

High Court Ruling Paves the Way for Competition from Alternative Communications Providers in South Africa

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The recent judgment in the High Court case of *Altech Autopage Cellular (Pty) Ltd v the Chairperson of the Council of the Independent Communications Authority of South Africa and Others* (Case No 20002/08), concerning the rights of value added network services (Vans) licensees to provide electronic communications networks may prove to be a pivotal event for the ICT industry in South Africa.

In this article, we look at the history of the matter, review the rulings made by the court, and conclude with some predictions of the possible impact the judgment will make on the industry.

Background

The Telecommunications Act (TA) came into force in the mid-1990s, creating a monopoly for the then state-owned Telkom in respect of, *inter alia*, providing electronic communications networks. The provisions of the TA relating to Vans, provided that licences must contain provisions that Vans be provided by means of telecommunications facilities provided by Telkom until 7 May 2002 and afterwards, provided by Telkom and the second national operator (SNO) 'until a date to be fixed by the Minister'.

The Minister fixed the date referred to in the TA as at 1 February 2005, in a government notice dated 3 September 2004. The Minister attempted to back track, issuing a press statement on 30 January 2005, the eve of the date proclaimed, indicating that Vans licensees may obtain telecommunications facilities from 'any licensed operator'. Although the press statement was not clear, it was interpreted by the Minister and Icasa in the court case to mean that Vans licensees could not self provide telecommunications facilities.

In mid 2006, the Electronic Communications Act (ECA) replaced the TA. It, *inter alia*, provides for the conversion of TA licences to ECA licences. In that respect, it provides, *inter alia*, that where existing licensees have the right to 'operate facilities or networks',

Icasa must issue those licensees with an electronic communications network services (ECNS) licence.

Accordingly, it is important to ascertain whether Vans licensees had a right to self provide as at 1 February 2005, as this will inform whether Vans licensees are entitled to ECNS licences in terms of the ECA.

Confusing the issue further, however, the Minister issued a policy direction to Icasa, after the coming into force of the ECA, that Icasa must consider whether none or only certain of the Vans licences should be converted to ECNS licences. Icasa was further directed to prioritise Vans licensees that met certain criteria.

The Minister is allowed to issue policy directions to Icasa and Icasa must 'consider' such policy directions in exercising the powers given to it by the ECA. However, according to the ECA, no policy direction may be made in respect of the granting, amendment, transfer, renewal, suspension or revocation of a licence.

Soon after the policy direction issued by the Minister, Icasa proposed that a hand full of Vans licensees be issued with individual ECNS (of national or provincial scale) and a few others be issued with class ECNS (of municipal scale). Icasa did not publicly indicate how it made the choices for such licences, but suffice it to say, Altech, who later took matter to the High Court, was not on the list.

Icasa, presumably after some industry pressure from Altech and others that were not on the Icasa list, back tracked on the process and issued a press statement that 'a competitive process will be followed in respect of granting Vans the right to acquire ECNS'.

This so-called competitive process never really got off the ground. Icasa agreed to stay the conversion process in that respect, pending the outcome of the Altech court case.

The Court Rulings

Last week the High Court handed down judgment in the matter, paving the way for Vans licensees to compete with the incumbents, Telkom, the SNO, the three mobile cellular

licensees, and the state-owned Sentech. Despite the lengthy judgment (67 pages), there are three basic findings, clearly articulated, and correctly decided.

Ministerial Determination re Self Provisioning

Vans were allowed to self provide from 1 February 2005, in accordance with the Ministerial determination made in terms of the TA.

Ministerial Policy Directions re Vans / ECNS Licence Conversions

The Ministerial policy directions regarding the conversion of Vans licences to ECNS licences is ultra vires the the ECA, and therefore are set aside by the court.

Licence Conversions

All Vans licensees are entitled to ECNS licensees, if they want them, in the licence conversion process. There can be no competitive process involved. Icasa is responsible for implementing the judgment, ie, issuing the licence conversions in terms of the rulings made in the judgment.

Conclusion

According to the ECA, Icasa must convert all licences issued or deemed to have been issued under the TA by no later than 19 January 2009 (30 months after the coming into force of the ECA). Although this seemed a reasonable time frame at the time that the ECA was promulgated, it may be difficult for Icasa to deal with the outstanding issues and complete licence conversions in that remaining time (less than five months).

In addition to the Vans/ECNS licence conversion issue that was the subject of the *Altech* court case, there are some other outstanding issues, such as the conversion of licences issued under the TA regulations still in force and effect, but after the coming into force of the ECA (eg, certain Vans licences); the conversion of licences in categories deemed to have been issued under the TA (eg, paging and satellite news gathering licences); and the conversion of private telecommunication network licences to licence exemptions. In a bizarre development, Icasa made regulations exempting certain services from licensing, such as private networks, but nonetheless requires service providers to

actually apply for an exemption and wait for Icasa to act on applications before providing a licence exempt service.

Leading to further pressure on the remaining five months of the licence conversion deadline, Icasa also has not promulgated certain necessary regulations. For example, it has not promulgated licence fee regulations. For TA licensees, one percent of licence fee turnover applies to most existing licensees.

Icasa also has not finalised regulations that allow it to impose pro-competitive licence conditions on incumbents. However, the ECA does provide that existing conditions continue to apply to licensees pending a review of those conditions concluded by Icasa in terms of the ECA.

Similarly, there are no regulations setting out obligations in respect of ECA licence categories, for contributions to the universal service and access fund (USAF). Existing TA licensees pay 0.2 percent of licence fee income annually to the USAF.

If Icasa misses the licence conversion deadline, it will have failed to abide by the dictates of the legislature laid out in the ECA. What will likely happen in the event will be that existing licences will remain, as the ECA indicates that all licences remain valid until converted. What Parliament will do remains to be seen. The consequence for the industry will be the maintenance of the status quo, where there remains little competition, little innovation, little choice, and little progress being made towards universal service.

Another possible scenario is that Icasa issues converted licences in line with the court rulings timeously.

What will not happen is the onslaught of 600 Vans licensees digging up streets and putting masts all over the place. First, less than a third of existing Vans licensees have even expressed an interest in obtaining any licence at all in the conversion process, much less, an ECNS licence. Second, the cost of rolling out network infrastructure is prohibitive for most of those licensees. Case in point is the SNO, which has still not rolled out consumer access networks although it was licensed in December 2005.

More likely is that some Vans licensees will rollout their own backbone networks where they can do so economically. Some Vans licensees might find niche markets to use their confirmed right to roll out infrastructure. Icasa has recently prescribed certain spectrum licence exemptions including for the use of the 2.4 GHz WiMesh band for wide band wireless systems.

Some Vans licensees might even eventually try to compete with the incumbents. The need for a spectrum licence to use spectrum, however, will limit competition in the wireless and mobile markets. The court in the *Altech* case quite rightly made it clear that the issue of spectrum licensing is a separate issue than that of service licensing. Just because one has a service licence does not necessarily entitle that entity to a spectrum licence.

Spectrum licences currently are awarded by ICASA on an ad hoc, except in instances where Icasa has decided there is insufficient spectrum available to accommodate demand, such as in the 2.5-2.6 GHz and 3.4-3.6 GHz WiMax bands. At the conclusion of an enquiry, ICASA indicated that it will draft regulations that will create a two stage process for awarding licences, involving a pre-qualification phase designed to ensure that the spectrum is awarded to entities owned by historically disadvantaged individuals, followed by an auction.

Therefore, although spectrum licensing was not an issue in the *Altech* case, it will be an issue in creating a competitive market going forward. On the one hand, if Icasa continues to only issue spectrum licences to incumbents on an ad hoc basis, then there will be little new competition in the wireless and mobile markets. If on the other hand, Icasa begins to issue spectrum licences on an equitable and fair, competitive basis, then the objects of the ECA will more likely be met.

In conclusion, the ruling in the *Altech* court case is a big step forward in implementing the ECA in a manner that conforms to the stated objects of the Act. That big step however will only prove to be the pivotal event suggested if South Africa continues down that same road. That road, in any event, will be a long one, as the South African government continues to play the conflicting roles as policy maker, regulator and competitive service provider.