 I am unable to come to the conclusion that there is a reasonable prospect that another court might find that the Policy Directions by the Minister did not constitute "*a decision of an administrative nature*" or that it did not have a "*direct, external legal effect*" or did not "*adversely*" affect the rights of existing VANS licensees.

11.4 I am similarly unconvinced that there is a reasonable prospect that another court can come to the conclusion that the period in terms of Section 9(1) of PAJA should not have been extended or that, in extending such a period, I have exercised my discretion in such a fashion as to merit interference on appeal.

11.5 There is yet a further factor which militates against the granting of leave to appeal in this regard and that is namely that the alternate finding based on the illegality principle to the effect that the Directions had been *ultra vires* the enabling legislation, has not been attacked in the application for leave to appeal.

[12] 12.1 I have already stated that I have dealt with the additional arguments raised orally at the hearing of the application

for leave to appeal insofar as they relate to those grounds set out in the notice as already repeatedly referred to above. There was no request nor application to amend the notice of application for leave to appeal nor to have the grounds argued inserted therein to a larger extent than I have done above. There is, however, one additional argument which was raised: It was argued that "*in paragraph 7.1, read with paragraph 6.12 His Lordship finds that the licence had a prohibition to self-provide contained in 1.1(b). This finding contradicts the main finding in 6.33 of the judgment*". In this regard the following needs to be noted: Paragraph 6 of the judgment dealt with prayer 2 of the Applicant's amended notice of motion in the main application. This dealt with the setting aside of the decision of the Second Respondent to the effect that it was not obliged to convert the Applicant's VANS licence into an I-ECNS licence. After dealing with the various issues applicable to this prayer, paragraph 6.33 merely constituted the conclusion to which I have come.

12.2 Paragraph 6.12 merely noted that the VANS licence which had been issued contained a limitation on the Applicant's right to self-provide in clause 1.1(b) thereof. It is stated in this paragraph in the judgment that that clause was separately attacked by the Applicant in prayer 4.2 of the notice of motion.

12.3 Prayer 4.2 of the notice of motion was separately dealt with in paragraph 7 of the judgment. Paragraph 7.1 of the judgment referred back to paragraph 6.12.

12.4 The conclusion to which I have come is contained in paragraph 7.2 of the judgment which reads as follows:

> *"Having regard to the conclusions to which I have come and the findings set out in paragraph 6.33 supra, the prohibition contained in this clause is in direct conflict with the neighbouring legislation."*

12.5 There is therefore no "*contradictory finding*" as alleged.

12.6 Apart from the aforesaid and the absence of a reasonable prospect that another court might find that some purported "*contradiction*" exists, it was argued on behalf of the Third Respondents that another court "*... could come to a different conclusion, namely, that because the licence in 1.1(b) contained a prohibition to self-provision, that the Applicant did not have the right to self-provide.*"

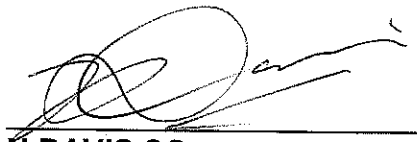
12.7 It is firstly difficult to understand how, if a finding had been made that the relevant statute at the time allowed the Applicant the right to self-provide (from a certain date) that that finding should now be overridden by virtue of the fact that the licence itself contains an unlawful condition contrary to the enabling statute. Be that as it may, the order dealing with clause 1.1(b) of the Applicant's previous VANS licence is contained in paragraph 10.6 of the

judgment. This order has neither been named nor attacked in the application for leave to appeal. Consequently, also on this alleged ground, the order referred to hereunder, must be made in all of the aforesaid instances.

12.8 On behalf of the Applicant it has been argued that, should leave to appeal be granted, it should only be granted in respect of those portions of the order sought to be attacked by the application for leave to appeal, being paragraphs 10.2, 10.3 and 10.5 of the order and then only on the limited grounds as set out in the application. Having regard to the conclusion to which I have come, this is not necessary.

ORDER:

[13] The application for leave to appeal is therefore refused with costs, such costs to include the costs of two counsel.



N DAVIS SC
ACTING JUDGE OF THE
HIGH COURT