IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

**CASE NO: 20002/08**

In the matter between:

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| **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 |

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| **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 |

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**JUDGMENT**

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**DAVIS, AJ:**

**INTRODUCTION:**

[1] The Applicant is the holder of a value added network service ("*VANS*") licence issued under the Telecommunications Act, No. 103 of 1996 ("*the TA*"). The TA has been replaced by the

Electronic Communications Act, No. 36 of 2005 ("*the ECA*") and the Applicant contends that it has the right in terms of the transitional provisions contained in the ECA to have its VANS licence automatically converted into both an individual electronic communications service ("*I-ECS*")-licence and an individual electronic communications network service ("*I-ECNS*")-licence. The Second Respondent (also referred to as "*ICASA*") is the relevant authority tasked with the conversion of licences under the ECA and has embarked on a "*conversion process*" during the course of which it disputed the Applicant's entitlement to an I-ECNS licence by way of conversion. It furthermore determined that not all VANS licensees will be entitled to I-ECNS licences. Both the manner of conducting the conversion process and the last-mentioned determination came about pursuant to a ministerial direction issued by the Third Respondent as relevant Minister.

**RELIEF CLAIMED**:

[2] 2.1 The matter initially came before court as an urgent application as a result of which an order was made by agreement between the parties regarding the interim relief sought in Part A of the Applicant's initial Notice of Motion. The relevant portion of the order that was made by agreement on 16 May 2008 by Ebersohn AJ in this court reads as follows:

"*It is ordered that:*

*1. Pending the determination of Part B of the Notice of Motion by this court, the Second Respondent will not:*

*1.1 continue with the adjudication process that it is currently conducting with the stated objective of granting selected VANS licensees the right to acquire an Individual Electronic Communications Network Services Licence ('I-ECNS') in terms of the Electronic Communications Act, No. 36 of 2005 ('the ECA');*

*1.2 grant selected VANS licensees the right to acquire the I-ECNS licence in terms of the ECA pursuant to the process described in paragraph 1.1 above.*

*2. For clarity it is recorded that the undertaking in paragraph 1 shall endure until the determination of Part B of the Notice of Motion by the court of first instance and shall not ipso facto be extended in the event of further proceedings following upon a determination by this court."*

2.2 Costs in respect of Part A of the Notice of Motion were reserved and dates were determined for the exchange of affidavits. The matter was then, pursuant to certain directions, specially enrolled for the hearing of Part B on 29 to 31 July 2008, when it came before me.

2.3 In addition to the exchange of affidavits, the said Applicant delivered, in respect of said Part B, an amended Notice of

Motion wherein it is claimed that the court should grant the following relief:

"*1.1 Declaring that paragraph 3 of the policies and policy directions drafted in terms of Section 3(1) and (2) of the Electronic Communications Act, 2005 as published in Government Gazette No. 30308 of 17 September 2007 (the '2007 Ministerial Policy Direction') is of no force or effect on the grounds that it is ultra vires Section 3(3) of the Electronic Communications Act 36 of 2005 (the 'ECA') and/or was issued in circumstances where there had not been proper compliance with Section 3(5)(a) of the ECA;*

*1.2 Reviewing and setting aside paragraph 3 of the 2007 Ministerial Policy Direction on the ground that it is ultra vires Section 3(3) of the ECA and/or was issued in circumstances where there had not been proper compliance with Section 3(5)(a) of the ECA;*

*1.3 In terms of Section 9(1) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), extending the 180 day period referred to in Section 7(1) of PAJA until the date on which this application was launched in respect of the relief claimed in paragraphs B1.1 and B1.2 above;*

*2.1. Reviewing and setting aside the decision of the Second Respondent, taken at a time presently unknown to the Applicant, to the effect that:*

*(a) the Second Respondent is not obliged to convert the Applicant's VANS licence into an Individual Electronic Communications*

*Network Services ('I-ENCS') licence and an Individual Electronic Communications Service ('I-ECS') licence in terms of Sections 92 and 93 of the ECA;*

(b) *the Applicant is required to apply to the Second Respondent for an I-ECNS licence; and*

(c) *the Applicant is required to participate in a competitive process pursuant to which the Second Respondent will select those VANS licensees who will be granted the right to acquire an I-ENCS licence;*

2.2 *Substituting the decision referred to in paragraph 2.1 above with a decision to the effect that the Second Respondent is obliged to convert the Applicant's VANS licence into an I-ECNS licence and an I-ECS licence in terms of Sections 92 and 93 of the ECA;*

2.3 *Directing the Second Respondent to issue an I-ECNS and an I-ECS licence to the Applicant in terms of Sections 92 and 93 of the ECA within the time period provided for in Section 92(6) of the ECA.*

3. *In the alternative to paragraph B2 above:*

3.1 *Declaring that the Second Respondent is obliged to convert the Applicant's VANS licence into an I-ENCS licence and an I-ECS licence in terms of Sections 92 and 93 of the ECA.*

3.2 *Declaring that the Second Respondent may not require the Applicant to apply for an I-ECNS licence in terms of Section 9 of the ECA and may not require the Applicant to participate in a*

*competitive process pursuant to which the Second Respondent will select those VANS licensees who will be granted the right to acquire an I-ECNS licence.*

*3.3 Directing the Second Respondent to issue an I-ECNS and an I-ECS licence to the Applicant in terms of Sections 92 and 93 of the ECA within the time period provided for in Section 92(6) of the ECA.*

*4.1 Declaring that the Applicant was entitled to self-provide its own telecommunication facilities with effect from 1 February 2005.*

*4.2 Reviewing and setting aside clause 1.1(b) of the VANS licence issued to the Applicant by the Second Respondent on 18 August 2005 (alternatively declaring the abovementioned clause to be unlawful and of no force or effect) to the extent that this clause purports to deprive the Applicant of its entitlement to self-provide telecommunications facilities.*

*4.3 In terms of Section 9(1) of PAJA, extending the 180 day period referred to in Section 7(1) of PAJA until the date on which this application was launched in respect of the relief claimed in paragraph B4.2 above.*

*5. In the alternative to paragraphs B2 and B3 above:*

*5.1 Declaring that the Second Respondent is required to follow the process provided for in Section 9 of the ECA before it awards new I-ECNS licences to persons who currently hold VANS licences.*

*5.2 Directing the Second Respondent to follow the process provided for in Section 9 of the ECA*

*before it awards new I-ECNS licences to persons who currently hold VANS licences.*

*5.3 Reviewing and setting aside the 2007 Ministerial Policy Direction to the extent that it purports to authorise the Second Respondent to follow a process other than the process provided for in Section 9 of the ECA when it awards new I-ECNS licences to persons who currently hold VANS licences.*

*5.4 In terms of Section 9(12) of PAJA, extending the 180 day period referred to in Section 7(1) of PAJA until the date on which this application was launched in respect of the relief claimed in paragraph B5.3 above.*

*6. Ordering those Respondents who oppose the relief in Part B of this Notice of Motion to pay the Applicant's costs on joint and several basis.*

*7. Granting the Applicant further and/or alternative relief."*

2.4 Due to certain issues raised in the papers at the time the matter came before me, the Applicant applied to have three further parties joined as the 30th, 31st and 32nd Respondents respectively. These parties are MTN Network Solutions (Pty) Ltd, CNC Networks (Pty) Ltd and JQE Technical (Pty) Ltd t/a UNINET. This application for joinder was not opposed and was granted at the outset of the hearing of argument herein.

2.5 In similar fashion (but for different reasons) Stream Broadband (Pty) Ltd applied for leave to intervene in

terms of Rule 12 read with Rule 6(14) of the Uniform Rules as Second Applicant. In interpose to point out that the initial Applicant is a wholly owned subsidiary of Allied Technology Ltd ("*Altech*"). Similarly Altech Autopage Holdings (Pty) Ltd is also a wholly owned subsidiary of Altech. Stream Broadband (Pty) Ltd is then a wholly owned subsidiary of Altech Autopage Holdings (Pty) Ltd. For the sake of convenience the initial Applicant (Altech Autopage Cellular (Pty) Ltd) shall simply be referred to as "*the Applicant*" as it has been throughout the papers filed of record, in most of the Heads of Argument and during argument itself.

2.6 The salient reasons for the intervention of Stream Broadband (Pty) Ltd was stated in its founding affidavit delivered for this purpose as the following: The Applicant had applied to the Second Respondent for transfer of its VANS licence to Stream Broadband (Pty) Ltd on 13 March 2008. This application for licence transfer was confirmed by the Applicant during the VANS licence hearings conducted on 17 to 19 March 2008 as more fully referred to hereunder, but had not yet been granted. This was also the position at the time of the hearing of the application. The Applicant had indicated that, pending the grant of the transfer, the Applicant before the Second Respondent was "*Autopage*" and not "*Stream Broadband*". The application for intervention was similarly not opposed and was also granted at the outset of the hearing of the application before me.

**CHRONOLOGY**:

[3] The relevant chronology of events relied on by the parties to the application are the following:

3.1 The TA was promulgated on 12 November 1996 and came into operation some time thereafter.

3.2 Prior to its repeal on 19 July 2006, the TA conferred a statutory monopoly on Telkom SA Ltd ("*Telkom*") to exclusively provide public switched telecommunication services ("*PSTS*") for a period of 5 years from 7 May 1997 until 7 May 2002, with an option for Telkom to extend its exclusivity for a further year (which option Telkom chose not to exercise). The TA envisaged a process which has been referred to in the papers and in some of the statutory instruments as that of "*managed liberalisation*" which in the context of this application, involved the moving away from Telkom's monopoly to a duopoly and thereafter to a situation of open participation. The managed liberalisation process relevant to value added network services is contained in Section 40(2) of the TA which provides that a VANS licence:

> "*... shall contain a condition that the service in question be provided by means of telecommunication facilities –*
>
> *a) until 7 May 2002 provided by Telkom ...*

b) *after 7 May 2002, provided by Telkom and the Second National Operator or any of them until a date to be fixed by the Minister by notice in the Gazette."*

3.3 The date referred to in the aforesaid subsection was fixed by the Third Respondent by way of a determination published in Government Gazette No. 26763 on 3 September 2004, clause 4(a) of which reads as follows:

> *"In terms of Section 4(2) of the Act, 1 February 2005 shall be the date from when value added network services may also be provided by telecommunications facilities other than those provided by Telkom and the Second National Operator or any of them..."*

3.4 During the course of September to October 2004, the Second Respondent published a discussion document in which it posed various questions to the public regarding the implementation of the said Ministerial determination.

3.5 Pursuant to the call to public participation, a "*public colloquium*" was held on 20 to 21 October 2004.

3.6 The Second Respondent subsequently issued an interpretation statement on 22 November 2004. In clause 4(b) of the interpretation statement the following view was adopted by the Second Respondent:

> *"VANS may self-provide facilities from 1 February 2005. Self-provision contemplates the procurement of telecommunication facilities by a VANS licensee*

*from any telecommunication facility supplier and to use them under and in accordance with its licence to provide telecommunication facilities."*

3.7 On 7 December 2004 the Second Respondent published draft VANS regulations for public comment in General Notice 2791 of 2004 in Government Gazette 27072. Clause 2.2(b) of the draft VANS regulations provided as follows regarding the provision of services by a VANS licensee:

> *"This licensee shall provide its service by way of telecommunication facilities provided by a licensed PSTS operator up until 31 January 2005, whereafter the licensee may self-provision (sic) or obtain its telecommunication facilities from any other licensed telecommunication service provider, including from a private telecommunication network operator that does not require a private telecommunication network licence."*

3.8 The concept of "*self-provision*" was defined in clause 2.1 of the draft VANS regulations as meaning "*... the procurement of any telecommunication facilities by the licensee from any supplier of telecommunication facilities and to use them under and in accordance with this licence to provide the telecommunication service.*"

3.9 On 30 January 2005 the Third Respondent issued a press statement wherein a contrary view to that of the Second Respondent contained in the draft VANS regulations were taken as follows:

> *"The issue of self-provisioning was issued in the government's policy determinations only in relation to mobile cellular operators in terms of fixed lengths, to give full meaning to the intention to reduce the costs of telecommunication services in SA. It is the intention that VANS operators may obtain facilities from any licensed operator and as specified in the determinations. It is not the government's intention to licence every single activity that can be provided by a VANS operator, as this would lead to an absurd result. I can assure the sector that the Convergence Bill, when tabled, will bring much needed certainty to the sector in this regard."*

The Convergence Bill was what the ECA was called at the time and this litigation indicates that neither the draft nor the promulgated ECA, brought sufficient envisaged clarity or certainty.

3.10 The Third Respondent declined to approve the draft VANS regulations which were as a consequence reformulated and on 20 May 2005 the final VANS regulations were published in Regulation Gazette No. 8223 in Government Gazette No. 27608. The final VANS regulations were silent on the right of VANS licensees to self-provide their own facilities or networks.

3.11 In July 2005 the Third Respondent published a standard set of licence terms and conditions for VANS licensees, clause 1.1 of which provides as follows:

> *"The licensee may provide its service by means of telecommunication facilities obtained from any other*

*person licensed to provide telecommunication services in terms of the Act."*

3.12 On 18 August 2005 the Applicant's prior application dated 10 November 2004 in respect of a VANS licence was approved. The licence which was issued (no. VLS 40/0121) was for a period of 10 years and provided as follows in relation to the licensee's rights and obligations:

"*1. Unless otherwise stated:*

*(a) the licensee shall be entitled, subject to the other provisions in this licence, to provide any or all value added network services and shall permit that service to be used for the carrying of voice.*

*(b) the licensee may provide its service by means of telecommunication facilities obtained from any other person licensed to provide telecommunication services in terms of the Act.*

*(c) the licensee shall have the right to interconnect with any other person licensed to provide telecommunication services in accordance with the Act to facilitate interconnection between the licensee and any such person.*

*(d) the licensee shall have the right to apply to the authority for numbering resources according to applicable regulations for the provision of the service and the authority may subsequently allocate to the licensee numbers in accordance with such*

*regulations as may be applicable from time to time."*

3.13 Hereafter, the ECA repealed and replaced the TA with effect from 19 July 2006.

3.14 By virtue of the fact that the ECA does not recognise any of the telecommunications service licence categories contained in the TA, Chapter 15 of the ECA requires all existing telecommunication service licences to be converted to the new licensing framework in terms of the ECA.

3.15 Section 92(1) of the ECA provides that, until conversion takes place, existing telecommunication service licences remain valid.

3.16 In terms of Section 92(6) of the ECA, conversion is to take place within 24 months of the commencement of the ECA which period may be extended by a further six months, which it has done. At the time of the hearing of the application, the last date for conversion was therefore 19 January 2009.

3.17 On 30 August 2006, the Third Respondent published a list of existing licensees whose licences needed to be converted into ECA licence categories in terms of Section 93(3) of the ECA. The list contained various schedules containing details of broadcasting licensees, electronic

communication network service l(signal distribution) licensees, electronic communication network and electronic communications services licensees (formerly known as telecomms licensees), private telecommunication network services licensees and VANS licensees (the list included the Applicant).

3.18 The Third Respondent requested all licensees listed in the list to confirm their relevant details by 13 October 2006. The Applicant's details were contained in a "*submission*" in response to the list, which was timeously delivered.

3.19 On 7 March 2007 the Third Respondent published a first draft license conversion "*matrix*" in which it indicated that it would issue a combination of both class and individual ECS and class and individual ECNS licenses to VANS licensees.

3.20 The public was asked to respond to the first draft matrix by 13 April 2007. The Applicant submitted a response on 30 April 2007 wherein the intention to establish a network in order to self-provide was expressed.

3.21 On 25 May 2007 the Third Respondent published draft policy directions for comment in terms of Sections 3(1) and 3(2) of the ECA.

3.22 On 13 July 2007 the Third Respondent issued a press release containing a time table for the conversion of

licences as well as an intention to publish a notice soliciting comment regarding the proposed terms and conditions for ECS and ECNS licences. It was further stated that the conversion of all existing licences would commence on 23 October 2007 and close on 12 November 2007.

3.23 On 17 September 2007 the Third Respondent finalised and published Ministerial policy directions. As the contents of clause 3 of these Ministerial policy directions form the direct subject matter of prayer 1 of the Applicant's amended Notice of Motion, I shall deal more fully therewith hereunder.

3.24 On 4 October 2007 the Second Respondent published a second draft matrix.

3.25 On 18 October 2007 the Second Respondent held a workshop regarding the policy directions as they pertained to VANS licensees. At the workshop an extensive list of information was required from VANS licensees, to be provided by 21 October 2007.

3.26 On 5 November 2007 the Second Respondent published a third draft licence conversion matrix containing a list of 177 licensees who had responded to the request for information by 21 October 2007. In this matrix it became apparent that the Second Respondent intended to issue a mixture of individual and class ECS licences to VANS

licensees and did not intend issuing ECNS licences to all VANS licensees. The matrix sought to map the consideration and allocation of specific licences to existing licensees and also sought comment in respect thereof. A select group of VANS licensees (also referred to in the papers as the "*prospective five*") was indicated as having I-ECNS licences "*under consideration*". This list of prospective five VANS licensees did not include the Applicant. The prospective five were cited as the 19th, the 21st, the 27th, 28th and 29th Respondents in the present application.

3.27 The Applicant submitted its response to the third draft matrix on 13 November 2007.

3.28 On 23 November 2007 the Second Respondent published a set of final licence conditions that would apply to individual ECS and ECNS licensees.

3.29 On 20 December 2007 the Second Respondent issued a press release stating that it had decided that VANS licences will in the first instance be converted to ECS licences and that a "*competitive process will be followed in respect of granting VANS* [licensees] *the right to acquire ECNS* [licences] *as per the Ministerial Directive.*"

3.30 On 22 January 2008 the Second Respondent issued another press release indicating the intention to hold "*one on one consultations*" with VANS licensees who were

considered to be entitled to receive individual ECS licences. During the one on one consultations which took place on February 2008 the Applicant was handed a draft individual ECS licence for comment and it was indicated that such a licence would be issued pursuant to the licence conversion process.

3.31 On 25 February 2008 the Applicant furnished the required comment in respect of the draft I-ECS licence.

3.32 On 3 March 2008 the Second Respondent issued a press release indicating the intention to hold hearings in relation to the "*conversion*" of VANS licences on 17 and 18 March 2008.

3.33 At the aforesaid VANS hearings it was made clear that the Second Respondent considered VANS licensees not to be entitled to "*self-provide*" telecommunication facilities or to operate and maintain a network. As such, VANS licensees were, according to the Second Respondent, therefore only entitled to conversion of their licences to I-ECS licences and not also to I-ECNS licences. The hearings were therefore part of the process to "*converge*" existing licences and, for that purpose and pursuant to the Ministerial directions, to consider the issuing of I-ECNS licences to VANS licensees in accordance with the criteria set out in the Ministerial directions. Reference was also made to the restriction made in clause 1.1(b) of existing VANS licensees. As both the said condition and the

decision by the Second Respondent as expressed at the hearing form the subject matter of individual prayers, they are more fully dealt with hereinlater.

3.34 The Applicant, at the hearings, objected to both the aforesaid stance of the Second Respondent and the then alleged illegality of the process followed by the Second Respondent.

3.35 After the exchange of certain correspondence, the Second Respondent published regulations prescribing the procedure for new licence applications on 31 March 2008.

3.36 Pursuant to a request by the Second Respondent dated 27 March 2008, the Applicant submitted its business plan to the Second Respondent on 9 April 2008. Herein the Applicant's view regarding its entitlement to receive a converted I-ECNS licence by way of conversion as a matter of right was reiterated.

3.37 After the exchange of yet further correspondence, this application was launched on an urgent basis on 21 April 2008 resulting initially in the relief claimed in Part A to be granted in the agreed terms as already stated.

[4] As can be seen from the above chronological sequence of events, there are a number of instances and occurrences which may or may not have had an impact on the rights of VANS licensees. The Applicant contends that in a number of instances the primary

Respondents, in particular the Second Respondent changed its stance, first from conceding the right to self-provision to an about-turn denying such right. This about-turn, so the Applicant contends, was as a result of ministerial intervention. The Applicant also, in the manner in which it set out and made reference to the aforesaid events, contended that the sequence of events indicates a gradual shift from an initial beneficial interpretation to the refusal of a right of conversion of VANS licensees to I-ECNS licences as well as a shift towards the requirement of applications for such licences which were to be considered as "*new*" as opposed to "*converted*" licences. This, so the Applicant contends, expresses a position contrary intention to the general intention of the ECA regarding a managed liberalisation process. Be that all as it may, I am of the view that each of the impugned or complained of instances should primarily or firstly be scrutinised individually and on its own respective merits. It is apposite to do so with reference to the relief claimed. For this purpose I will now turn to consideration of each of the Applicant's prayers.

**AD THE MINISTERIAL POLICY DIRECTIONS OF 17 SEPTEMBER 2007**:

[5] 5.1 In prayer 1.1 of the Applicant's amended Notice of Motion a declaration of invalidity of the Ministerial policy directions is sought. The grounds for this relief as set out in said prayer 1.1 are the allegations that the directions are *ultra vires* Section 3.3 of the ECA "*and/or was issued in circumstances where there had not been proper compliance with Section 3(5)(a) of the ECA*". During

argument the Applicant disavowed itself of reliance on this second ground.

5.2 The first issue to be considered is whether the Ministerial policy directions are at all reviewable by a court of law. On behalf of the Third Respondent the court was referred to **Minister of Health v New Clicks (Pty) Ltd and Others** 2006(2) SA 311 (CC) at 373 as well as the provisions of Section 85(2)(a) of the Constitution of the Republic of South Africa, Act 108 of 1996. It was argued that the issuing of the Ministerial policy direction constituted a permissible exercise of executive authority placing it beyond the ambit of PAJA. It was also argued that, in considering whether the directions constituted an exercise of executive authority or not, one should have regard to their import. It was argued that decisions of general application will more readily fall in the sphere of executive authority and constitute the exercise of those powers listed in Section 85(2)(a) to (e) of the Constitution. On the other hand more "*concrete*" decisions or those involving individual instances would be more likely to constitute administrative action.

5.3 For purposes of evaluating these and other arguments, it is necessary to refer to the paragraph of the Ministerial policy directions which is sought to be impugned. This reads as follows:

"3. ***Increasing competition through conversion of VANS licences***

*Under Section 93(4)(a) ICASA must convert existing licences that authorise the holder of such licence to both provide services and operate electronic communications facilities or networks into licences relating to electronic communications services or broadcasting services, radio frequency spectrum licences and electronic communications network service licences.*

***I THEREFORE DIRECT ICASA**, in terms of Section 3(2)(c) read with Section 2(b), (c) and (d) of the ECA to urgently consider whether none, or only certain of the existing VANS licensees can be authorised to provide services as well as to provide and operate electronic communications facilities or networks to ensure that such licences are issued electronic communications network services licences in addition to other licences specified in the relevant sector of the ECA, if applicable.*

*For the purposes of immediate implementation ICASA should prioritise the following VANS licensees:*

(a) *Those who already have electronic communications networks of national scope, whose facilities have been duly obtained in terms of the provisions of the Telecommunications Act 103 of 1996 and the applicable regulations promulgated thereunder pertaining to the licensing of VANS; and*

*(b) Those who intend to roll out electronic communications networks of national scope;*

*(c) Those who, in terms of Section 5(3)(e) of the ECA show good cause that if issued with a licence to provide electronic communications network services, would be able to bring about a significant impact on socio-economic development in the country, providing details of the manner of such impact. This should include the provision of strategies to target the high costs of communication services, the digital divide, achievement of goals in terms of broad-based Black Economic Empowerment, etc.*

*(d) Those who are able to satisfy the requirements of the fixed licence fee that would be applicable, as the determined by the authority for VANS licensees that will be converted into this category (individual ECNS licence) taking into account any proposed Universal Service Obligations that the VANS licensees are able to provide by virtue of being converted into this category (individual ECNS) of licensing.*

*(e) Those that have been issued with licences on or before 19 July 2006 and intending or already providing international connectivity."*

5.4 At a first reading, it is clear that the introductory paragraph preceding the express direction constitute nothing more than a virtual repetition of the statutory obligation contained in Section 93(4) which reads as follows:

*"The following framework must be used by the Authority for converting existing licences and issuing new licences:*

*(a) Where an existing licence authorises the holder of such licence to both provide services and operate electronic communications facilities or networks the Authority must issue to that licence holder –*

*(i) a licence relating to the electronic communications services or broadcasting services, if applicable, that coincide with the services authorised in the existing licence;*

*(ii) a separate licence relating to any radio frequency spectrum authorised in the existing licence; and*

*(iii) a separate licence relating to the electronic communications network services, consistent with the licence types set out in Chapter 3.*

*(b) As part of the conversion process, the Authority may grant rights and impose obligations on the licensee in order to ensure that the existing licences comply with this Act including the continuation of any obligations imposed upon existing licensees by virtue of a previous determination."*

5.5 One can also readily appreciate that the issues listed under (c) of the sought to be impugned paragraph of the Ministerial directions referring to socio-economic issues (but excluding the requirement to show "*good cause*") may

constitute "*broad*" or "*general*" considerations of a policy nature.

5.6 Before considering the remainder of the contents of the directions, it must, however, be pointed out that Section 93(1) contains the following injunction to the Second Respondent:

> "*Subject to subsection (4), the authority must convert existing licences by granting one or more new licences that comply with this Act on no less favourable terms.*" (my underlining)

5.7 It is clear that neither the injunctive nor the enabling sections of the ECA contained in Sections 93(1) and 93(4) contain any specific provisions corresponding with those contained in paragraphs (a), (b), (d) or (e) of paragraph 3 of the Ministerial directions. There is also no indication that the said paragraphs have been included in the Ministerial directions to ensure compliance with the ECA as envisaged in Section 93(4)(b).

5.8 Upon a reading of the ministerial policy directions it is clear that it entails the following:

5.8.1 A requirement that a decision be made as to whether any particular VANS licensee would be entitled to an I-ECNS licence through conversion or not;

5.8.2 Insofar as VANS licensees might so qualify for conversion, an assessment of qualification or compliance with paragraphs (a) to (e) of paragraph 3 as referred to above;

5.8.3 Insofar as there may have been qualification in respect of said paragraphs (a) to (e), a further decision to list those "*qualifying*" VANS licensees in order of preference or to "*prioritise*" the conversion and issuing of licences in what can only be described as a competitive process.

5.9 When considering what the directions then in fact entail, it is clear that the directions overstep the line of pure policy or directions of a general nature. They entail a direct instruction to the Second Respondent to deal with VANS licensees in terms of specific and specified criteria. These directions can only be of a "*concrete*" nature. I find that such "*concrete*" directions constitute administrative action which is reviewable in terms of the provisions of PAJA and not executive action beyond the reach of PAJA as excluded in terms of Section 1(i)(aa) thereof.

See also:

**President of the RSA v SARFU** 2000(1) SA 1 CC at para [143];

**Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) Section 21 (Inc)** 2001 (2) SA 1 CC at paragraphs [18] and [21] and

**Sebenza Forwarding and Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another** 2006(2) SA 52 (CPD).

5.10 Even if Ministerial Policy Directions may escape reviewability in terms of PAJA on the basis of constituting the exercise of executive authority, they appear to be *ultra vires* the enabling legislation. Chapter 2 of the ECA especially provides that the Third Respondent as responsible Minister:

> "*... may make policies on matters of national policy applicable to the ICT sector, consistent with the objects of this Act...*"

"*ICT*" has been defined in Section 1 of the ECA as meaning:

> "*information, communications and technology*".

5.11 Section 3(3) of the ECA however, provides as follows:

> "*No policy made by the Minister in terms of subsection (1) or policy direction issued by the Minister in terms of subsection (2) may be made or issued regarding the granting, amendment, transfer, renewal, suspension or revocation of a licence, except as permitted in terms of this Act.*"

5.12 Section 3(1) refers to policy and Section 3(2) refers to policy directions.

5.13 The relevant portions of Section 3(2) read as follows:

"*3(2) The Minister may ... issue to the Authority policy directions ... in relation on -*

*(b) The determination of priorities for the development of electronic communications networks and electronic communication services or any other service contemplated in Chapter 3;*

*(c) The consideration of any matter within the authority's jurisdiction reasonably placed before it by the Minister for urgent consideration.*"

5.14 The relevance and importance of ministerial policy directions can be found in Section 3(4) which obliges the Second Respondent, in exercising its powers and performing its duties in terms of the ECA and related legislation to "*consider*" both the policies and ministerial policy directions.

5.15 The First and Second Respondents relied on the submissions and arguments made on behalf of the Third Respondent in justification of the ministerial policy directions which aspect will be dealt with hereunder.

5.16 In addition to the aforesaid, the First and Second Respondents submitted that the literal meaning of Section 3(3) of the ECA only precludes the Third Respondent from making policy with regard to the granting, amendment, transfer, renewal, suspension or revocation of a licence except as permitted in terms of the Act. The conversion of

VANS licences takes place in terms of Sections 92 and 93 to the Act and, so the argument goes, a conversion does not amount to one of the instances in respect of which policy directions have been precluded by Section 3(3).

5.17 According to the sixth edition of the Shorter Oxford English Dictionary the principal meaning of "*convert*" is to "*change in character or nature*". Conversion would constitute the action of changing or being changed to or into something else. Whilst the secondary meaning of "*turning*" is not applicable, the third principal meaning is, namely a "*change by substitution*" such as in the exchange of monies, stocks or units in which a quantity is expressed into others of a different kind. In the instance of licences under the ECA, this "*changing in character*" results, in terms of Section 93(5)(b), in the previous licence being considered to have been surrendered and without any further force or effect and that a (substituted) licence be issued in terms of Section 93(4)(a). The substituted licence can only be a new licence issued in terms of the ECA. "*Conversion*" would therefore also result in the issuing of a licence.

5.18 On a proper interpretation of the wording of the relevant sections I am therefore of the view that the prohibition contained in Section 3(3) would also apply to those licences issued in terms of the conversion process envisaged in Chapter 15 of the ECA. The issuing of policy directions such as those in question are, therefore,

precluded by this section. The exception to the blanket ban contained in Section 3(3), insofar as it is an exception, is contained in Section 5(6) of the ECA and is dealt with hereinlater. The policy directions are therefore *ultra vires* on this ground.

5.19 The finding of illegality of the directions would also apply and be a basis for the striking down of the Ministerial Policy Directions, irrespective of whether they had been made in the exercise of a public function or executive power.

See: **Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others** 1999(1) SA 374 (CC) at [56] and
**Masetlha v President of the RSA** 2008(1) SA 565 (CC) at par. [81]

5.20 It is further clear that the directions, insofar as they constitute administrative action, seek to either interfere with or prescribe to the Second Respondent how the "*must*" obligation contained in Section 93(1) regarding conversion of licences should take place. Clearly such direction oversteps the line of interference and encroaches upon the Second Respondent's independence. The Second Respondent's independence is entrenched in the Independent Communications Authority of South Africa Act, No. 13 of 2000. The

directions therefore contravenes a law and are on this basis both *ultra* vires and to be struck down in terms of Sections 6(2)(f)(i) and 6(2)(i) of PAJA.

5.21 Having regard to the distinction between "*conversion*" of licences which take place in terms of Chapter 15 of the ECA and the issuing of new licences which take place in terms of the provisions of Chapter 3 of the ECA, the provisions of Section 5(6) of the ECA, which read as follows, can also not save the directions from illegality:

> "*In consideration of the implementation of the managed liberalisation policies, the Authority may only accept and consider applications for individual electronic communications network services licences in terms of a policy direction issued by the Minister in terms of section 3*".

On a proper interpretation, insofar as Section 3(3) as qualified by Section 5(6) does not contain a blanket ban against the issuing of policy directions, the exception pertains only to the consideration of applications for (new) I-ECNS licences and not to the conversion process envisaged in Chapter 15.

5.22 The Ministerial policy directions suffer from further deficiencies:

5.22.1 As seen above, the Third Respondent purported to issue the direction in terms of Section 3(2)(c). As already stated above, Section 3(2)(c)

empowers the Minister to place a matter for urgent consideration before the Second Respondent.

5.22.2 It is clear that the present application deals with the dispute as to whether VANS licensees have a right to conversion to I-ECNS licences. In her answering affidavit, the Minister sought to clothe her directions in the cloak of a mere referral of this vexing question to the Second Respondent. In this regard she had the following to say at paragraph 47.11 of her answering affidavit:

> *"The second paragraph of clause 3 of the Ministerial Policy Directions must be read as a policy direction by me requesting ICASA to consider a matter within its jurisdiction for urgent consideration. This is a section 3(2)(c) matter. ICASA was directed to <u>urgently</u> consider whether any VANS have a right to an I-ECNS. It should be clear from my media statement of 30 January 2005 that I believe VANS do not have a right to an I-ENCS but it was necessary for ICASA to independently consider this matter."*

5.22.3 It is clear that the direction goes further than merely placing of the aforesaid "*matter*" before the Second Respondent. It directs the Second Respondent also to decide not only the question in general, but whether only certain of the existing VANS licensees can be authorised to provide and operate electronic communications facilities or networks. Read together with the directions "...

*for the purposes of immediate implementation*" I find that the directions exceed the mere "*placing*" of a question before the Second Respondent as alleged in the Third Respondent's answering affidavit.

5.23 The deficiencies from which the Ministerial Policy Directions suffer are exacerbated by the Third Respondent's attempt in paragraph 47.12 of her answering affidavit to portray the remainder of the directions as referring only to new licences. In this regard she stated:

> "*At the same time the third paragraph of clause 3 of the Ministerial Policy Directions directed ICASA, in accordance with the requirement in section 5(6) of the ECA, to commence a 'new licence application process' and I essentially authorised ICASA to accept and consider applications for I-ECNS licences. The matter I was placing before ICASA for ICASA's consideration was the matter of new licence applications for I-ECNS licences. For that reason I determine that ICASA should consider the factors listed in paragraphs (a) to (e) of the third paragraph of clause 3 ...*"

The wording of the direction itself militates against the aforementioned interpretation to be placed thereon: The heading of the third paragraph refer to "*VANS licensees*" as do paragraphs (d) and (e). Furthermore, paragraph (d) clearly and unambiguously refer to conversion of VANS licences into I-ECNS licences. This is clearly a Chapter 15 ECA matter and not a matter of issuing new licences in

terms of Chapter 3. The quoted statement by the Third Respondent is clearly wrong and is neither helped nor saved by the following statement later in the answering affidavit:

> "*49. ... If the third paragraph of clause 3 of the Ministerial Policy Directions was applied to the conversion process then that would be a wrong application of the directions. Section 3(3) does prevent me from making certain policies and policy directions except as permitted in terms of the ECA ...*"

(Reliance is then again attempted to be placed on the provisions of Section 5(6) which has already been referred to above.)

5.24 In summary, my finding is that the Ministerial Policy Directions:

5.24.1 constitute administrative action and are as such reviewable under PAJA; and

5.24.2 having regard to the content and extent of interference contained therein, are to be reviewed and set aside; and

5.24.3 even if not reviewable under PAJA, are *ultra vires* and equally to be set aside.

5.25 Much has been made by various Respondents as to the timing of the application when viewed against the required 180 day period prescribed in Section 7(1)(b) of PAJA. The argument that the Applicant was a "*mere*" one month "*late*" was countered by an argument that, in the circumstances, the said section still required an Applicant in any proceedings for a judicial review to bring such proceedings within a reasonable time and without unreasonable delay. The Respondents contended that there was such an unreasonable delay.

5.26 The Applicant argued that it would be in the interests of justice to extend the 180 day period in terms of Section 9(1) of PAJA for the reason that the Applicant was, since and subsequent to the publication of the directions "*proactively engaged with ICASA throughout the conversion process (from publication of the draft matrix in its various forms to the submission of a business plan to ICASA on 9 April 2008)*".

5.27 The Applicant furthermore denied that the Respondents suffered any prejudice which they would not have suffered, had the application been launched earlier. Whilst it is true that, had the application been launched prior to the end of 2007, most of the actions taken prior to and culminating in the hearing of the "*VANS licence applications*" might have been prevented. This appears to me to be only a question of costs and the delay of no more than 4 months. It is not clear what prejudice, if any,

the delay caused any of the Respondents. On the other hand of the scale, the interests of justice would require the immediate halting of a process if such a process is tainted by illegality and might result in serious and extensive consequences. It must be noted at this stage that, at the date of the hearing of the application, no converted or new I-ECNS licence to any VANS licensee has been refused or granted. I further agree with the Applicant that considerations of pragmatism and practicality require a lawful, speedy and efficient licence conversion process. As more fully set out hereunder, the present process, being the one initiated by the Ministerial policy directions, does not appear to be such a process. I find that these considerations are such that the 180 day period should be extended in the present instance.

See also: **Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others** 2008(2) SA 638 (SCA) and **Ntame v MEC for Social Development, Eastern Cape** 2005(6) SA 248 (ECD).

[6] **AD PRAYER 2 (AND ITS ALTERNATIVE PRAYER)**:

6.1 In prayer 2.1 of the amended Notice of Motion, the Applicant seeks to have three described decisions of Second Respondent reviewed and set aside. Notionally, the first two decisions listed as (a) and (b) in prayer 2.1 could and should be taken as one, namely the refusal to convert with the consequence of a VANS licensee having

to apply afresh for a (new) I-ECNS licence. The third decision, namely the requirement to participate in a "*competitive*" and selective process, is on a slightly different footing.

6.2 All three "*decisions*" were however, "*part and parcel*" (to use a modern "*buzzword*") of the process initiated by the Second Respondent in direct response to the Third Respondent's directions referred to under the consideration of prayer 1. The directions required the Second Respondent to consider whether "*none or only certain*" of the existing VANS licensees could be awarded an I-ECNS licence, be it by way of application of the priorities determined by the Minister or by way of conversion in terms of paragraph (d) of her direction. Any doubt was further removed at the "*VANS hearings*" as part of the consideration process of the aforesaid competitive and selective process at which the Second Respondent's chairperson of the hearing panel, Dr M Socikwa stated the following (initially with reference to clause 1.1(b) of VANS licences and thereafter in general):

> "*It is the view of the Authority that this clause in the VANS licence does not confer a right on VANS licensees to construct, operate and maintain a network. VANS licensees must obtain the facilities from entities licensed to provide telecommunication facilities in accordance with their licence conditions ... As indicated the Authority's position is that the VANS licence does not authorise the VANS licensees to operate electronic communications facilities or networks and therefore the VANS*

> *licensees are not during converging entitled to a separate licence relating to I-ECNS. However section 3(4) of the Act provides that the authority must, when performing its functions in terms of the Act, consider policies and policy issued by the Minister in terms of section 3 of the Act ... The Authority considered the policy directives and on 5 November 2007 published and noticed in the Gazette setting out the converging matrix."*

Reference was then made to the prioritisation categories contained in the Ministerial Directive and the process of "*converging*" VANS licences. Hereafter, the following was stated:

> *"... The notices referred to earlier require the VANS licensees interested in individual ECNS to indicate promise of performance including universal service and access obligations. In the event that the licence is favourably considered for an individual ECNS, any promise of performance accepted by the authority will form part of the obligations in the licence."*

6.3 In this regard further, the said Dr Socikwa as deponent for the Second Respondent had the following to say in her answering affidavit at paragraph 5.41 thereof:

> *"During March 2008 the Second Respondent took a decision that it was not obliged to convert the Applicant's VANS licence into a ECNS licence without the Applicant partaking in a competitive process."*

6.4 I am therefore of the view that the three named decisions can be taken as a composite decision for purposes of determination of the relief sought and that nothing of

substance turns on the separation or splitting thereof into three parts.

6.5 Apart from certain allegations as to alleged "*material irregularities*" and the objections based on the alleged "*slavish following of the Ministerial Directions*", the main basis of the Applicant's relief claimed in this prayer, centres around the Applicant's assertion of its entitlement to "*self-provide*".

6.6 A "*value-added network service*" is defined by the TA as a "*telecommunication service provided by a person over a telecommunication facility, which facility has been obtained by that person in accordance with the provisions of section 40(2) of the Act.*" A "*telecommunication service*" is in turn defined as meaning "*any service provided by means of a telecommunication system*". A "*telecommunication system*" is defined as meaning "*any system or series of telecommunication facilities or radio, optical or other electromagnetic apparatus or any similar technical system used for the purpose of telecommunication, whether or not such telecommunication is subject to rearrangement, composition or other processes by any means in the course of their transmission or emission or reception*". Lastly, a "*telecommunication facility*" is defined as something which "*includes any wire, cable, antenna, mast or other thing which is or may be used for or in connection with telecommunication*".

6.7 It is clear from the aforesaid definitions that, for a VANS licensee to provide the licensed service, it needs to do so by way of a "*facility*", lastmentioned which could include a network. In terms of the TA only two types of telecommunication networks were defined, being a "*private telecommunication network*" and a "*public switched telecommunication network (PSTS)*". There are no further definitions of licences regarding "*facilities*".

6.8 It is furthermore clear from the provisions of Section 40(2) of the TA, that a VANS licensee did not have a free choice of facility to be used. For the period until 7 May 2007 it had to make use of Telkom, being a PSTS provider in terms of Section 36 of the TA. After 7 May 2007 until a date to be fixed by the Minister, a VANS licensee may make use of facilities provided by Telkom and the second national operator (Neotel) or any of them. The Applicant refers to the aforesaid provisions as placing operational constraints on a VANS licensee in respect of the manner in which it could provide a service. This restraint pertains to limitations on which facility or network a VANS licensee may use. This contention appears to be correct.

6.9 The Applicant contends that Section 40(2) envisaged that the aforesaid constraint would cease to operate from the date determined by the Minister. Its contention is that, with effect from that date, a VANS licensee would no longer be obliged to provide a service "*by means of telecommunications facilities*" provided by Telkom or the

second national operator is clearly correct. So is the contention that a VANS licensee would henceforth from the determined date be able to choose to provide a service by obtaining telecommunication facilities from any third party other than Telkom or the second national operator. The dispute arises where the Applicant contends that, as an alternative, the VANS licensee might choose to self-provide its own telecommunication facilities.

6.10 In disputing the Applicant's contentions, the Second Respondent contends that Section 40(2) regulated, in the words of Dr Socikwa "*... the source from which VANS licensees can procure telecommunication facilities*". The contention is that, once the restraint has been removed and the authorisation to only obtain facilities from Telkom and the second national operator is uplifted, the Applicant would still be restrained to procure those telecommunication facilities from a third party only, i.e. that it would not be at liberty to self-provide.

6.11 The contrary contention of the Applicant is that the general principle is that private parties are at liberty to perform any conduct unless that conduct has been prohibited by law. In accordance with this principle, VANS licensees will be permitted to self-provide their own telecommunication facilities unless there is a legal provision that prohibits them from doing so. On behalf or the First and Second Respondents it has been argued

that Section 32(1) of the TA indeed contains such a prohibition. Section 32 reads as follows:

> "*32(1) Subject to the provisions of this Act no person shall provide a telecommunication service except under and in accordance with a telecommunication service licence issued to that person in terms of this chapter.*
>
> *(2) A licence shall confer on the holder the privileges and subject him or her to the obligations provided in this Act or specified in the licence.*"

6.12 The Applicant's counter argument is of course that in having been issued a VANS licence, such a licensee is, in terms of the provisions of the Act licensed to provide a telecommunication service. The section is therefore not a prohibition to the extent contended for by the First and Second Respondents. The only prohibition which is contained in the section and which is applicable to a VANS licensee is the *proviso* that such licence be subject to the terms specified therein. Insofar as clause 1.1(b) of the VANS licence issued to the Applicant contains a limitation on the Applicant's rights to self-provide, it is separately attacked by the Applicant in prayer 4.2 of the amended Notice of Motion which I deal with more fully hereunder.

6.13 Irrespective of limitations imposed on a VANS licensee by the contents of its licence, the First and Second Respondents contend that each kind or type of licence is

separately provided for in the Act and, unless so authorised by the licensing authority and a specific section, a VANS licensee cannot contend to hold a licence for the provision of facilities. In this regard reference was made to Section 33 which, under the heading "*kinds of licences*" determines which licences may be granted. It reads as follows:

> "*33(1) The categories of licences which may be granted and the telecommunication services authorised by such licences are -*
>
> *(a) as contemplated in sections 32C(1)(b), 34(2)(a)(i) to (v) and 39 to 41; and*
>
> *(b) subject to subsection (2) as prescribed.*
>
> *(2) The authority may prescribe the telecommunication services and activities other than those referred to in subsection (1)(a) which may be provided or conducted without a licence.*"

6.14 Contrary to the aforesaid contentions of the First and Second Respondents, it is clear that, in terms of Section 33(1)(a) read with Section 40, VANS licences are a separate category of licences.

6.15 Other examples of separate "*types*" or categories of licences are, for example, those provided for in Section 32C. Section 32C(1)(b) refers to the providing of multimedia services and the issuing of a corresponding

licence to Sentech Ltd as referred to in Section 4 of the Sentech Act, No. 63 of 1996. This category is clearly not applicable to a VANS licensee.

6.16 Reference was also made to Section 34(2) which reads as follows:

> *"No application shall be lodged or entertained in respect of a licence to provide –*
>
> *(i) a public switched telecommunication service;*
>
> *(ii) a mobile cellular telecommunication service;*
>
> *(iii) a national long-distance telecommunication service;*
>
> *(iv) an international telecommunication service;*
>
> *(v) a multimedia service; or*
>
> *(vi) any other telecommunication service prescribed for purposes of this subsection unless such application is lodged pursuant to and in accordance with an invitation issued by the Minister by notice in the Gazette."*

It is clear that Sections 34(2)(a)(i) to (v) do not refer to VANS licences. It was contended that a VANS licence fall within the category contemplated by Section 34(2)(a)(vi), despite it being listed as a separate category of licences

as provided for in the latter part of Section 33(1)(a) as stated above.

6.17 Even if this contention may be correct, the only relevant consequence thereof is the requirement of an invitation to apply to have been issued which appears then, at the risk of repetition, to include invitations for applications for licences not listed in 34(2)(a)(i) to 34(2)(a)(v) (but excluding Telkom who will be deemed to have made such application in terms of Section 30(3)(a), 36(1)(a) or 40(1)(a)).

6.18 It was neither contended nor alleged that all VANS licences were invalid due to a non-compliance with Section 34(2)(vi). There is accordingly no room to argue that the issued licences should, based on this sub-section, be deemed to only include those limited rights as later interpreted by the Second and Third Respondents. A reading-in of such a limitation is simply not justified if the argument therefor is based on Section 34(2).

6.19 The argument further on behalf of the First and Second Respondents was that it would only have been permissible for the Applicant to self-provide if a separate "*other*" licence to operate a network had been issued. I have already indicated that, save in specific instances regarding two specific types of licences, the concept of a "*network*" was not defined in the TA. Insofar as specific and defined licences were issued to public switched

telecommunication service providers (such as Telkom, the second national operator and envisaged third or even fourth national operators in terms of Section 36), mobile cellular communication service providers (such as Vodacom, MTN and Cell C and prospective further providers in terms of Section 37), national long-distance telecommunication services (such as only Telkom until 7 May 2002 in terms of Section 39), local access telecommunication service providers and public pay phone service providers (such as only Telkom until 7 May 2002 in terms of Section 39), under-serviced area licensees (in terms of Section 40A) and private telecommunication networks (in terms of Section 41), these licences were "*vertically integrated*" in the sense that they permitted the licence holders to self-provide their own facilities. Such self-provision would then accord with the concept of an individual ECNS licence under the ECA. Further examples of this "*integration*" are the extension of rights included in the aforesaid sections. Both the ability and permissibility to self-provide appear to be implicitly included in these licences.

6.20 The existence of separate licences as referred to above does therefore not purely as a result thereof and in itself confirm the alleged prohibition against self-provision as now sought to be imposed on VANS licensees, even after the determined date provided for in Section 40(2)(b).

6.21 The interpretation which the First and Second Respondents seek to impose on Section 40(2)(b) is to the effect that the following words are to be read in at the end of the said subsection:

> *"... whereafter the telecommunication facilities shall continue to be provided by a licensed telecommunication service provider"*

and that such a "*licensed provider*" be someone else other than the Applicant itself.

6.22 Although the Applicant objected to the aforementioned reading-in, the requirement that the provider of facilities has to be licensed can brook no argument. The question remains whether a VANS licensee is so licensed and therefore whether the legislature had intended that a VANS licensee would be entitled to an I-ECNS licence through conversion.

6.23 Based on the trite principle that the legislature must be deemed not to have contemplated an absurd result (see *inter alia* **Jaga v Dönges NO, Bhana v Dönges NO** 1950(4) SA 653 (AD)), the First and Second Respondents contended that an interpretation that would allow VANS licensees access to I-ECNS licences simply through conversion would lead to an absurd result. This argument is based on an alleged unlimited access to a limited resource and on an alleged untenable prolification of network providers.

6.24 It was expressly contended that such a situation would lead to an absurd result "*... when the resources are scarce and cannot support the demand brought on by such a situation*". This is, however, not correct. The only resource which is scarce, is radio frequency spectrum. The ECA envisages that service providers will obtain separate licences in order to provide ECS and ECNS on the one hand and to use radio frequency spectrum on the other hand. Spectrum relates to bandwidth required for purposes of wireless telecommunication services, such as Wimax. Although a separate subsidiary of Altech has built and operates a test Wimax 802.16E network in terms of a separate temporary licence from the Second Respondent, the Applicant is not applying for, nor contending that its VANS licence should be converted with the inclusion of a spectrum licence. Similarly the argument relating to self-provision does not include an entitlement to a spectrum licence. It is lastly to be noted that it is common cause that the Second Respondent had decided to "*de-link*" both the conversion process and the issuing of I-ENCS licences from the issue of radio frequency spectrum licences. The debate about an alleged entitlement to a scarce resource is therefore a non-issue.

6.25 The argument based on the perceived opening of floodgates by the resultant entitlement of 600 VANS licences to I-ECNS licences through conversion is also not supported by evidence. On the contrary, the Applicant has indicated that the cost factor involved in setting up

and operating a network is a prohibitive factor. The licence fee alone amounts to R100 million. From the 21st Respondent's presentation it appears that it intends spending some R700 million over a period of 5 years in connection with its network whilst the presentation of the 7th Respondent indicated that a "*very small network*" consisting of only 60 stations could cost up to R300 million. The Applicant intends operating a network with 1 500 base stations. Apart from the prohibitive influence of the costs factor, there were also no indications in the Second Respondent's prior interpretation of the 2004 Ministerial Determinations contained in its media release in respect thereof as referred to above as well as the draft VANS regulations, both which did not preclude self-provision, that the same perceived fear of absurdity was in fact a reality. It is to be noted that of the 600 VANS licensees only 177 responded to the Second Respondent's request to provide detail for purposes of conversion and that even fewer of them would insist on I-ECNS licences.

6.26 The First and Second Respondents have now in the present application stated the following regarding their prior interpretation contained in their media statement:

> "*It will be argued further, on behalf of the First and Second Respondents, that the media statement made by the Second Respondent dated 22 November 2004, apart from being an incorrect interpretation of the Ministerial Determinations of 3 September 2004, does not confer a right to the*

*VANS licensees to an ECNS licence. Put differently, the reference in the media statement to the VANS licensees having the right to self-provide is, in law, incorrect and of no force and effect."*

6.27 The following has now also been stated by the First and Second Respondents regarding their interpretation contained in the draft VANS regulations:

> *"It is submitted that, save for the erroneous interpretation by the Second Respondent and the subsequent steps it took pursuant to that order, all of which have no force in law, the legislative scheme has at all times, required VANS licensees to obtain their telecommunications facilities from the licensed persons or entities (as contemplated by s40(2) of the TA and Ministerial Determinations of 3 September 2004 and the 2005 regulations)."*

6.28 Apart from the about-face and the fact that it is correct that the interpretation of a party, even one such as the Second Respondent, being the implementing authority, does not bind a court and that a court should arrive at a separate and independent interpretation of a statutory provision, the present argument regarding absurdity appears both on the facts and on a proper interpretation, to be a novel one without foundation.

6.29 On a separate issue, I can also find no justification for the Second Respondent's interpretation that the lifting of the restrictions contained in Section 40(2) on 1 February 2005 merely has the effect to add private telecommunications network licence holders as "*an additional licensed source*

*from which the VANS licensees can procure telecommunications facilities*". There are no allegations of substance supporting such an interpretation.

6.30 The Second Respondent further argued that the "*new VANS regulations*" preclude the right of VANS licensees to self-provide. This contention is also without foundation. The new VANS regulations were published on 31 March 2008 in terms of Section 5(7) of the ECA and deal with the procedure involved in applying for individual licences. The right to self-provision of VANS licensees vests in the prior provisions contained Section 40(2) and, since the Ministerial Determination of 2004, operate from 1 February 2005. The regulations are firstly procedural in nature and secondly cannot in any event detract from previously existing substantive rights.

6.31 Upon a reading of Section 93(4) of the ECA, it can only be found that the legislature therein intended or at least contemplated that there would be licensees (including VANS licensees) under the TA other than public switched telecommunication service providers who would be entitled to provide electronic communication facilities and network services and who would, by way of converstion, be entitled to ECNS licences under the new legislative framework.

6.32 I have also been referred to **Patel v Minister of the Interior and Another** 1955(2) SA 485 (A) in support of

the view that later acts of Parliament, without having been passed for the express purpose of explaining previous acts, may nevertheless be used as legislative declarations or parliamentary expositions of the meaning of prior acts. Although such declarations are to be used with caution, the reliance on and application thereof and particularly Section 93 as quoted, corresponds with my interpretation of Section 40(2)(b).

6.33 I therefore find that the Applicant's existing licence permitted it to self-provide its own telecommunication facilities under its existing VANS licence which include the *right to provide network and connectivity* services. I therefore find that the Applicant is entitled in terms of Section 93(1) to a conversion and issuing of not only a replacement individual ECS licence (which has been conceded by all of the Respondents, in particular including the Second and Third Respondents), but also to a replacement individual ECNS licence. In these premises it must follow that prayer 2.1 should be granted.

6.34 It has been argued on behalf of all the Respondents that, even should I come to the aforementioned conclusion, this court should not substitute its decision for that of the Second Respondent. It was submitted that it would be improper to do so. It was further submitted that, to do so would amount to the court usurping the powers and functions of the Second Respondent and thereby infringe

on the principle of separation of powers. I agree with these submissions.

6.35 Section 93(4)(b) furthermore provides that the Second Respondent may, as part of the conversion process, grant rights and impose obligations on a prospective licensee in order to ensure that the licence issued comply with the ECA until such time as pro-competitive conditions are reviewed in terms of the provisions of Section 67(8). I am of the view that, apart from what I have stated above, would a court grant a substituting decision, it would be made without the benefit of the Second Respondent's expertise and would deprive the Second Respondent of the opportunity of complying with Section 93(4)(b). There are also an absence of allegations of instances of bias or gross incompetence or even allegations that, were a court to decline the substituting of its own decision for that of the Second Respondent, that the result would be foregone conclusion.

6.36 Although I do not interpret paragraph 2.2 of the amended Notice of Motion referring to the substitution of a decision as having the detrimental effects referred to above, for the sake of clarity and at the risk of making any order which may be interpreted as an intruding and substituting decision, it will be sufficient, in my view, pursuant to the conclusion which I reached in respect of the relief claimed in paragraph 2.1 of the said amended Notice of Motion, if a declaration is granted as claimed in paragraph 3.1. It is

to be emphasised that paragraph 3 is claimed as an alternative to paragraph 2 of the amended Notice of Motion.

6.37 Similarly, the relief claimed in paragraphs 2.3, 3.2, 3.3 and 4.1 would be superfluous. The Second Respondent is clearly as Authority the proper instance to see to the implementation of both the declarations contained in this judgment and in the provisions of the ECA.

[7] **AD PRAYER 4.2**:

7.1 As already stated in paragraph 6.12 *supra*, the only relevant remaining prohibition to self-provision applicable to the Applicant's VANS licence, is the *proviso* contained in clause 1.1(b) as quoted in paragraph 3.12 *supra*.

7.2 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 enabling legislation.

7.3 Any limitation of rights to which a subject is entitled to in terms of an Act by an authority, would result in the authority then assuming the right to determine the rights and benefits to which an applicant for a licence would be entitled. The *proviso* contained in Section 32(2) of the TA relating to privileges or obligations "*specified in the licence*", can clearly only relate to such practical issues

regarding the contents of the licence which would not detract from the substance to which such a licensee would be entitled to in terms of the Act, such as the right to self-provision.

7.4 To impose, by way of a licence condition, a limitation which is not provided for in the Act, would, in my view, amount to a "*reading in*" of limitations such as already dealt with by me in paragraphs 6.18 and 6.21 *supra*. Such a reading in as imposed by way of the aforesaid clause would therefore be *ultra vires* and unlawful.

7.5 The contentions by the Applicant that, were this court to make the findings referred to above, they would jointly only amount to a *brutum fulmen* if the exercise of the "*benefits*" of self-provision are still precluded by the aforesaid licence conditions until set aside, is clearly also correct. Although the limitation imposed by the aforesaid clause would only be of a rather temporary nature until conversion to an I-ECNS licence takes place, it cannot, in view of the findings made, be allowed to remain in place.

7.6 I am therefore of the view that prayer 4.2 of the amended Notice of Motion should be granted and, in the circumstances of the matter as already dealt with above, that any extension of the 180 day period prescribed in Section 7(1) of PAJA required for such a consideration and finding, should also be granted.

[8] Before making an order along the lines as set out above, it is necessary to consider the contentions and approach of the 19th and 22nd Respondents. In broad terms, this approach is to the effect that, whatever finding this court might make or conclusion it might reach, no relief should be granted in respect of that claimed by the Applicant. In short, the opposition to the relief is based on an attempt to allow the process upon which the Second Applicant has embarked regarding VANS licensees and the consideration of their entitlement to I-ECNS licences and which process has been halted by the relief granted in respect of Part A of the Notice of Motion, to proceed and to have it remain intact. In this regard, the contentions are the following:

8.1 Both the 19th and 22nd Respondents contended that, irrespective of which conclusion I might reach in respect of any of the prayers claimed by the Applicant, the judgment and order of this court should not have the import or effect of derailing the current "*adjudication process*" being conducted (by the 2nd Respondent) "*with the stated objective of granting selected VANS licensees the right to acquire an individual electronic communications network services licence ('I-ECNS')*" in terms of the ECA. As already aforestated, this process has been suspended in terms of paragraph 1 of the order in terms of Part A of the Notice of Motion.

8.2 Apart from the various issues raised in the Heads of Argument filed on behalf of the said Respondents, the principal issues relied on by them were that:

8.2.1 The Applicants would not be prejudiced if the adjudication process would be allowed to be continued whilst on the other hand, the said Respondents (and other parties) would be prejudiced if the process is halted or even set aside;

8.2.2 The court should in the exercise of its discretion decline to grant any of the relief claimed (and, as a second set of strings to the bows from which arrows were directed from this quarter against the relief claimed by the Applicants, the issue of alleged undue delays and the effluxion of the prescribed 180 day period in terms of PAJA were again relied on).

8.3 The argument regarding the absence of prejudice is, in my view, a rather curious one: The contention is on the one hand that the Applicant's application is premature in that there has not yet been a decision by the Second Respondent not to convert the Applicant's VANS licence to an I-ECNS licence also. The argument is therefore that any possible prejudice had not yet occurred and that it might turn out that the Applicant might be successful at the end of the "*conversion process*" in obtaining the licence which it seeks. This argument however, ignores the Applicant's present entitlement to self-provision and its entitlement to continue to exercise it until such time as the conversion process is finalised. It also ignores to an

extent, the conclusion to which I have come, namely that the Applicant is entitled to a conversion as of right and cannot therefore lawfully be "*locked*" into a process where this entitlement is stil part of an uncertain and competitive process.

8.4 The other side of the coin relating to prejudice of the other participants in the conversion process, such as the 19th and 22nd Respondents, nestles in the optimistic prospect that these Respondents might obtain I-ECNS licences and that the halting of the consideration of their applications, should the conversion process not be continued with, would result in a prejudicial delay for these Respondents. It is also difficult to follow this argument. If the 19th and 22nd Respondents were the holders of VANS licences similar to that of the Applicant (which they clearly are) then, once a finding has been made in this application that VANS licensees are both entitled to self-provide and entitled by way of conversion to the issue of I-ECNS licences, then clearly such a finding would also be to their benefit. Consequently, the prescribed conversion of their licences as prescribed by Section 93 of the ECA would be the more beneficial procedure than the participation in the present competitive procedure, the outcome of which is presently still conditional upon the prioritisation process contained in the Ministerial Policy Directions and imposed by the Second Respondent.

8.5 The manner in which the Second Respondent deals with the consequences of the findings contained in this judgment can also obviate any further prejudice. The possibility that the existing process might be streamlined, amended or brought to an earlier or more speedy termination if it is not hampered by the requirements of prioritisation or a competitive process, has not been addressed in the papers but conceivably though, it should be possible. Similarly, insufficient allegations had been made that, even if the process was not capable of modification or amendment and even if it were to start afresh (at this time only as a conversion process) that it would not be possible to finalise it by the deadline prescribed in the Act, being 19 January 2009.

8.6 It was also argued that there was no basis for granting any relief resulting in the holding up of the present process which could in turn impact on new applications for new licences. Firstly, as pointed out, it appears that the present process is clearly part of a "*conversion*" process. On the one hand, insofar as conversion is to take place, in view of the findings made herein, there is no reason why this process cannot continue, as long as it does not do so with the impediments imposed by the Ministerial Policy Directions. On the other hand, insofar as it also may involve the consideration of applications for new licences by applicants not entitled to or insisting on conversion, there is similarly no reason why that part of the process cannot continue.

8.7 Having regard to all of the aforesaid, and having considered all the case law referred to in this regard, I fail to find sufficient grounds for refusing the relief to which the Applicant is entitled, based on the alleged prejudice caused thereby to other parties.

8.7 Rather extensive arguments were again reiterated regarding the issue of the 180 day period prescribed in Section 7(1)(a) of PAJA. It was particularly argued on behalf of the 22nd Respondent that the Applicant had unduly delayed in launching its application. I had again separate regard to these objections made by Respondents other than the first three, but still came to the conclusion that, in the present instance, the interests of justice would require that the said period be extended.

8.8 A further argument relied on extensively on behalf of the 22nd Respondent was that relief in review proceedings are discretionary in nature and in this regard I was referred to the work of the learned author Baxter, **Administrative Law** at pp.712-713 and in particular the matters of **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004(6) SA 222 (SCA) and **Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others** [2005] 4 All SA 487 (SCA) and the cases quoted therein.

8.9 The principal contention relied on in the **Oudekraal Estates**-case was the following (at 246C-E):

> "*... a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy.*"

8.10 The preceding paragraphs of the said judgment was also relied on in an attempt to convince this court that, even if findings of illegality were made regarding the Ministerial Policy Directions or the decisions of the Second Respondent, "*injustice*" should be "*minimised*" by allowing these acts to stand. In the present instance, this contention of the 22nd Respondent is to be adhered to, it would mean that, despite there being a finding that a VANS licensee would by way of conversion be entitled to an I-ECNS licence, the acts which would preclude him from enforcing such an entitlement to conversion, being the Ministerial Policy Directions, the Second Respondent's impugned decisions and the requirement of the participation in a competitive process, should be allowed to remain intact. I find that, in the present instance, to allow such negating acts to remain intact and to thereby deprive, not only the Applicant, but all parties with similar VANS licences of the conversion rights to whey they are entitled in terms of the ECA, would be an improper or unjustifiable exercise of my discretion.

8.11 Similarly, I cannot find that, simply because of the fact that the tainted conversion process had already commenced and progressed up to where it was halted by the interim relief granted in terms of Part A of the Notice of Motion,

that the process is as irreversible as, for example, the performance of the tenders in the case of **Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd** (*supra*). Equally, the "*reversibility*" of the consequences of the administrative acts to be reviewed and the existence of alternate processes which can and should be followed to attain the conversions provided for in Chapter 15 of the ECA, indicate that this case is not one of those where it should be found that an aggrieved party had for such a long period of time failed to institute review proceedings that for reasons of pragmatism he should not be entitled to relief in the vein as in **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad** 1978(1) SA 13 (A), to which I was also repetitively referred.

8.12 As yet another submission, it was contended that the Applicant, by initially participating in the "*VANS conversions hearings*" had thereby elected to abide by the decision of the Second Respondent and had thereby waived its rights to move the present review application. With reference to **Chamber of Mines of South Africa v National Union of Mineworkers and Another** 1987(1) SA 668 (AD) at 690-691 it was argued that a party cannot approbate and reprobate at the same time. Apart from the fact that this case is to be distinguished on the different facts thereof, the question of election or waiver is nowhere near as clearly indicated in the present application as in the **Chamber of Mines**-case. Despite

the initial submissions made to the Second Respondent by the Applicant, the impugned decision of the Second Respondent which forms the subject matter of prayer 2 of the amended Notice of Motion took place in the circumstances as set out in paragraphs 6.1 to 6.4 *supra*. This was at the commencement of the formal "*VANS hearings*" and from that moment on, insofar as it had not already been done previously, the Applicant repetitively asserted its insistence on its right to conversion. Any further submissions were further made expressly without prejudice to these rights. I cannot in these circumstances find that there was an election in the true sense of the word or a waiver of the rights. In fact, quite the contrary was indicated by the Applicant during its further participation in the process. In my view, this defence must also fail.

[9] **COSTS**:

Having considered all of the above and, in the exercise of my discretion, I find no reason to stray from the general principle that costs should follow the event. There dan be no doubt that the Applicant was substantially successful in the application. The first three opposing Respondents should therefore be liable for the Applicant's costs. The opposition of the 19th and 22nd Respondents are on a slightly different footing. Although they were also opposing parties, they did so only in order to protect their own interests. The interests they sought to protect were those primarily relating to participation in the conversion process,

being an administrative process or set of circumstances which were not of their own making. They did not claim costs against the party responsible for the set of circumstances but I am not of the view that they should also be liable for the Applicant's costs, being a similar victim of the same circumstances. The various parties also employed various sets of counsel, some who appeared and some who did not. Although the matter is lengthy, novel and intricate, the employment in excess of two or, in some instances, three counsel, appears to be somewhat of a luxury and a matter between attorney and client.

[10] **ORDER**:

In view of all of the above, the order that I make is the following:

10.1 In terms of Section 9(1) of the Promotion of Administrative Justice Act, 3 of 2000, the 180 day period referred to in Section 7(1) of the said Act is, in respect of the relief claimed in paragraphs B1.1, B1.2 and B4.2 of the Applicant's amended Notice of Motion extended until the date on which this application was launched.

10.2 It is declared that paragraph 3 of the Ministerial Policies and Policy Directions published in Government Gazette No. 30308 of 17 September 2007 and drafted in terms of Section 3 of the Electronic Communications Act, 36 of 2000, is *ultra vires* and of no force or effect.

10.3 Paragraph 3 of the aforesaid Ministerial Policies and Policy Directions is therefore hereby reviewed and set aside.

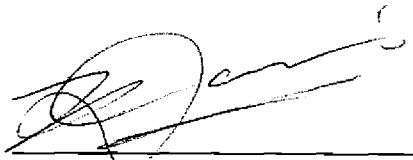
10.4 The decisions of the Second Respondent to the effect that the Second Respondent is not obliged to convert the Applicant's value-added network service licence into an individual electronic communications services licence as well as an individual electronic communications network services licence in terms of Sections 92 and 93 of the Electronic Communications Act, 36 of 2000 and that the Applicant is required to apply to the Second Respondent for an individual electronic communications network services licence and that the Applicant must do so by way of participation in a competitive process pursuant to which the Second Respondent will select those value-added network services licensees who will be granted the right to acquire an individual electronic communications network services licence, are hereby reviewed and set aside.

10.5 It is declared that the Applicant was entitled to self-provide its own telecommunications facilities with effect from 1 February 2005.

10.6 It is declared that clause 1.1(b) of the value-added network services licence issued to the Applicant by the Second Respondent on 18 August 2005 to the extent that it purports to deprive the Applicant of its entitlement to

self-provide telecommunications facilities is of no force or effect.

10.7 The First, Second and Third Respondents are jointly and severally ordered to pay the Applicant's costs of this application including those costs reserved in terms of Part A of the Applicant's Notice of Motion, such costs to include the costs of two counsel.



**N DAVIS SC**
**ACTING JUDGE OF THE**
**HIGH COURT**