UNREPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 8734/2000

DATE: 28 July 2000

IN THE MATTER BETWEEN:

NEXTCOM CELLULAR (PTY) LTD	APPLICANT
AND	
SONWABO EDDIE FUNDE NO	1ST RESPONDENT
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	2ND RESPONDENT
THE MINISTER OF COMMUNICATIONS	3RD RESPONDENT
CELL C (PTY) LTD	4TH RESPONDENT
AFRICASPEAKS COMMUNICATIONS (PTY) LTD	5TH RESPONDENT
FIVE MOBILE NETWORKS	6TH RESPONDENT
KELGELA INVESTMENTS (PTY) LTD	7TH RESPONDENT
TELENOR/TELIA CONSORTIUM	8TH RESPONDENT

JUDGMENT

COETZEE, AJ

On 4 April 2000 the applicant (“Nextcom”) brought an application for the following relief:

1. That condonation be granted for the hearing of this application as a matter of urgency, in terms of rule 6(12).

2. That the intended and, if made, the final recommendation made by the second respondent in terms of section 35 of the Telecommunications Act, 1996 (“the act”), in respect of the award of the third cellular telecommunications service licence in favour of the fourth respondent (“the recommendation”) be forthwith suspended and deemed to be of no force or effect, pending the final determination of the relief claimed in part B below.

3. That the third respondent be interdicted forthwith from acting upon the recommendation or from granting a third cellular telecommunications service licence in terms of section 35 of the act, pending the final determination of the relief claimed in part B below.

4. That the second respondent be interdicted forthwith from issuing a third cellular telecommunications service licence in terms of section 35 of the act, pending the final determination of the relief claimed in part B below.

5. If the second respondent has granted a cellular service licence in terms of section 35 of the act to fourth respondent or anyone other than the applicant, that such licence be suspended with immediate effect, pending the final determination of the relief claimed in part B below.

6. In the alternative to paragraph 2 above and if a final recommendation as described therein had not yet been made:

6.1 that second respondent be ordered to notify the applicant once a final recommendation is made in terms of section 35 of the act by transmitting to applicant's attorneys of record a copy of such final recommendation:

6.2 that such final recommendation not be acted upon by the third respondent by granting a cellular service licence in terms of section 35 of the act or in any other manner before the lapse of a period of at least ten days from the date on which paragraph 6.1 above is complied with.

7. That the costs occasioned by the hearing to consider part A of this application, be ordered to be costs in the cause of the main application (part B) unless part A is opposed in which event the court will be requested to order the unsuccessful respondents, jointly and severally, to pay the costs occasioned by such opposition.

8. That the applicant be granted further or alternative relief.

The relief claimed in part B (the main relief) is the following:

1. That the intended and final recommendation made by the second respondent in terms of section 35 of the Telecommunications act, 1996, in respect of the award of a third cellular licence in favour of the fourth respondent be reviewed and set aside.

2. That all steps taken by the third respondent on the strength of the aforesaid recommendation (including, if applicable, the grant of a cellular service licence to the fourth respondent or anyone other than the applicant), be reviewed and set aside.

3. That the second respondent be ordered to pay the costs of this application. If any of the other respondents should appose the application, that all opposing respondents be ordered, jointly and severally with second respondent, to pay the costs of the application.

4. That the applicant be granted further or alternative relief.

The notice of motion calls upon the first, second and third respondents, in terms of rule 53(1) of the Uniform Rules of Court to show cause why the decisions or proceedings set out in part B should not be reviewed and corrected or set aside and to dispatch, within fifteen days of receipt of the application, to the registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as they are by law required or desire to give or make, and to notify the applicant's attorney that they have done so. The said respondents are also called upon to deliver notice to the applicant that they intend to oppose the relief sought in part B of the notice of motion and to deliver any affidavits which they may desire to deliver in answer to the allegations made by the applicant within 30 days of the expiry of the time referred to in rule 53(4).

The first respondent ("Mr Funde"), the second respondent ("Icasa") and the third respondent ("the Minister") gave notice of intention to oppose the application. The eighth respondent ("Telenor") wrote to Nextcom's attorneys, on 5 April 2000, and informed them that the papers had been received, that its rights are reserved and that the attorneys will be informed of what it intends to do as soon as an informed decision had been made. The first and second respondents delivered an answering affidavit which was deposed to by Mr Funde. The Minister also delivered an answering affidavit.

The application was heard by Bertelsmann J. Mr Funde, Icasa, the Minister and the fourth respondent ("Cell C") opposed the application. Telenor supported it. The other respondents were not represented. On 12 April 2000 Bertelsmann J made the following order:

"1. The second respondent is ordered to notify the applicant and the fourth to and including the eighth respondents of the final recommendation made in terms of section 35 of the act to the Minister by transmitting a copy thereof to the aforesaid parties' attorneys of record or to such other address as may be provided by the applicant and to the fourth to and including the eighth respondents, such notification to be made at the same time that the final recommendation is provided to the third respondent;

2. The Minister is ordered not to act upon the final recommendation for a period of five (5) full days after receipt of the final recommendation;

3. The Minister and the first, second, and fourth respondents are to pay the applicant's costs, jointly and severally, the one to pay, the other to be absolved, such costs to include the costs of two counsel.

4. All other prayers and the application itself are hereby postponed sine die."

Reasons for the order made by Bertelsmann J were furnished by him on 5 June 2000.

On 30 June 2000 Satra (as the second respondent was then known) advised the applicant that it had notified the Minister that it had resolved, on 29 June 2000, to recommend that the

application of Cell C for the third cellular licence be granted and that certain specified conditions be imposed. It further advised that the reasons for the recommendation as well as the suggested licence conditions would be made available on 4 July 2000. Satra was dissolved and disestablished on 1 July 2000. On 4 July 2000 its successor, the Independent Communications Authority of South Africa ("Icasa") published a document entitled "recommendation in terms of section 35(2)(b)(i) of the Telecommunications Act, no. 103 of 1996, in respect of applications for the third mobile cellular telecommunications service licence." Those reasons run to some 207 pages.

On 7 July 2000 Nextcom delivered a notice of substitution in terms whereof Satra was substituted by Icasa as the second respondent in the proceedings. It also gave notice of intention to amend its notice of motion by replacing the original notice of motion and substituting in its place the notice of motion attached to that notice. In the amended notice of motion it seeks the following relief:

1.That condonation be granted for the hearing of this application as a matter of urgency in terms of rule 6(12)

2. That the final recommendation made by the South African Telecommunications Regulatory Authority ("Satra") in terms of section 35(2)(b)(i) of the Telecommunications Act, 103 of 1996 ("the act"), in respect of the award of the third cellular telecommunications service licence in favour of the fourth respondent ("the final recommendation") be forthwith suspended and deemed to be of no force or effect pending the final determination of the relief claimed in part B below.

3. That the third respondent be interdicted forthwith from acting upon the final recommendation in any manner whatsoever or from exercising any powers under section 35 of the act with respect to the third cellular telecommunications service licence, pending the final determination of the relief claimed in part B below.

4. That the second respondent be interdicted forthwith from issuing a third cellular telecommunications service licence in terms of section 35 of the act, pending the final determination of the relief claimed in part B below.

5. That the costs occasioned by the hearing to consider part A of this application, be ordered to be costs in the cause of the main application (part B) unless part A is opposed, in which event the court will be requested to order the unsuccessful respondents, jointly and severally, to pay the costs occasioned by such opposition.

6.That the applicant be granted further or alternative relief.

Part B (the main relief) of the amended notice of motion reads as follows:

“1. That the final recommendation made by Satra in terms of section 35(2)(b)(i) of the Telecommunications Act, 1996, in respect of the award of a third cellular licence in favour of the fourth respondent (“the final recommendation”) be reviewed and set aside.

2. That the process conducted by Satra leading up to the final recommendation and the final recommendation itself be declared to have been vitiated by irregularities.

3. That the third respondent be interdicted from issuing a third cellular telecommunications service licence in terms of section 35 of the act on the strength of Satra's final recommendation.

4. That the second respondent be order to pay the costs of this application. If any of the other respondents should oppose the application, that all opposing respondents be ordered, jointly and severally with second respondent, to pay the costs of the application.

5. That the applicant be granted further or alternative relief."

This part of the notice of motion then calls upon the first, second and third respondents to show cause why the aforesaid decisions or proceedings should not be reviewed and corrected or set aside, to dispatch to the registrar the record of the proceedings sought to be corrected or set aside, together with such reasons as they are by law required or desire to give, to notify the applicant of any intention to oppose and to deliver their answering affidavits, if any, within 30 days after the expiry of the time referred to in rule 53(4).

Notwithstanding the fact that the first, second and third respondents have twice been called upon to furnish the registrar of this court with the record of the proceedings, they have not complied with that obligation imposed by the rules of court.

On the same date Nextcom delivered a supplementary founding affidavit. Mr Funde, Icasa, the Minister and Cell C gave notice of intention to oppose. The matter was called on Tuesday morning, 11 July 2000. Directives were issued in respect of the delivery of answering and a replying affidavit and the application was stood down to Friday 14 July 2000. Argument

commenced on 14 July 2000, proceeded on 18 July 2000 and was concluded on 21 July 2000.

The parties, with the exception of the Minister, were agreed that the matter was urgent and that it should be dealt with in terms of rule 6(12). The Minister contended that the application is not urgent because Nextcom is not entitled in law to prevent and frustrate the Minister exercising her powers in determining and awarding the third cellular licence. Furthermore, that it based its case for urgency simply on the tenuous basis that the Minister had not furnished any undertaking that she will not act on Icasa's final recommendation upon the lapsing of the five day period as ordered by Bertelsmann J.

URGENCY

I ruled that the application be heard as a matter of urgency. In my view, the fact that Nextcom may not be entitled in law to prevent and frustrate the Minister exercising her powers in terms of the act is not relevant to the question of urgency; it is a matter which has to be decided and which will be decided in this application. Secondly, the Minister's refusal to undertake not to act on Icasa's final recommendation pending the review application and having indicated that she will in fact do so, could lead to a licence being issued to Cell C before the review application is heard and determined. In that event, Nextcom might suffer substantial irreparable harm of such a magnitude that it would have been most unfair not to have dealt with the matter on an urgent basis. This matter is of great public interest and importance. The expeditious awarding of a third cellular licence is in the interest of the South African economy. For these reasons I deemed it necessary to hear the application as a matter of urgency.

THE APPLICATION TO STRIKE OUT

Cell C made application to strike out a number of paragraphs in Nextcom's founding and supplementary founding affidavits as well as the three affidavits deposed to by the chairman of Icasa ("Mr Maepa") on the ground that the averments in those paragraphs constitute hearsay. These paragraphs deal with four of the grounds for the review of the decisions and the proceedings of Icasa namely:

1. That the independence and impartiality of Icasa have been compromised by executive interference;
2. Icasa's failure to take into account and/or to apply its mind to the relevant evidence of its own experts;
3. Mr Funde and councillor Gosa failed to disclose conflicts in interest in accordance with section 15 of the act; and
4. The presentation by Icasa of its recommendation as having been unanimous whereas, in fact, it was not unanimous.

In Mr Maepa's affidavit which was sworn to on 29 March 2000, annexure "MOK 28" to Nextcom's founding affidavit, he sets out in detail particulars of executive interference which resulted in his withdrawal from participation in the adjudication proceedings which led to the recommendation made by Icasa to the Minister. He states that he was placed under pressure by both the Minister and adv Gumbi of the president's office and that, as a result of that pressure, he recused himself which recusal was not voluntary. He furthermore states that the advices furnished by Icasa's consultants, Afcent/clc consultants, BDO Spencer Steward and that of Icasa's staff were not given due weight by Icasa and says that the decision to recommend that the third cellular licence be awarded to Cell C is at variance with the advice

to Icasa contained in these expert reports. In his affidavit which is annexed to Nextcom's replying affidavit he reiterates that he was advised by the Minister that the president's office was of the view that he ought to recuse himself from the process and that she herself, on 18 February 2000, insisted that he withdraws. He states that the pressure to which he had been subjected by the Minister and the President's legal adviser, Adv Gumbi, led to his withdrawal. He says that he believes that the pressure on him which emanated from the executive was because the view had been formed that he could not be relied upon to support a recommendation that Cell C be awarded the third cellular licence and that he was for that reason forced out of the process. No application to strike out is made in respect of the paragraphs containing those statements. In paragraph 4 of his affidavit deposed to on 6 July 2000, annexure "SFA2" to Nextcom's supplementary founding affidavit, he states that he has read the founding and supplementary founding affidavits of Nextcom and that he confirms the truth of the contents thereof insofar as it relates to him. Those paragraphs in the founding affidavit and the supplementary founding affidavit which deal with the alleged executive interference in the process and with three of the expert reports furnished to Icasa are confirmed as true and correct by Mr Maepa who obviously has firsthand knowledge of the contents of those reports. For this reason the averments made in Nextcom's founding and supplementary founding affidavits in respect of what Mr Maepa has experienced do not constitute hearsay evidence.

The news reports merely confirm what Mr Maepa has stated. The contents of those reports and thus the evidence given with reference to those reports, is hearsay evidence. In the light of what I have said and considering the fact that Mr Maepa's evidence in respect of the mentioned aspects is not contradicted, I find that the hearsay evidence tendered in these paragraphs is acceptable and the application to strike out the paragraphs dealing with the first

and second grounds of review enumerated above, must be dismissed.

In paragraphs 19.18 and 19.19 of Nextcom's supplementary founding affidavit it deals with the GTKF report and states that Icasa decided to ignore that report on the grounds of an utterly spurious allegation of a conflict of interest. It is stated that so seriously did GTKF take the second respondents false and unjustified slur on it that it published an advertisement in the national media rebutting the allegations of a conflict of interest. A copy of the advertisement was annexed as annexure "SFA 14". Cell C did not apply to strike out those two paragraphs for obvious reasons.The preceding paragraphs, 19.14 to 19.17 contain hearsay evidence which deals with this report. Considering the fact that Cell C did not apply to strike out the contents of paragraphs 19.18 and 19.19 there is no reason why the said preceding paragraphs should be struck out.

Paragraph 38 of Nextcom's founding affidavit states that the adjudication process was marred by allegations of conflicts of interest on the part of some of the members of Icasa's council. It is stated that, according to media reports, an investigation is being conducted by the national inteligence agency into the process. Copies of a selection of these articles were annexed as annexure "MOK 29". Nextcom states that, under the circumstances, it has a reasonable and well-founded apprehension that the independence and impartiality of Icasa has been compromised. Cell C applies for the striking out of those paragraphs. In respect of the preceding paragraphs under the heading "conflicts of interest and the appearance of bias" no application to strike out was made. These paragraphs deal with the alleged conflicting interests of certain of the members of Icasa which allegedly disqualified them from participating in the process. In the light of the fact that those paragraphs are not attacked there appears to me to be no reason to strike out par 38.

Mr Maepa's replying affidavit contains hearsay evidence in respect of what councillor Mayimele and councillor Lesibu had told him. This evidence relates to the fourth ground of review stated above. In my judgement, considering the fact that this is an urgent application, that Nextcom seeks interim relief only and considering the criteria enumerated in section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988, this evidence should be admitted in the interests of justice. The same reasoning applies to paragraphs 18.1 and 18.2 of Nextcom's founding affidavit.

Much of the evidence contained in the paragraphs in question was not rebutted. In respect of some of the evidence the respondents expressly declined to deal with the evidence. For instance, in the first and second respondent's first answering affidavit Mr Funde states that "I have been advised that it is not necessary for me, at this stage to respond to those allegations made by the applicant in support of the review sought by it in part B of the notice of motion. Satra and I will deal with those allegations at an appropriate stage". In the first and second respondent's second answering affidavit councillor Currie states that "I have been advised that it is not necessary at this stage of the proceedings for Icasa to respond to the applicant's allegations of impropriety or irregularity of the recommendation or the process by which it was arrived at. That will be done once the record has been prepared and filed in terms of the provisions of rule 53 of the uniform rules of this honourable court". Cell C adopted a similar stance when it stated, in respect of the supplementary founding affidavit the following: "Finally, as to the supplementary affidavit delivered by Nextcom on Friday, 7 July 2000 I am advised and respectfully submit that the contents thereof are argumentive, irrelevant and unsubstantiated. It accordingly requires no further response from me, save to deny the arguments raised and the conclusions drawn therein."

A failure to rebut that evidence enhances the probative value of the evidence given by Nextcom (section 3(1)(c)(iv) of the act). See Hewan v Kourie NO and Another 1993 (3) SA 233 (T) at 240F-H. Also for this reason the application falls to be dismissed.

HAS NEXTCOM ESTABLISHED A PRIMA FACIE RIGHT

The main grounds for the review of the decisions made by Icasa and the adjudication process conducted by it are the following:

1. The independence and impartiality of Icasa have been compromised by executive interference;

2.Two councillors failed to disclose conflicting interests as they were required to do in terms of section 15 of the act and they were therefore precluded from performing their functions in a fair, unbiased and proper manner;

3. Icasa failed to comply with the provisions of the act, the regulations and Icasa's ruling on confidential information and as a result acted irregularly and ultra vires section 35 of the act;

4. Notwithstanding its ruling to the contrary, Icasa unfairly permitted applicants to make material changes to their applications and then adjudicated those applications;

5. Icasa failed to take into account and to apply its mind to the relevant evidence of its own experts;

6. Icasa failed to give adequate and sufficient reasons for its recommendation to the Minister and did not comply with the obligation to give written reasons in terms of section 33(2) of the constitution;

7. Icasa's recommendation that Cell C be awarded the third cellular licence is irregular, arbitrary, unfair, unreasonable and unjustifiable;

8. Icasa's decision to refuse the application of and not to recommend that Nextcom be awarded the third cellular licence is irregular, arbitrary, unfair, unreasonable and unjustifiable;
9. Icasa's evaluation of the application of Telenor is irregular, arbitrary, unfair, unreasonable and unjustifiable;
10. Icasa double-counted Nextcom's alleged weaknesses and Cell C's alleged strengths;
11. Icasa claimed and averred that the decision to recommend Cell C for the award of the cellular licence was a unanimous one whilst that was not the case.

The independence and impartiality of Icasa has been compromised by executive interference.

The Icasa councillors conducted its deliberations in respect of the applicant to be recommended for the third cellular licence on 18, 19 and 20 February 2000. Mr Maepa's evidence is that prior to 18 February 2000 a meeting was held between the councillors and the Minister at the office of the Minister. This meeting was convened at the request of the Minister. One of the matters that was discussed during the course of the meeting was the Minister's desire to obtain legal assistance so as to ensure that Icasa applied its mind to the applications before it during the course of its deliberations. The Minister decided that she would appoint such a person to be present at the deliberations and adv I Simenya SC was briefed by the Minister to perform this function. During the afternoon of 17 February 2000 Mr Maepa met the Minister, at her request, at the Johannesburg International Airport. She referred to a report by the auditor- general which dealt with a possible conflict of interest on the part of Mr Maepa as a result of a past business relationship with one Mashudu Tshivhase. She expressed concern that the media and the politicians might comment negatively on his participation in the deliberations because of his possible conflicting interests and told him that he should recuse himself from the deliberations. Mr Maepa pointed out to the Minister that

there was no legal basis meriting his recusal and that he wanted to discuss the matter with any person with a legal background who had participated in making the decision that his recusal was required. The Minister informed him that adv Gumbi, a member of the president's staff, participated in making this decision and it was arranged for him to meet adv Gumbi on the same day. At the meeting adv Gumbi advised him that it was necessary that he recuse himself because Mr Tshivhase held a 14% interest in one of the bidders, Africaspeaks and, because of his past business association with Mr Tshivhase, he was required to recuse himself. Mr Maepa explained to her that her information was wholly incorrect but she persisted that he should recuse himself from the deliberations. He protested and advised her that he would consider the matter and would contact her after he had considered his position. The following morning he contacted her and advised her telephonically that he saw no basis for his recusal. This conversation was an acrimonious one and adv Gumbi asked him whether she or the Minister could attend at the venue where the deliberations were to be conducted in order to discuss the matter further. He replied that the Minister herself should come.

At the commencement of the proceedings on 18 February 2000 the matter of his alleged conflicting interest was raised. He explained his position and left the meeting in order to afford the remaining five councillors an opportunity to debate the application of section 15 of the act. Documents in respect of the alleged conflict of interest were prepared and submitted to an attorney, Mr Pretorius, in order to obtain his opinion with regard to this issue. The attorney furnished an opinion in which he concluded that he did not have conflicting interests within the meaning of section 15 of the act. During the afternoon of 18 February 2000 Mr Funde and Ms Gosa remained adament that the provisions of section 15 be applied and that Mr Maepa should recuse himself. These discussions were recorded by adv Simenya who operated the recording device. These discussions delayed the commencement of formal deliberations on

who to recommend for the licence. During the afternoon of 18 February 2000 the Minister arrived at the venue in order to discuss the matter of his recusal with him and, so he states, with a view to persuade him that he should recuse himself. The matter was discussed with the Minister alone and also with him in the presence of adv Simenya. He also had several telephone conversations with adv Gumbi during the course of the day.The Minister conveyed to him that the president's office still held the view that it was necessary for him to withdraw from the process. He perceived these insistent requests that he should withdraw as significant pressure emanating from the president's office and from the Minister. He reluctantly agreed to withdraw. The formal deliberations of the Icasa council commenced during the afternoon of 19 February 2000. He spent the morning preparing a letter to the president as well as points to be made to the council and staff present at the deliberations. At a meeting that was held during the afternoon of 19 February 2000 he told the Icasa council and staff that he was withdrawing from the adjudication proceedings. He explained that he was withdrawing because of a vendetta against him that included newspaper attacks and attacks by the SABC based on false information emanating from within Icasa. He states that he knows that adv Simenya was present as a representative of the Minister throughout the deliberations which led to a decision to propose to recommend that the cellular licence be awarded to Cell C.

Nextcom contends that the adjudication process has been irreparably tainted by the extreme form of political interference. It relies upon section 5(3) of the act which expressly provides that Icasa shall be independent and impartial in the performance of its functions. The Minister and the president's office, having interfered in the conduct of the adjudication proceedings, section 5(3) of the act has been violated and this constitutes an irregularity which vitiates the proceedings and the decision to recommend that Cell C be awarded the licence. Furthermore, Nextcom submits that the separation between Icasa's adjudication processes and the

functions of the Minister is consistent with section 41(1) of the constitution which requires, amongst others, that all organs of state within each sphere of government must exercise their powers and perform their functions in a manner that does not encroach on the functional or institutional integrity of government in another sphere. This section has been violated by the conduct of the Minister and the president's office. The Minister and the presidents's office breached their constitutional duties to respect and uphold the independence of Icasa and acted ultra vires the act. There is no source of law, so it contends, which authorises this conduct of the Minister and the office of the president. Such conduct is therefore ultra vires, unlawful and in violation of the legality principal embodied in the constitution.

It is not in issue that the Minister and adv Gumbi requested and advised Mr Maepa to withdraw from the deliberations. Cell C submits that the Minister's role in relation to Mr Maepa had nothing to do with the process in terms whereof Icasa made a final recommendation to the Minister. t says that the Minister was dealing with the competency of the members of the authority who are councillors as she is entitled and obliged to do in terms of section 9 of the act, read with section 12. It also submits that because Mr Maepa received assistance with the drafting of his affidavits from Nextcom's legal representatives and the fact that this was not revealed at the outset of these proceedings, his bona fides must be doubted and a questionmark put over the veracity of his evidence. The Minister goes further and contends that the assertion by Mr Maepa that he is "clean and untainted" is questionable. The question is asked "why did he not intervene independently in this matter as an amicus but elected to align himself vigorously with one of the bidders (Nextcom). This alignment, so the argument goes, surely demonstrates his partiality. It is submitted that both his impartiality and credibility are questionable.

I find nothing sinister in the fact that Mr Maepa, at Nextcom's request, provided it with supporting affidavits. His first affidavit, annexure "MOK 28" to Nextcom's founding affidavit runs to 42 pages. It fully sets out the facts upon which Nextcom relies for this ground of review as well as other facts to which will be referred later. He states that, as a result of a threat which had been made to his life, he laid a complaint with the South African Police Services as a result of which a docket was opened. He states that he made the first affidavit because he is still concerned and in fear for his life and that he seeks to place on record the facts in respect of the adjudication process of Icasa so that should anything untoward happen to him, these facts will be matters of public record. The affidavit was made in order to have it deposited in the docket opened by the police.There is no reason to doubt what he has said in this regard.The suggestion that he lied when he said that that affidavit was made for the reason stated by him and that it was in fact made with the view to support the application, is in my view unwarranted. In his second affidavit, the confirmatory affidavit annexed to Nextcom's supplementary founding affidavit he states that he has no objection to the use of the first affidavit, not only by Nextcom but by any other party in these proceedings. There is no reason to doubt that statement.

Icasa contends that his evidence shows that the decision to withdraw from the process was made by him and him alone and that this is borne out by documentary evidence. This documentary evidence is annexure "IM-C1" to Cell C's answering affidavit. It is a letter addressed to the president by Mr Maepa in which he informs him that he has recused himself from participation in the deliberations and of Icasa's process and in which he sets out the reasons for doing so.That is a letter which was drafted by adv Simenya. Copies of drafts were annexed to Mr Maepa's replying affidavit. He states that this letter was an effort both to make it clear to the president that he had no conflict of interest and an attempt to retain his dignity in

the face of the executive pressure to which he had been subjected and by which he had felt insulted and hurt. He states that it did not seem appropriate to him at the time to catalogue the pressure to which he had been subjected by the Minister and the president's legal adviser which had led to his withdrawal. There is in my judgment no basis for rejecting this evidence. In my view the evidence prima facie shows that pressure was brought to bear upon Mr Maepa to withdraw from the Icasa deliberations and that, by doing so, the Minister and the president's office violated the encroachment principle contained in section 41(1) of the constitution and acted contrary to the provisions of section 5(3) of the act. This appears to be irregular action which may lead to a court hearing the review application to find that this conduct vitiated the proceedings and nullifies the decisions. There is a reasonable prospect that a review court will find that the effect of the executive interference in the adjudication process deprived Icasa of the essential appearance of independence and impartiality which is required by section 5(3) of the act and by the constitution.

Conflicts of interest

The conflicts of interest which, so Nextcom alleges, resulted in appearance of bias surrounding the position of Mr Funde and Ms Gosa are particularized in Nextcom's founding affidavit. Nextcom alleges, with reference to Mr Maepa's affidavit, that Mr Funde was required by section 15(2)(a) of the act to disclose both the nature of his interest in Escom Enterprises (Pty) Ltd and other Escom entities by virtue of his membership of the Escom Electricity Council. This is so because Escom had expressed an interest in all the applicants for the licence. It had obtained a revocable option to acquire an equity interest of up to 26% in Telenor. Although this right was subsequently revoked, Telenor nevertheless presented its application to Icasa by emphasizing an interest expressed by Escom in its application which

went beyond a general interest in the outcome of the process. As a result of Mr Funde's participation in Icasa's hearings and deliberations, Escom had privileged access to material information in relation to the content of the competing applications themselves which none of the other applicants nor the public enjoyed, and it had privileged access to the internal processes of Icasa in considering the applications. Given his position as the deputy-chairman of Icasa, Mr Funde was in a position to assist Escom, his fellow member of the Escom Electricity Council and the chairperson of the National Electricity Regulator. The chairperson of the Electricity Council, Mr R Khoza is a director or member of at least two corporate entities which are shareholders in Cell C. Mr E Banda, the chairperson of the National Electricity Regulator, is a director or member of a company which has an equity interest in Cell C.

Mr Funde at no stage disclosed his interest in Escom, neither to the applicants nor his co-councillors. In the circumstances it is submitted that he had an interest which may have precluded him from performing his functions in a fair, unbiased and proper manner as contemplated by section 15(1)(b) of the act. Furthermore, it is stated that, as appears from Mr Maepa's affidavit, he was throughout the process a consistent and strong supporter of the applications of Cell C and Telenor. It is submitted that, for that reason, Nextcom has a reasonable apprehension of bias on the part of Mr Funde in favour of Cell C and Telenor and against Nextcom.

As far as Ms Gosa is concerned Nextcom states that she, as of November 1999, had a direct and material interest in the outcome of the licensing process. She was a director of an entity known as Katekane which is a shareholder in Africaspeaks. She was obliged in terms of section 15 of the act to disclose this and Nextcom states that, to the best of its knowledge, she did not do so.

Mr Funde and Ms Gosa made affidavits in which they refute these accusations. In my view they convincingly did so. In my opinion Nextcom failed to establish the alleged irregularity based on conflicts of interest.

Non- compliance with the provisions of the act, the regulations and Icasa's ruling on confidential information

Nextcom complains that neither Cell C nor Telenor complied with section 34 of the act, the regulations of 24 May 1999 or Icasa's ruling of 19 July 1999 in respect of confidentiality of applications. It states that Cell C and Telenor withheld from public disclosure a substantial amount of documentation and information which did not enjoy protection under the relevant provisions relating to confidentiality. This inadmissible information which could not be lawfully considered by Icasa because it ought to have been publicly disclosed was nevertheless considered in its deliberations on 18, 19 and 20 February 2000. It is said that Icasa's eventual and belated decision to publish for inspection documentation previously withheld from public inspection which fell outside the scope of section 34 of the act, on 1 February 2000, and at that stage to invite further representations with respect to the more complete applications, did not and could not cure the defect.

Mr Funde answers and states that Icasa made a ruling that only information relating to financial capacity and business plans of an applicant would be held confidential. Some of the applicants did not immediately comply with that ruling. During the hearings some applicants, including Nextcom, raised their concerns regarding the fact that other applicants did not comply with the council's ruling. Icasa performed an audit as to which of the applicants did not

comply with its ruling. Thereafter it issued a directive that information withheld on the grounds of confidentiality not in accordance with the ruling should be released for inspection by members of the public, including the competing applicants. Part of the ruling was that members of the pubic and the competing applicants were given an opportunity to make further representations after they had had an opportunity to inspect information previously withheld. The applicants did make representations regarding the information now released for public inspection, Nextcom did inspect the information released and did make further representations regarding that information. Consequently Nextcom did not suffer the kind of prejudice relied upon.

Cell C states that Icasa's decision to publish further information at this late stage may have infringed Cell C's rights, being publication of information in respect whereof it was entitled to confidentiality in terms of section 34(4)(b) of the act read with the applicable regulations and rulings. However, Nextcom was not prejudiced by such publication.
The competing applicants and the public had a right of access to all information relating to the applications at the time that public hearings were held. It is not in dispute that at that stage all information relating to the applications had not been made available. That, in my view, prima facie constitutes a procedural irregularity.

Notwithstanding its ruling to the contrary, Icasa permitted applicants to make material changes to their applications and then adjudicated those applications taking into account the material changes.

Nextcom's case is that, on 26 November 1999, after it and other applicants had presented oral and written submissions, Icasa circulated a letter in which it conveyed its ruling regarding

new information submitted by applicants after 14 June 1999 being the date on which applications were required to be submitted. The letter states, amongst others, that Icasa is of the view that, as a general rule, applicants should not be allowed to introduce any new information if, in the opinion of Icasa, the introduction of such new information would amount to a material amendment of the original application concerned and thus be likely to cause undue prejudice to other applicants. This interpretation of section 35(1)(a) and the common law reflected in this ruling, is incorrect. Neither the common law nor section 35(1)(a) permit Icasa to allow applicants to make material changes which would amount to amendments of their applications which were required to be submitted on 14 June 1999. Once Icasa decided that applications had to be submitted by 14 June 1999 it was no longer open to applicants to amend those applications during the course of the public hearings or thereafter. In any event, so Nextcom argues, Icasa has failed to comply with its own ruling. It permitted applicants, including Cell C and Telenor, to introduce new material and undertakings into their applications which did not form part of those applicants original applications. It allowed these two applicants to make substantial and material amendments to or alterations of their applications and then considered their applications on the basis of those variations or amendments. It sets out two examples of this process to illustrate Icasa's alleged irregular conduct in this regard.

Icasa denies that it permitted any applicant to materially amend its application or submit irregular, fresh or new material in support of a bid. Icasa and Cell C put in issue the correctness of Nextcom's interpretation of section 35(1) of the act. Cell C deals at length with the two examples given in illustration of the alleged irregular process in this regard in paragraphs 42.1 to 42.2.5 of Nextcom's founding affidavit. One of these examples is Telenor's attempt, after 14 June 1999, to merge its application with that of Afrozone Tellecom (Pty) Ltd

which had withdrawn its application. Nextcom and other applicants objected strenuously to this attempt. It states that Telenor was the only applicant that did not have an empowerment partner. If Icasa's ruling on new information had been applied it would have meant that the application of Telenor was fundamentally flawed and doomed to failure. Yet Telenor was placed second in the race for the licence. This, Nextcom submits, means that Icasa either permitted Afrozone to become the empowerment partner of Telenor, in which case Icasa acted irregularly, in conflict of a statement issued by it on 28 July 1999 and with its own ruling of 26 November 1999 dealing with its approach to new information, or that it over-assessed the Telenor application. Telenor supported Nextcom's application at the hearing before Bettelsmann J.In the se proceedings it adopted a neutral stance. It is not improbable that Telenor will, at the hearing of the review application, support Nextcom's application and will concede that Icasa acted irregularly in the assessment of its application. An overview of the evidence tendered in respect of this review ground convinces me that Nextcom has reasonable prospects of success in the review proceedings to show that the irregularity in the process complained of under this heading has been established.

Icasa's failure to take into account and/or apply its mind to the relevant evidence of its own experts

Icasa commissioned two expert consultants to analyse the applications of all the applicants. Afcent/clc was commissioned to evaluate and assess the compliance by applicants with the five criteria against which the applications were to be measured. BDO Spencer Steward was commissioned to evaluate the financial aspects of the applications.These consultants were required to bring to bear their expert understanding and experience to the decision-making process which Icasa otherwise did not have available to it. Without such experts Icasa could

not have properly undertaken the technical tasks required in a full and proper evaluation of the applications.These consultants produced reports. In addition, Icasa appointed an internal committee of its staff which produced an evaluation of the applications. Nextcom submits that it appears from Icasa's reasons for its recommendation that the reports are not fully dealt with and that Icasa has not taken them into account nor applied its mind to them notwithstanding the fact that they clearly constitute relevant evidence which should properly have been taken into account. The failure to do so, so it submits, amounts to a material irregularity. It appears that there are material differences between the findings and recommendations contained in the expert reports and those of Icasa embodied in its recommendation. Afcent/clc and BDO Spencer Steward awarded Nextcom the highest scores in their reports and Nextcom was adjudged by these experts to be the appropriate applicant for the award of the licence.

It appears from the BDO Spencer Steward report that serious doubts were expressed concerning the viability of Cell C's business plan. BDO Spencer Steward concluded that Cell C will be technically insolvent from the year 2000 to 2005, that its structure would not stand up to the level of loss that will be sustained over that period and that recapitalisation would have to be undertaken to ensure its survival. Nextcom contends that the decision to recommend Cell C and to reject its application is radically at odds with the findings, conclusions and recommendation of Icasa's own experts and that there is no acceptable explanation in Icasa's reasons for the recommendation to justify these material discrepancies. Icasa found, and this is set out in the recommendation, that Nextcom had failed to provide any project for the implementation of its universal service plan. This finding is said to be incorrect and at odds with the findings of Icasa's experts. Icasa's own task team held a different opinion from that of Icasa's councillors. Nextcom concludes that Icasa has, without any public explanation in its reasons for the recommendation, totally ignored or else rejected

the findings of its experts. Such rejection without reason is arbitrary, unreasonable and unjustifiable. It is inconsistent with the requirements of section 35 of the act and its recommendation should also for this reason be set aside.

On 7 May 2000 it became public knowledge that one of Icasa's councillors Mr W Currie, had commissioned and received a second report from BDO Spencer Steward. It was reported that he commissioned the report in February 2000, shortly before Icasa started its deliberations with a view to making a recommendation. The second BDO Spencer Steward report is said to be even more damaging of Cell C's application than the original report. This report was never tabled before Icasa and its existence only emerged when BDO Spencer Steward invoiced Icasa on or about 29 February 2000 for the work that it had done. Mr Currie was reported to have stated that this report was in fact a summary of the original report and did not contain any additional information which could have influenced Icasa to a different decision.

On 16 May 2000 Icasa engaged GTKF as a financial adviser to review, analyse and report on the financial and business plans submitted by six applicants for the licence. At that stage Icasa had already taken a decision to recommend that the licence be awarded to Cell C. Councillor Currie explained that GTKF was commissioned to furnish a report in order to make sure that Icasa has examined every aspect of the applicant's financial plans. On 23 June 2000 it became known that GTKF had come to the same conclusion as had BDO Spencer Steward namely that according to its own business plan Cell C would be insolvent for the first five years of its operation. Icasa then decided to ignore the GTKF report on the grounds of a conflict of interest to which I have already referred.

Icasa states that it was entitled to disregard BDO Spencer Steward's opinions, that it

considered its opinions and did not accept it. It states that it did so after it properly applied its mind to the opinions as well as the contents of representations made by various applicants. In respect of the Afcent/clc report it states that “to the extent that they made an evaluation, council was entitled to depart from that evaluation, after it had applied its mind.”

In my opinion, considering all the evidence in respect of this review ground, Nextcom may succeed in convincing a review court that, because Icasa ignored or did not give proper weight to the opinions of its experts, it failed to apply its mind to the matter in question and that such failure constitutes an irregularity which vitiates its proceedings and decisions. I must add that the fact that councillor Currie commissioned a report without his co-councillors knowledge and consent and did not disclose the fact that he had received a report may well be found to constitute a further irregularity in Icasa’s proceedings.

The inadequacy and insufficiency of Icasa’s reasons

Nextcom contends that the reasons furnished by Icasa do not comply with the obligation to give written reasons in section 33(2) of the constitution. It states that a number of material issues were not addressed and are unexplained. Icasa did not explain why it considered applications, including those of Cell C and Telenor, notwithstanding non-compliance by those applicants with the requirements of section 34 of the act, the 24 May 2000 regulations and Icasa’s own rulings on the issue. There is no explanation as to why the complete documentation comprising applicants’ bids were only made available for public inspection belatedly in early February 2000. There is no account of how Icasa actually applied its ruling in relation to new information and no explanation of precisely what information it considered to be new and therefore inadmissible or which it considered to be new and nevertheless

admissible. There is no explanation as to whether, and if so, on what basis and in respect of which applicants, Icasa permitted material amendments to or variations of applications nor any account of the nature of those amendments. The facts and circumstances of Mr Maepa's withdrawal from the process is not explained. Icasa has not provided any explanation that accounts for the differences between its opinions and those of its experts.

Icasa does not deal with these complaints in its answering affidavit. In my view a review court may well find that the reasons furnished by Icasa for its recommendation do not comply with the requirements of section 33 of the constitution.

Ad the further review grounds relied upon by Nextcom

I do not deem it necessary to deal with the further grounds for review relied upon. In my opinion Nextcom has reasonable prospects of convincing a review court that, on the review grounds that I have dealt with and in respect whereof I consider that there are reasonable prospects of success in the review, Icasa's decisions and proceedings have been marred by irregularities and that it should be set aside. A court hearing a review application which is based on a number of grounds consider those grounds individually and cumulatively. Even if one or more grounds are not so serious that it warrants the setting aside of an administrative decision or proceeding, the grounds, viewed cumulatively, may result in a successful review. See Schoultz v Voorsitter, Personeel - Advieskomitee van die Munisipale Raad van George en 'n Ander 1983 (4) SA 689 (C) at 721B-C. The number of irregularties allegedly committed by Icasa may result in such a finding. I am satisfied that Nextcom has made out a prima facie case for the relief it seeks and that, should I find that it has met the other requirements for interim relief, the application should be granted unless I find for the respondents on the

special defences raised by them.

IRREPARABLE HARM AND PREJUDICE

It is submitted that, should the Minister act on Icasa's recommendation, the licence may be issued to Cell C without further notice to Nextcom. It is probable that the Minister will accept Icasa's recommendation and that such a licence will be issued to Cell C in the immediate future should interim relief not be granted. Nextcom states that Cell C is already conducting itself as if it had been awarded the licence. It has, for example, concluded an agreement with certain operators being Mobile Telephone Networks (Pty) Ltd and Vodacom (Pty) Ltd for the sharing of the GSM 1800 frequency. It states that it has no doubt that Cell C's efforts to establish a network, advertise its services so as to attract market share and to prepare to commence its operations will rapidly gain momentum if interim relief is not granted and the Minister awards the licence to Cell C. Under those circumstances Cell C will have a free hand, as the holder of the licence, to entrench its position in the local market. It will also then have every incentive to delay the determination of the review application and to draw the process out for as long as possible. Should Nextcom ultimately succeed in reviewing the decisions and the proceedings of Icasa it will be extremely difficult for it to capture Cell C's market share. This is because Cell C will have the opportunity of rolling-out its network and infrastructure and of atracting customers and subscribers while Nextcom's review is pending. Nextcom, by contrast, will not be in a position without a licence to commence doing the same. Consequently, should Nextcom be ultimately successful on review, subscribers of Cell C will be placed in a position where they either have to await the outcome of Icasa's further revised decision, which they are unlikely to do, or, if Nextcom or another applicant is awarded the licence after a successful review, those subscribers will in all likelihood become part of the

market of MTN or Vodacom since those entities will be able to provide services to them without delay. Cell C subscribers will in those circumstances be inconvenienced. This will cause irreparable harm to Nextcom's prospects of capturing significant market share. In addition, Nextcom contends that, if interim relief is refused and Cell C is permitted to implement its business plan and begin to establish its vastly expensive network, there will be enormous pressure on Icasa, if the review is successful and if it has to reconsider its decision, to reach the same conclusion it has already reached. This is so because Cell C will by then have entrenched itself in the market to such an extent that major disruption and inconvenience will be caused to the entire industry and to consumers by any other outcome. To allow such a situation to develop would be extremely and irreparably unfair to Nextcom and other bidders in the same position.

Cell C replies that it intends, should the licence be awarded to it, to immediately commence the implementation of its network roll-out and construction of its infrastructure notwithstanding that review proceedings are pending. It states that, given its corporate guarantees in respect of the funding requirements of Cellsaf, this means that the entire funding of the business will be provided by Saudi Oger entirely at its own risk. However, it has no choice in the matter. If Cell C is the successful licensee and does not commence operations forthwith, the opportunity will have disappeared permanently.

In my view it is clear from the evidence that should interim relief not be granted, Nextcom will suffer irreparable harm and prejudice.

BALANCE OF CONVENIENCE

Nextcom's submission that the balance of convenience favours it is supported by the facts and considerations which it stated in support of its submission that it will suffer irreparable harm and prejudice should the relief sought by it not be granted. In addition it submits that public interest considerations are also relevant to the balance of convenience in these circumstances. It points out that if Icasa's decisions fall to be reviewed and set aside then the Minister's decision, even if it is regular, will be based on an invalid recommendation to her. The entire process has already attracted much public criticism and had done little to encourage foreign investment which is recognised as being essential to the economic policy of the country. Interim relief would ensure that the process is now being appropriately dealt with by the courts. If further steps are suspended until confidence in the process has been restored through judicial determination this can only benefit the public in re-establishing confidence that the process will finally be properly scrutinized and that any unlawful conduct will be properly reviewed prior to proceeding to the next step. It is furthermore submitted that the re-establishment of confidence in the process which interim relief and a speedy review will provide, will work to the benefit of all the applicants, the members of Icasa and the political organs of state.The Minister will not be placed in the invidious position of having to perform her functions on the basis of a process that is under attack and that may turn out to have been irregular. Interim relief will put the Minister in a position to act on the basis of and only when a lawful and regular process has been completed. If the application is ultimately dismissed then she will be able to act securely in the knowledge that her final award is not open to challenge on the basis of Icasa's conduct. It is also submitted that the members of the public who subscribe to the service which Cell C will begin offering while the review is pending may be severely prejudiced if the review is ultimately successful and Cell C is not awarded the licence, once Icasa has considered the matter afresh. They will be severely prejudiced by having concluded contracts for Cell C's services. The impact on public

confidence in an important and rapidly expanding new market will have been shaken. They will also not be able to subscribe immediately for the services provided by the ultimately successful applicant because that applicant will require some time to roll-out its network and infrastructure and begin offering its services.

Icasa's view is that the balance of convenience does not favour the applicant because the licensing procedure set out in the act would be segmented into separate processes, each of which could become the subject of a review. The balance of convenience favours a "once-off" approach to a review of the steps taken in terms of section 35 of the act.

Cell C 's view is that the very existence of a third mobile cellular service operating in South Arica depends on the successful licensee entering the market without delay. A prerequisite for its success and sustained viability is that such third operator should enter the market while the sector is still experiencing a healthy growth phase so that a reasonable market share can be secured by the new entrant. An entrant in a saturated market will obviously not succeed. It states that, by every possible yardstick, the South African market will begin to approach saturation around 2004 with limited growth thereafter. As matters stand at present the award of the licence is already almost a year behind schedule. If the entry into the market by the third licensee is delayed further, considering the time required in which to roll-out the necessary infrastructure, it is unlikely that there will be such an entry at all. As far as Cell C is concerned, if there were to be a considerable delay, it will be compelled to reconsider whether to participate any further at all. Cell C submits that, should the interim relief be granted and the review proceedings commenced and, in the likely event that because of material factual disputes on the papers be referred to oral evidence, such a hearing will not take place, at the very earliest, during the first half of 2002. In the event of an appeal, which is also a likely

event, even an urgent appeal directly to the Supreme Court of Appeal, the matter would be delayed further. It is extremely unlikely that a final judgment will be obtained before some time during the latter part of 2003. Should the application succeed the effect would be that the process will be repeated and the successful licensee will not be able to enter the market before, at the very earliest, the latter part of 2005. Because of this delay it is unlikely that there will ever be a third mobile cellular operation in South Africa.

The Minister contends that a delay of the awarding of the third cellular licence carries with it the risk of great and substantial loss to the other bidders as well as the government. It is in the interest of all concerned parties that finality is reached which will enable any bidder if it so elects to challenge the determination and award of a third cellular licence by the Minister.

In my view the scenario predicted by Cell C is over-pessimistic. It has happened before that urgent matters and matters of public importance were dealt with in this division in the third motion court as a matter of urgency. Even if this matter should be referred for oral evidence or to trial I have no doubt that the Judge President will allocate a judge to adjudicate the issues between the parties on an urgent basis. If the parties co-operate there is no reason why this matter cannot be finalized during the course of this year. In the event of an appeal it is likely that the Chief Justice will have the appeal heard as a matter of urgency. In my view this matter will probably be disposed of in a matter of months and not years. It would also help if the Minister and the first and second respondents comply with the directive that the record of the proceedings be submitted to the registrar. Their failure to do so is delaying the finalization of a matter which in the interest of the country has to be brought to finality expeditiously.

In my judgment, considering all the factors and considerations put forward by the parties, the

balance of convenience favours Nextcom.

THE ABSENCE OF A SUITABLE ALTERNATIVE REMEDY

Nextcom does not have a cause of action in damages against Icasa for its conduct. Even if it did, the quantum of such damages would be practically impossible to quantify. For the reasons already stated the determination in due course of a review, will not provide Nextcom with an adequate remedy unless it is accompanied by interim relief.

The Minister submits that it was open to the applicant to make submissions to the Minister with a view to persuading her not to accept the recommendation of Icasa. There is no suggestion that the provisions of the act preclude or deny Nextcom an opportunity to make these representations. Nextcom has chosen not to persue these remedies at its own peril.
I do not agree with this submission. As I will point out later there is no need for Nextcom to wait with its review application until such time as the Minister has had an opportunity to consider the recommendation. It is also unlikely in my view that the Minister will be persuaded, in the light of the recommendation of Icasa, to award the licence to anyone else but Cell C. In my view Nextcom has shown that it has no alternative remedy.

IS THE RELIEF SOUGHT BY NEXTCOM PREMATURE

The respondents submit that, in terms of section 35(2) of the act, the Minister has a discretion to make a decision in relation to the recommendation. She is not bound to follow the recommendation and may reject it. Until she has done so, the relief sought by Nextcom is premature. In launching this application Nextcom has pre-empted a possible judicial review of

a decision that has yet to be made. The recommendation by Icasa in favour of Cell C does not result in Nextcom being excluded from being considered by the Minister and the recommendation accordingly is not reviewable at this stage. The intervention by this court on a matter at a stage before a final decision has been taken is not countenanced by our courts. In support of these submissions reliance is placed upon Meyer v South African Medical and Dental Council and Others 1982 (4) SA 450 (T) and Akani Big Hole (Pty) Ltd v Northern Cape Gambling and Racing Board and another 1999 (4) ALL SA 316 (NC).

Icasa's counsel argued that the Minister can do one of four things namely to accept the recommendation, to refuse the recommendation, to refer the matter back to Icasa for reconsideration or to award the licence to one of the other competing applicants. This submission in my judgment is not correct. Section 35(6) of the act nor any other provision of the act expressly confers on the Minister the power to refer Icasa's recommendation back to it. Icasa's counsel submitted that such a power was implicit in the power to refuse or grant the application. In my view such an implied power cannot be read into the act. There is no basis for such a submission. This view also applies to the contention that the Minister may award the licence to one or the other contenders, a contender not recommended by Icasa. Section 35 does not confer upon the Minister such a power. Such a power can also not be implied in the act. Powers which are not expressed in a statute will not be read into that statute by implication unless the implication is a necessary one. The implication must be necessary in the sense that without it effect cannot be given to the statute as it stands or to realise the ostensible legislative intention or to make the statute workable. See Palvie v Motale Bus Service (Pty) Ltd 1993 (4) SA 742 (A) at 749C. It is not necessary, in my view, to imply such powers contended for to make the act workable. If the recommendation is accepted that is the end of the matter. If it is refused, Icasa deals with applications afresh.

Icasa's councillors are persons who are knowledgeable, if not experts, in the field of telecommunication engineering. They have sat for weeks if not months sifting through applications, hearing and considering arguments for and against the applications which were put before them and deliberated for days in respect of who the most meritorious applicant is. Their recommendation is or is supposed to be a painstakingly considered one. In the light thereof it is most unlikely that the Minister will ignore their recommendation. The practical effect of that recommendation is that Nextcom and the other bidders have lost the race. In the circumstances there would be no point in awaiting the Minister's decision before bringing the application for the review of Icasa's decisions and proceedings. See Bindura Town Management Board v Desai & Co 1953 (1) SA 358 (A); Esikhehleni (Pty) Ltd and another v The Mpumalanga Gaming Board and others (unreported case number 2111/97 (TPD) and Akani Msunduzi (Pty) Ltd and another v The Premier of the Province of Kwazulu-Natal and others (unreported case number 4105/98 (NPD).

The Akani Big Hole case is not a case in point. It deals with the intervention by a court in the decision-making process of an authority created by a statute which provides for an appeal by an aggrieved applicant against a preliminary decision. The Meyer case concerned the justiciability in a court of law of a matter which fell within the exclusive jurisdiction of a disciplinary committee.

Furthermore, where a recommendation is a nullity because of irregularities committed in the course of proceedings leading to the decision to make that particular recommendation, it means that a right to procedurally fair administrative action has been infringed. That infringement cannot be rectified by the Minister's decision; it remains an infringement of a

constitutional right. Under the circumstances it makes no sense to expect of Nextcom to await the Minister's decision before bringing a review application. Once unlawfulness is manifest in a form which cannot be corrected no matter how the public authority continues to act, there is no point in insisting that the complainant should continue to go through the motions before bringing the matter to court. (Baxter, Administrative Law, p 720.) In my view the review application and this application is not premature.

HAS NEXTCOM EXHAUSTED THE REMEDY PROVIDED FOR IN THE STATUTE.

Counsel for the Minister argued that section 35(6)(a) gives Nextcom a remedy. It is submitted that Nextcom has not shown that this remedy is valueless. The remedy referred to is Nextcom's right to compel the Minister, once the Minister has taken a decision, to furnish written reasons for that decision.

This does not appear to me to be a remedy. Once the Minister has taken a decision and that decision favours Cell C, a licence will be issued to Cell C with the prejudicial consequences referred to above.

THE SEPARATION OF POWERS - ARGUMENT

Icasa and the Minister submit that the combined effect of prayers 2 and 3 of the notice of motion is to effectively prevent the Minister from exercising the statutory powers which she is enjoined and called upon to execute in terms of the act. The effect of these prayers is to efface the constitutional scheme of separation of powers enshrined in the constitution. The fundamental and core value of our constitutional jurisprudence is that of separation of powers.

The courts do not ordinarily issue orders which prevent public functionaries from discharging their statutory duties but are concerned with judicial control on how executive power or public function is exercised. The respondents rely, amongst others, on the constitutional court's judgment in the matter of Pharmaceutical Manufacturers Association of SA and Another: In Re, Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC). It is submitted that the court should intervene only when the Minister has exercised her powers and only when those powers have been improperly exercised.

This case and the other cases relied upon are not supportive of this submission. On the contrary, the extract from this judgment quoted in Icasa's heads of argument, supports Nextcom's case. Courts are duty-bound to regulate and control the exercise of public power by other branches of government. That control is vested in them under the constitution which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which the public power has to be exercised. What the court is doing in this case is to regulate and control the exercise of public power by an organ of state, Icasa. It is called upon to do so because Nextcom alleges and it has been found to have prima facie shown that Icasa acted irregularly in the proceedings which lead to its decision to recommend Cell C for the cellular licence. Far from preventing the third respondent from exercising statutory powers, it is ensuring that the Minister does not exercise that power unlawfully. A decision by the Minister based on an unlawful recommendation would also be unlawful. In my view this submission is incorrect and must be rejected.

THE REVIEWABILITY OF THE RECOMMENDATION

The respondents contend that Icasa's recommendation to the Minister is not open to review at

this stage for two reasons. Cell C submits that, although the recommendation is a condition precedent of powers to be exercised by the Minister, it does not in itself constitute a decision effecting the rights or interests of Nextcom. Mr Funde and Icasa contend that a recommendation cannot be a decision.The Minister's view is that the recommendation is neither an executive nor administrative decision. It is a mere recommendation which is not reviewable. In the result, there is no justification for allowing the present proceedings against the Minister to continue. The Minister relies upon the judgment of Smith v Minister of Justice and Another 1991 (3) SA 336 (T) at 341D-G. It was held that a recommendation by an Advisory Release Board to the first respondent not to release the applicant, a prisoner, is not reviewable.The court found that the Advisory Release Board is an organ or department of government created specially to facilitate the task of the first respondent in the performance of his functions under the act. The board should not be seen as a separate tribunal vested with the power of adjudicating on issues or determining rights, but rather as an arm of government performing a service for the first respondent. It was held that the applicant had no cause to complain that she had not been treated fairly under section 69 of the Prisons Act, 8 of 1959. This case was referred to with apparent approval in the matter of Rapholo v State President and Others 1993 (1) SA 680 (T) by Van Dijkhorst J. That court correctly understood what Leveson J had said in the Smith case namely that the audi alteram partem rule does not apply where a convicted prisoner seeks a release or remission in terms of the Prison's Act because the gift of liberty or remission of the sentence of a convicted prisoner is the prerogative of the sovereign, which is not reviewable. The Smith judgment is clearly, in my view, distinguishable from the present case. In this matter, should the Minister take a decision, that decision would be reviewable. It is also distinguishable because of the fact that since that judgment was delivered our constitution came into existence. Nextcom is not only claiming a review in terms of the common law but also in terms of section 33 of the Constitution. (See

President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC) at 12 (footnote 23).

Counsel for Icasa relied heavily on the case of Kruger v The Master and Another NO Ex parte Kruger 1982 (1) SA 754 (W) in which Slomowitz AJ held that a master's refusal to recommend a rehabilitation in terms of section 124(2)(b) of the Insolvency Act was not a decision, ruling or order within the meaning of those words where they appear in section 151 of the act. The ratio of that decision was that the proviso to section 124(2)(a) of the act removes the jurisdiction of the court even to consider an application unless the master has recommended it, and that what was intended was an independent exercise by the master of a discretion; to hold that the master's recommendation was subject to review under section 151 and that the court could de novo call his conclusion into question would be subverting the act and arrogating those powers to the court; had that been the intention of the legislature, it would simply have required the master to furnish a report.

In Greub v The Master and Others 1999 (1) SA 746 (C) Friedman JP and Brand J disagreed with Slomowitz AJ's opinion and in my view, with respect, convincingly so. It was held that to argue that were the court to review the master's refusal to recommend, it would be arrogating to itself a discretion which vests in the master, begs the question. The question is whether a refusal to recommend is a decision within the meaning of section 151 of the act. It was held that a refusal to recommend is a decision; when the master considers whether or not to recommend a rehabilitation he has to make a decision. Having made that decision, he announces his recommendation one way or the other. In Jerpis Trading (Pty) Ltd v Westsun Hotel (Pty) Ltd and others 1984 (2) SA 431 (D) the issue was whether a recommendation in terms of the Liquor Act, 87 of 1977, by the Liquor Board to the Minister that a liquor licence

should be granted was a decision or not. The court (Nienaber J [as he then was]) rejected the argument that the board recommends but that the decision is that of the Minister. In Greub it was held that, on a similar line of reasoning to that in the Jerpis Trading case in order to recommend or to decline to recommend an application for rehabilitation the master has to consider all the relevant circumstances and in the light thereof come to a decision as to what his recommendation should be. His recommendation is therefore a decision for the purposes of section 151 of the act and that decision is subject to review. I am in respectful agreement with the opinions expressed in these two judgments.

Icasa also relies on Standard Bank Investment Corporation v The Competition Commission and Others (2000) 2 All SA 245 (A) in support of its submissions. In paragraph 31 of the judgment of Schutz JA the court deals with a prayer praying a direction to the Minister of Finance and the Registrar of Banks to provide Standard Bank with certain documents. The Minister of Finance submitted that, in the light of his undertaking to furnish interested parties with such documents as they may be entitled to, there is no dispute in that regard. The court stated that it is not the function of that court to act as an adviser and added that, insofar as Standard Bank basis its case on the constitution it is a salutary rule that a question of constitutional law should not be anticipated in advance of the necessity of deciding it and that Standard Bank should await the decision of the Minister before taking action, if any. This is not a case in point. It deals with a rule which was laid down in Zantsi v Council of State, Ciskei, and Others 1995 (4) SA 615 (CC). It does not deal with the question whether a decision of a recommendatory body may be taken on review or not.

In my view, Icasa’s recommendation constitutes a decision which is subject to review at this stage.

PRAYER 4 OF THE NOTICE OF MOTION

The Minister's counsel submits that, should I be disposed to grant the relief sought by Nextcom, it would be inappropriate to grant prayer 4 since the licensing process has not reached finality. Nextcom's counsel argues that no harm can be done if an order is made in terms of that prayer. Until such time as the Minister has made a decision a licence cannot be issued. If an order is made in terms of prayer 3 the Minister is precluded from taking a decision. For that reason there is no necessity to make an order in terms of prayer 4.

COSTS

The parties are agreed that costs should follow the result. They are also agreed that costs should include the costs of two counsel.

THE ORDERS

The following orders are made:

1. Condonation is granted for the hearing of the application as a matter of urgency in terms of rule 6(12).

2.The application to strike out is dismissed.

3. The final recommendation made by the second respondent in terms of section 35(2)b)(i) of the Telecommunications Act, 103 of 1996, in respect of the award of the third cellular telecommunications service licence in favour of the fourth respondent is suspended and deemed to be of no force or effect pending the final determination of the relief claimed in part B of the applicant's amended notice of motion.

4. The third respondent is interdicted from acting upon the said final recommendation in any

manner whatsoever or from exercising any powers under section 35 of the act with respect to the third cellular telecommunications service licence pending the final determination of the relief claimed in part B of the applicant's amended notice of motion.

5. The first, second , third and fourth respondents are ordered, jointly and severally, to pay the costs of the application. The costs include the costs of two counsel.

N J COETZEE

ACTING JUDGE OF THE HIGH COURT