

Ulawulo Lomthetho/Ngokomthetho
Puso ya Molao
Oppergesag van die Reg



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Attention: Mr Davis Kgosimolao Moshweunyane

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**Free Market Foundation's
RULE OF LAW PROJECT**

**Representations regarding
the Authority's contemplated review
of its ICT Covid-19 disaster regulations**

7 May 2021

Introduction

The Independent Communications Authority of South Africa (“the Authority”, “Icasa”) by notice on 22 April 2021 has invited written representations on its contemplated review of its Covid disaster regulations.

Icasa announced that day to the media that its chair Dr K Modimoeng had indicated that mobile network operators must continue to provide services to the public during the state of disaster and may derive commercial value from this high-value spectrum resource assigned temporarily to them, and therefore Icasa needs to apply itself with care and circumspection to these regulations’ provisions, particularly the temporary spectrum extensions.

The unassigned high-demand (“emergency”) spectrum has been temporarily made available under the 2002 Disaster Management Act (a statute for mitigating a disaster’s severity, rapid response to disasters, and post-disaster recovery). This emergency spectrum has been made available to address consequences of the Covid disaster.

These representations focus on whether Icasa’s regulations may validly stipulate any fixed date before the end of the declared Covid disaster as a date by which this spectrum shall be returned to Icasa. The period of assignment of this spectrum to licensees is influenced by the contemplated spectrum auction. The representations also touch on aspects of the auction.

Summary representations

Icasa’s contemplated review of its Covid disaster regulations should accommodate these arrangements and what Dr Modimoeng has indicated.

Icasa’s requiring that this temporary spectrum be returned to it by any fixed date before the end of the declared Covid disaster is *ultra vires* and invalid. For as long as the disaster endures, Icasa is not authorised under the Disaster Management Act to revoke the allocation of the emergency spectrum. The temporary allocation of this emergency spectrum should remain in force for at least the duration of the disaster, and indeed for as long as necessary to address the effects of the disaster.

To address the virus within the country, South Africa is using the 2002 Disaster Management Act (a statute for mitigating any disaster’s severity, rapid response to disasters, and post-disaster recovery). The National Disaster Management Centre must, when an event occurs, determine if it should be regarded as a disaster and, if so, assess its magnitude and classify the disaster as local, provincial or national. The Centre has classified the Covid disaster as a national disaster. In the event of a national disaster, the responsible Minister may declare a national “state of disaster” if existing legislation and arrangements do not adequately provide for the executive to deal effectively with it or special circumstances warrant. In March 2020, the Cooperative Governance Minister, noting that the Disaster Management Centre has classified it as a national disaster, and taking into account the need to augment existing measures, declared a national state of disaster. A national state of disaster lapses after three months but the Minister may extend it for a month at a time. The Minister has extended the state of disaster to the 15th of July, August, September, October, November and December 2020, and January, February, March, April and May 2021, successively.

The Cooperative Governance Minister on 18 March 2020 issued disaster-management regulations under the Act regarding steps necessary to prevent escalation of the disaster or alleviate its effects. They state that any Minister may issue directions within his or her mandate, to address and combat the spread of Covid-19, and such directions continue to apply unless amended or withdrawn by the minister responsible.

The Communications Minister accordingly on 26 March issued directions which stipulate that Icasa must relax spectrum regulations to enable the temporary licensing of unassigned high-demand spectrum for duration of the Covid-19 national disaster, focusing on licensees who are able to make expeditious use of the spectrum.

Icasa, pursuant to the Communications Minister's directions, made regulations on 6 April which declare that: During the national state of disaster any licensee may apply to Icasa to dispense with the procedures for the licensing of high demand spectrum to enable it to deal with the anticipated rise in demand for network capacity or data services; the 700MHz, 800MHz, 2300MHz, 2600MHz, and 3500MHz spectrum bands are made available for temporary assignment; and spectrum so assigned temporarily to licensees shall be revoked upon the expiry of three months of termination of the national state of disaster, but no spectrum licence pursuant to these regulations shall be valid "after 30 November 2020". This meant that the high-demand spectrum was made available until, whichever is earlier, 30 November or three months after termination of the state of disaster.

Icasa in September 2020 announced that, because its spectrum auction would now be completed in March 2021, Icasa would amend its State of Disaster Regulations to extend the period of assignment of emergency spectrum to the end of March. In November, Icasa amended its State of Disaster Regulations to extend the temporary-spectrum period of assignment to, whichever was earlier, 31 March 2021 or three months after termination of the state of disaster. In March 2021 Icasa resolved to extend the assignment period of the temporary spectrum for two more months, and amended the Regulations to further extend the period of assignment of the temporary spectrum, to 31 May 2021.

But neither the Cooperative Governance Minister's regulations nor the Communications Minister's directions authorise Icasa to stipulate 30 November 2020, or 31 March 2021 or 31 May 2021, or any other fixed date as a date on which spectrum must revert to Icasa, whether or not three months after termination of the national state of disaster has passed. The Cooperative Governance Minister's 18 March disaster-management regulations authorise Ministers to issue directions to address the spread of COVID-19 including taking steps that may be necessary to minimise the effects of the national state of disaster. (The Minister's later, April, regulations do not affect this.)

The Communications Minister's 26 March directions to Icasa state that Icasa must relax spectrum regulations to enable temporary licensing of the high-demand frequency spectrum for duration of the COVID-19 national disaster, and the temporary assignment of that spectrum must focus on licensees able to use it for duration of the disaster.

It follows, from the Communications Minister's directions which require Icasa to enable temporary licensing of the high-demand spectrum for the duration of the disaster, that Icasa's regulation stipulating a fixed date (whether 30 Nov 2020, or 31 Mar or May 2021) by which that spectrum must return to Icasa is *ultra vires* and invalid.

Icasa in October 2020 issued an Invitation to Apply for spectrum licences to provide national broadband services in stated spectrum bands. Icasa specified two minimum spectrum portfolios to ensure the third and fourth wholesale ("Tier-2") operators had enough spectrum to be credible. Any bidder (other than the two Tier-1 operators) could "Opt In" to bid for these lots, even one with no current spectrum.

(This spectrum auction was due to take place in March 2021, but has been delayed by a Pretoria high court order that month. The court, at the instance of telecommunications operator Telkom and broadcaster e.tv, interdicted Icasa from adjudicating applications received by it in its auction of the spectrum.

(Telkom and e.tv contended that auctioning the spectrum to telecommunications operators was irrational because broadcasters were still used it and it would not be available to a telecommunications operator until after the digital migration process, which had stalled.

(The court observed that the spectrum in the IMT 700 and 800 bands would only become available on completion of the digital migration process. Despite its unavailability, Icasa had included those bands in the spectrum to be licensed i.t.o. the auction. This was likely to result in successful bidders' deriving no commercial benefits on being awarded a licence. Icasa's decision was thus irrational.)

As mentioned, the Cooperative Governance Minister's disaster-management regulations authorise Ministers to issue directions to address the spread of Covid-19 including taking steps that may be necessary to minimise the effects of the national state of disaster. The Communications Minister's directions require Icasa to enable temporary licensing of the high-demand spectrum for duration of the disaster.

It arguably therefore follows that the temporary spectrum allocation ought to continue for so long as necessary to alleviate the disaster's effects. (South Africa's unemployment rate in at the end of 2020 rose to 42.6 percent, and economists say it could take at least three years for employment to return to 2019 levels.) The Communications Minister's directions require Icasa to enable temporary licensing of the high-demand spectrum for duration of the disaster. It can be contended that, only when the disaster's effects had been alleviated, should Icasa proceed with an auction.

It is however said that IMT spectrum should be released to the market as early as possible for operators to stay abreast of technological changes and demand. A temporary assignment does not provide operators with certainty or entice the investment required to extract full value from the spectrum.

However, as a precautionary measure to ensure the lawfulness of Icasa's auctioning of the high-demand spectrum during the state of disaster and before the disaster's effects have been minimised, it would be prudent for the Communications Minister to amend her directions requiring Icasa to enable temporary licensing of the high-demand spectrum, so as to make expressly clear that the auctioning by Icasa of the temporarily-allocated high-demand spectrum during the state of disaster and before the disaster's effects have been minimised shall be lawful, provided the auction is subject to the condition that the successful bidder (and any transferee of the radio frequency spectrum licence concerned) shall, during the state of disaster and before the disaster's effects have been minimised, implement and use the frequency spectrum concerned for the duration of the Covid-19 national disaster and until the disaster's effects have been minimised.

Spectrum-auction applicants should not be classified into two tiers, with applicants in the one tier being excluded from an opt-in round of the auction.

[end of Summary]

Icasa's has invited representations about its review of its Covid regulations

The Authority issued a news release on 26 March 2021 which—

Made known that its Council has resolved to extend the temporary assignments of radio-frequency-spectrum to licensees for a further two months, to 31 May; stated that the temporary release of high-demand spectrum to licensees was aimed to mitigate the impact of the national state of disaster following the outbreak of Covid-19, by easing network congestion, maintaining good quality of broadband services, and enabling licensees to lower the cost of access to consumers;

announced that the Authority will embark on a comprehensive review of its ICT Covid-19 National Disaster Regulations¹ including the radio frequency spectrum extensions;

reported that its chair Dr K Modimoeng was of the view that the Authority needs to safeguard the interest of consumers within the temporary spectrum-licensing regime.²

The Authority, in a general notice in the *Gazette* on 22 April 2021—

Stated³ that—

Its Covid-19 Disaster Regulations⁴ were prescribed when the country was on lockdown and subsequently when the “Alert level system” was introduced;

but the country is currently on “Alert level 1”, in which several economic activities have been allowed to resume and operate;⁵

it is hence prudent for the Authority to review the measures prescribed in its Covid-19 Disaster Regulations;

accordingly invites interested parties and members of the public to make written representations on issues the Authority should consider in its review of its Covid-19 Disaster Regulations; and

stipulates that representations must be submitted to the Authority by 16h00 on 7 May 2021, by hand delivery, or electronically in word and signed pdf versions.⁶

The same day as its general notice in the *Gazette* (22 April), the Authority also issued a media statement⁷ which—

Reiterated what the Authority stated in its March news release, that the temporary release of high-demand spectrum to licensees was aimed at mitigating the impact of the National State of Disaster following the outbreak of Covid-19;⁸

¹ Independent Communications Authority of South Africa. ICT Covid-19 National Disaster Regs, Gen N 238 of 2020 (*Gazette* 43207 of 6 Apr), as amended by Govt Notices 252 of 5 May 2020 (*Gazette* 43279), 500 of 11 Sep 2020 (*Gazette* 43707), 678 of 27 Nov 2020 (*Gazette* 43945) and 165 of 31 Mar 2021 (*Gazette* 44374).

² Independent Communications Authority of South Africa. Latest news and events: “Icasa extends temporary radio frequency spectrum assignments for licensees”, 26 Mar 2021, <https://www.icasa.org.za/news/2021/icasa-extends-temporary-radio-frequency-spectrum-assignments-for-licensees>.

³ Gen Notice 226 of 2021 (*Gazette* 44488, 23 Apr). Independent Communications Authority of South Africa: Notice inviting written representations: Review of ICT Covid-19 National Disaster Regulations. Intro par 6.

⁴ Disaster Management Regs, Govt N R480 of 29 Apr 2020.

⁵ Alert levels are prescribed i.t.o. the Disaster Management Regs (supra) reg 3, read with Govt N 867 of 7 Aug 2020 (*Gazette* 43599) directions regarding criteria guiding determination of alert levels, par 2.

⁶ For attention of Mr Davis Kgosimolao Moshweunyane, at 350 Witch-Hazel Avenue, Eco Point Office Park, Eco Park, Centurion; or email address Covid19regulations@icasa.org.za. Gen Notice 226 of 2021. Icasa: Notice inviting written representations: Review of the ICT Covid-19 National Disaster Regulations (supra).

⁷ Independent Communications Authority of South Africa. Media statement: “ICASA publishes a Call for Comments on the ICT Covid-19 National Disaster Regulations”, 22 Apr 2021, <https://www.icasa.org.za/news/2021/icasa-publishes-a-call-for-comments-on-the-ict-covid-19-national-disaster-regulations>.

⁸ Mainly by easing network congestion, maintaining good quality of broadband services and enabling licensees to lower the cost of access to consumers.

stated that—

the Authority’s chair Dr K Modimoeng has indicated that mobile-network operators— must continue to provide services to the public during the state of disaster, and may derive commercial value from this high-value spectrum resource temporarily assigned to them;

the Authority therefore needs to apply itself with care and circumspection to these Covid disaster regulations, particularly temporary-spectrum extensions, and in a manner that is justifiable and primarily beneficial to the consumers of electronic communications.⁹

Disaster Management Act, 2002

The Disaster Management Act, 2002¹⁰ is a statute to provide for a “disaster management” policy that focuses on¹¹ “mitigating [the] severity” of disasters”, and “effective response” to disasters, and “post-disaster recovery and rehabilitation”.¹²

“Disaster management” means a “continuous”¹³ process of¹⁴ “implementation of measures” aimed at¹⁵ mitigating the severity “or consequences” of disasters, and post-disaster recovery and rehabilitation.¹⁶

The Act established a National Disaster Management Centre.¹⁷ When a disastrous event occurs, the Centre must¹⁸ determine whether it should be regarded as a disaster i.t.o. the Act, and if so, assess its magnitude and severity and classify it as local, provincial or national.¹⁹ The Centre has classified the Covid disaster as a national disaster.²⁰

The national executive must deal with a national disaster i.t.o. existing legislation and contingency arrangements augmented by regulations or directions made or issued under the Act, if a national state of disaster is declared.²¹

On 15 March 2020, the Minister of Cooperative Governance²² declared a national state of disaster.²³

⁹ And broadcasting and postal services.

Dr Modimoeng said this is an opportunity to identify what is really pressing and compelling for the public benefit. There is a need to measure the impact of the Authority’s regulatory interventions on the broader industry and the regulated sector as a whole including consumer protection and benefits.

Icasa. Media statement: “ICASA publishes a Call for Comments on the ICT Covid-19 National Disaster Regulations”, 22 Apr 2021, *supra*.

¹⁰ Disaster Management Act 57 of 2002.

¹¹ *Inter alia*.

¹² Disaster Management Act, 2002 *Long title*.

¹³ “[A]nd integrated multi-sectoral, multi-disciplinary”.

¹⁴ *Inter alia*.

¹⁵ *Inter alia*.

¹⁶ Disaster Management Act, 2002 s 1 svv “disaster management”.

¹⁷ As an institution in the public service. Disaster Management Act, 2002 Ch 3 (*National disaster management*) Pt 1 (*National disaster management centre*) s 8 (*Establishment*).

¹⁸ For the purpose of the proper application of the Act.

¹⁹ Disaster Management Act, 2002 s 23(1)(a) and (b) read with ss (4), (5) and (6) (*Classification and recording of disasters*).

²⁰ National Disaster Management Centre: Classification of national disaster. Govt Notice 312 of 15 Mar 2020.

²¹ Disaster Management Act, 2002 Ch 3 (*National disaster management*) Pt 2 (*Powers and duties of national government*) s 26(2)(a) and (b) (*Responsibilities in event of national disaster*).

²² And Traditional Affairs, being the designated Minister. Disaster Management Act, 2002 s 1 sv “Minister” read with s 3 (*Administration of Act*).

²³ After noting that the Covid-19 outbreak has been classified as a national disaster by the National Disaster Management Centre, and taking into account the need to augment existing measures undertaken by organs of

The Act states that a national state of disaster lapses three months after it is declared, but may be extended²⁴ by the Minister²⁵ for a month at a time.²⁶

The Minister²⁷ has extended the national state of disaster to (successively) the 15th of July, August, September, October, November and December 2020, and January, February, March, April and May 2021.²⁸

If a national state of disaster is declared, the Minister may²⁹ make regulations or issue or authorise the issue of directions concerning³⁰—

- Regulation of traffic to, from or within the disaster-stricken or threatened area;
- regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;
- control and occupancy of premises in the disaster-stricken or threatened area;³¹
- suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;³²
- facilitation of response and “post-disaster recovery and rehabilitation”; or
- other steps that may be necessary to “prevent an escalation of the disaster” or “alleviate, contain and minimise the effects of the disaster”.³³

The Minister may make such regulations³⁴ to the extent necessary for—

- Assisting and protecting the public;
- providing relief to the public;³⁵
- protecting property;³⁶
- preventing or combating disruption ; or
- dealing with the destructive and other effects of the disaster.³⁷

The regulations may prescribe penalties for contravening them.³⁸

state to deal with the pandemic and recognising that special circumstances exist to so warrant. Declaration of a national state of disaster. Govt Notice 313 of 15 March 2020.

²⁴ Before it lapses or before an extension is due to expire.

²⁵ By *Gazette* notice.

²⁶ Disaster Management Act, 2002 s 27(5)(a), (c) (*Declaration of national state of disaster*).

²⁷ “[T]aking into account the need to continue augmenting the existing legislation and contingency arrangements undertaken by organs of state to address the impact of the disaster”.

²⁸ “Extension of a national state of disaster (Covid-19).” Govt Notices 646 of 5 Jun 2020, 765 of 13 Jul 2020, 889 of 15 Aug 2020, 995 of 14 Sep 2020, 1090 of 14 Oct, 1225 of 14 Nov and 1341 of 11 Dec 2020, R15 of 13 Jan, R86 of 11 Feb, R193 of 11 Mar and 333 of 14 Apr 2021.

²⁹ After consulting the responsible Cabinet member.

³⁰ *Inter alia*.

³¹ Disaster Management Act, 2002 s 27(2)(e), (f) and (g) (*Declaration of national state of disaster*).

³² Disaster Management Act, 2002 s 27(2)(i) (*Declaration of national state of disaster*).

³³ Disaster Management Act, 2002 s 27(2)(m) and (n) (*Declaration of national state of disaster*).

³⁴ Or issue or authorise the issue of such directions.

³⁵ Disaster Management Act, 2002 s 27(3)(a)–(b) (*Declaration of national state of disaster*).

³⁶ Disaster Management Act, 2002 s 27(3)(c) (*Declaration of national state of disaster*).

³⁷ Disaster Management Act, 2002 s 27(3)(d) and (e) (*Declaration of national state of disaster*).

³⁸ Disaster Management Act, 2002 s 27(4) (*Declaration of national state of disaster*).

Minister of Coop Governance’s 18 March disaster-management regulations

The Minister on 18 March made disaster-management regulations³⁹ stating⁴⁰ that—

Any Minister within his or her mandate may issue⁴¹ directions to address, prevent and combat the spread of Covid-19, including⁴² taking any steps that may be necessary to alleviate, contain and minimise the effects of the national state of disaster;⁴³ and such directions shall continue to apply unless varied, amended or withdrawn by the Cabinet member responsible for them.⁴⁴

(The Cooperative Governance Minister in April made new regulations,⁴⁵ which repealed her 18 March ones. Those April regulations⁴⁶ do not affect the Communications Minister’s 26 March directions to Icasa:⁴⁷

(The Cooperative Governance Minister’s April regulations expressly state that, despite the repeal of her 18 March regulations,⁴⁸ any minister’s directions issued i.t.o. those regulations “shall continue to apply”,⁴⁹

(and her April regulations contain a provision to the same effect as the empowering provision in her 18 March regulations (that any Minister may issue⁵⁰ directions to address, etc., the spread of COVID-19, including taking steps that may be necessary to prevent escalation of the national state of disaster, or to alleviate, etc., its effects⁵¹); and

(the general statute governing the interpretation of legislation⁵² states that, where a law repeals and re-enacts a provision of a former law, references in another law to the repealed provision must be construed as references to the re-enacted provision.⁵³)

Communications Minister’s directions to Icasa

Pursuant to the Cooperative Governance Minister’s 18 March regulations, the Minister of Communications⁵⁴ on 26 March issued directions⁵⁵ which state that they—

Seek to provide for the availability and use of technologies in the area of⁵⁶ access to communications infrastructure and digital services;⁵⁷ and

³⁹ And amended them from time to time that month and in April. Govt Notice 318 of 18 Mar 2020, as amended by Govt Notices R398 of 25 Mar 2020, R419 of 26 Mar 2020, R446 of 2 Apr 2020, R465 of 16 Apr 2020, and R471 of 20 Apr 2020

⁴⁰ Inter alia.

⁴¹ And vary.

⁴² *Inter alia*.

⁴³ Govt Notice 318 of 18 Mar 2020 reg 10(8)(c) (*Authority to issue directions*).

⁴⁴ Govt Notice 318 of 18 Mar 2020 reg 10(9) (*Authority to issue directions*), added by Govt Notice R465 of 16 Apr 2020.

⁴⁵ By Govt Notice R480 of 29 Apr 2020, as amended by Govt Notice 608 of 28 May 2020.

⁴⁶ Or its amendments.

⁴⁷ Pursuant to the Cooperative Governance Minister’s 18 March regulations.

⁴⁸ Govt Notice R480 of 29 Apr 2020 reg 2(1) (*Repeal and transitional provisions*).

⁴⁹ Unless, varied, amended or withdrawn by the Cabinet member responsible for such directions. Govt Notice R480 of 29 Apr 2020 reg 2(6) (*Repeal and transitional provisions*).

⁵⁰ And vary.

⁵¹ Govt Notice R480 of 29 Apr 2020 reg 4(10) (*Authority to issue directions*).

⁵² Interpretation Act 33 of 1957.

⁵³ Unless the contrary intention appears. Interpretation Act, 1957 s 12(1).

⁵⁴ And Digital Technologies.

⁵⁵ Govt Notice 417 of 26 Mar 2020. Minister of Communications and Digital Technologies. Electronic communications, postal and broadcasting directions issued under reg 10(8) of Disaster Mgmt Act (57/2002).

⁵⁶ *Inter alia*.

⁵⁷ Govt Notice 417 of 26 Mar 2020 (*supra*). Min of Comms. Directions under Disaster Mgmt reg 10(8): cl 2.2.

provide for measures necessary to manage Covid-19 and “are valid for the duration of the declared national state of disaster”.⁵⁸

The Communications Minister’s directions stipulate that—

the Independent Communications Authority of South Africa⁵⁹ must⁶⁰ relax spectrum regulations to enable the temporary licensing of all available spectrum bands “including the unassigned high demand spectrum” for “duration of the Covid-19 national disaster”;⁶¹ and

the temporary assignment of the unassigned high demand frequency spectrum must be focused on those licensees that would be able⁶² to implement and use assigned frequency spectrum “for duration of the Covid-19 national disaster”.⁶³

Icasa’s regulations set spectrum return date

Icasa, stating that it had considered the Communications Minister’s 26 March directions⁶⁴ and citing its statutory power to make urgently necessary regulations,⁶⁵ made regulations on 6 April 2020.⁶⁶

Icasa’s regulations state that their declared purpose is to prescribe minimum standards that licensees must adhere to “during subsistence of” the national state of disaster,⁶⁷ in order to⁶⁸—

Enable facilitation of the national response to the disaster and “post-disaster recovery and rehabilitation”;

enable implementation of measures that may be necessary to prevent escalation of the disaster or to alleviate, contain and minimise its effects; and

ensure there is continuation of the provision of services.⁶⁹

Icasa’s regulations declare⁷⁰ that—

“During the national state of disaster,” any licensee may apply to Icasa to dispense with the prescribed procedures for the licensing of radio-frequency spectrum including high-demand spectrum, to enable it to deal with the anticipated rise in demand for network capacity or data services;⁷¹

⁵⁸ Govt Notice 417 of 26 Mar 2020 (supra). Min of Comms. Directions under Disaster Mgmt reg 10(8): cl 3.2.

⁵⁹ Govt Notice 417 of 26 Mar 2020 (supra). Min of Comms. Directions under Disaster Mgmt reg 10(8): cl 1, read with Electronic Communications Act 36 of 2005 s 1 sv “Authority”.

⁶⁰ To the extent possible.

⁶¹ Govt Notice 417 of 26 Mar 2020 (supra). Min of Comms. Directions under Disaster Mgmt reg 10(8): cl 6.10.

⁶² On an expeditious basis.

⁶³ Frequency coordination and planning will be necessary to effect this assignment. Govt Notice 417 of 26 Mar 2020 (supra). Comms Mnstr. Directions under Disaster Mgmt reg 10(8): cl 6.11.

⁶⁴ Govt Notice 417 of 26 Mar 2020 (supra). Min of Comms. Directions under Disaster Mgmt reg 10(8).

⁶⁵ And which authorise it to make regulations that are incidental or necessary for the performance of its functions, and which dispense with the requirement to invite interested parties to make representations about a proposed regulation in the case of one which “the public interest requires should be made without delay”. See reply Independent Communications Authority of South Africa Act 13 of 2000 s 4(3)(j) (*Functions of Authority*); Electronic Communications Act 36 of 2005 s 4(1) and (7)(b) (*Regulations by Authority*).

⁶⁶ Gen N 238 of 2020 (6 Apr). Independent Communications Authority of South Africa: “ICT COVID-19 National Disaster Regulations.”

⁶⁷ Gen N 238 of 2020 (6 Apr) supra. Icasa: ICT Covid-19 National Disaster Regs, reg 2.

⁶⁸ *Inter alia*.

⁶⁹ Gen N 238 of 2020 (6 Apr) supra. Icasa: ICT Covid-19 National Disaster Regs, reg 2(b), (c), (d).

⁷⁰ Gen N 238 of 2020 (6 Apr) supra. Icasa: ICT Covid -19 National Disaster Regs, reg 6 (Access to radio frequency spectrum: Temporary assignment of radio frequency spectrum).

⁷¹ Gen N 238 of 2020 (6 Apr) supra. Icasa: ICT Covid -19 National Disaster Regs, reg 6(1).

the 700MHz, 800MHz, 2300MHz, 2600MHz, and 3500MHz spectrum bands⁷² are made available for temporary assignment;⁷³

any such radio-frequency spectrum so assigned temporarily to licensees shall be revoked upon the “expiry of three months of termination of the national state of disaster”;

but “[n]o radio frequency spectrum licence assigned pursuant to [these regulations] shall be valid after 30 November 2020”.⁷⁴

The effect of those Icasa regulations was that the high-demand spectrum was made available until, whichever was the earlier date⁷⁵—

30 November 2020; or

the date three months after termination of the national state of disaster.

Invitation to Apply for spectrum licences for 700, 800, 2600, 3500 MHz bands

Icasa in early October 2020⁷⁶ issued an Invitation to Apply for spectrum licences to provide national broadband services.⁷⁷ The spectrum offered will be—

Two x 20 MHz in the 700 MHz band (713–733 MHz // 768–788 MHz);

two x 30 MHz in the 800 MHz band (791–821 MHz // 831–862 MHz);

one x 140 MHz in the 2600 MHz band ((2530–2575 MHz) and 2595–2690 MHz); and

one x 86 MHz in the 3500 MHz band (3458–3544 MHz).⁷⁸

The spectrum available is packaged into 34 Lots in seven categories, each category of Lots having a different reserve price per Lot. Applicants may bid for any Lots.⁷⁹

Icasa has specified two “spectrum floors” or minimum spectrum portfolios to ensure that, after the auction and including existing assignments, the third and fourth national wholesale (“Tier-2”) operators⁸⁰ have “enough spectrum to be credible”:

Portfolios	Sub-1GHz (minimum, including existing assignments)	1800MHz / 2100MHz and/or 2600MHz (minimum, including existing assignments)
Portfolio 1	2 x 10 MHz	60 MHz
Portfolio 2	2 x 15 MHz	40 MHz

⁷² So-called ““high demand” spectrum.

See *Connecting Africa* 7 Nov 2019 P Gilbert “S A Spectrum licensing: What you need to know”; *Connecting Africa* 7 Apr 2020 P Gilbert “S A releases emergency spectrum for Covid-19 broadband demand”; *Reuters Healthcare* 17 Apr 2020 “S Africa’s mobile operators granted emergency lockdown spectrum to meet data demand”; *Adams & Adams* 12 May 2020 J Marais and N Gungubele “Covid-19: ICASA processing applications for the assignment of emergency temporary spectrum licences”.

⁷³ And must be assigned i.a.w. criteria and conditions stipulated in the Annexure. Gen N 238 of 2020 (6 Apr) supra. Icasa: ICT Covid-19 National Disaster Regs, reg 6(3) read with Annex A (“COVID-19 spectrum access framework”). The Annexure mentions incumbent licensees Liquid Telecoms, Rain, and Telkom. Gen N 238 of 2020 (6 Apr) (supra). Icasa: ICT Covid-19 National Disaster Regs, Annex A.

⁷⁴ Gen N 238 of 2020 (6 Apr) supra. Icasa: ICT Covid -19 National Disaster Regs, reg 6(6) and (7).

⁷⁵ *ITWeb* 17 Apr 2020 “Vodacom welcomes ICASA temporary spectrum decision”; *TechCentral* 17 Apr 2020 “MTN will be ready to use extra spectrum within six weeks”.

⁷⁶ On 2 Oct 2020.

⁷⁷ Gen N 535 of 2020 (*Gazette* 43768 of 2 Oct). Icasa Invitation to Apply for licences for 700, 800, 2,600 and 3,500 spectrum bands to provide national broadband wireless access services for urban and rural areas.

⁷⁸ Gen N 535 of 2020 (supra) par 5.1.

⁷⁹ Gen N 535 of 2020 (supra) par 5.2–4.

⁸⁰ See below.

Any bidders (other than the two “Tier-1” operators⁸¹) may “Opt In” to bid for these lots, even bidders with no current spectrum holding. Operators are not precluded from also bidding for other Lots.⁸² Icasa will give eligible bidders prior notice of the Opt-in Round.⁸³

There are two “spectrum caps” limiting the amount of spectrum a Bidder can bid for. A cap preventing current holders of 2x11MHz in the 900MHz band, and licensees with no sub-1GHz spectrum, from acquiring more than 2x10MHz; and an overall cap, preventing any licensee from acquiring more than about 18% of the high-demand spectrum.

Icasa postponed spectrum auction from end 2020 to March 2021

In April 2020 Icasa said it would make high-demand spectrum available for “the duration of” the national state of disaster.

But it insisted that this would not negate processes underway for the permanent assignment of spectrum, and it was hoped to finalise an auction by the end of 2020.⁸⁴

Icasa has also postponed spectrum return date

In September 2020 Icasa announced that it had had to delay the high-demand spectrum auction,⁸⁵ which would be completed by March 2021.⁸⁶ In November Icasa thus amended its Covid-19 State of Disaster Regulations, to extend the period of assignment of the temporary spectrum to 31 March 2021.⁸⁷

In March 2021 Icasa resolved to extend the period of assignment of the temporary spectrum for two more months.⁸⁸ Icasa accordingly in late March amended the Regulations to further extend the period of assignment of the temporary spectrum, to 31 May 2021.⁸⁹

The amended Regulations thus now state that radio-frequency spectrum assigned temporarily to licensees —

Shall be “revoked upon the expiry of three (3) months of termination of the national state of disaster”; but will not be valid “after 31 May 2021”.⁹⁰

MTN applies for court order that two-tier aspects of auction should be set aside

MTN has reportedly applied in January 2021 to the Pretoria high court for orders declaring certain decisions by Icasa which relate to its spectrum auction process unlawful, and reviewing, correcting or setting them aside.

(Those decisions by Icasa allocate spectrum-auction applicants into one of two tiers, and exclude applicants in the one tier from the auction’s opt-in round.

⁸¹ See below.

⁸² Gen N 535 of 2020 (supra) par 6.

⁸³ Gen N 535 of 2020 (supra) par 17.2.1.

⁸⁴ *Mobile World Live* 7 Apr 2020 K Majithla “South Africa regulator responds to spectrum call”.

⁸⁵ *Business Day* 4 Sep 2020 “Icasa delays spectrum auction to March 2021”.

⁸⁶ And spectrum that will be made available to the WOAN. Icasa. 3 Sep 2020: “Date for the issuing of invitations for the licensing of high demand spectrum and the wireless open access network.”

⁸⁷ Gen N 238 of 2020 (6 Apr) supra, Icasa ICT Covid-19 National Disaster Regs, reg 6((7) as amended by Gen N 678 of 2020 (*Gazette* 43945 of 31 Mar).

⁸⁸ *TechCentral* 26 Mar 2020 “Icasa extends temporary spectrum assignments”.

⁸⁹ Gen N 238 of 2020 (6 Apr) supra, Icasa ICT Covid-19 National Disaster Regs, reg 6 (7) as further amended by Gen N 165 of 2021 (*Gazette* 44374 of 31 Mar).

⁹⁰ Gen N 238 of 2020 (6 Apr) supra. Icasa: ICT Covid-19 National Disaster Regs, reg 6(7) (as amended by Gen N 678 of 2020 (27 Nov) Third Amendment Regs, reg 4.3.

(MTN and Vodacom are the only operators classified in that tier, which means they will not be allowed to participate in the opt-in round for two spectrum portfolios that are available in the opt-in round. Those portfolios include the sought-after 3,500MHz band, which is optimal for 5G use.

(MTN also avers that Icasa's definitions which purport to differentiate an operator in the one tier from an operator in the other tier are vague, arbitrary, and unreasonable.

(MTN contends that it was also not given notice of Icasa's intention to categorise it as an operator in the one tier or an opportunity to make representations about it.

(MTN is seeking the removal from the auction process of Icasa's two-tier categorisation and associated opt-in round.⁹¹)

Authority's spectrum auction delayed by court order

Icasa's spectrum auction, which was due to take place in late March, has been delayed by a court order in early March 2021 in separate litigation.⁹²

(The Pretoria high court, at the instance of telecommunications operator Telkom⁹³ and broadcaster e.tv,⁹⁴ has interdicted Icasa from assessing or adjudicating applications received by it in the course of its auction of the spectrum.⁹⁵

(Telkom and e.tv contend that auctioning the spectrum to telecommunications operators was irrational because⁹⁶ it was still being used by broadcasters and would not be available to a potential telecommunications bidder until after the digital migration process, which had stalled and was unlikely to occur in the near future.⁹⁷

(The court observed⁹⁸ that the spectrum in the IMT 700 and IMT 800 bands would only become available on completion of the digital migration process. Despite its unavailability, Icasa had included those bands in the spectrum to be licensed i.t.o. the auction. This is likely to result in successful bidders deriving no commercial benefits on being awarded a licence. The decision of Icasa is thus intrinsically irrational.⁹⁹)

Any spectrum-return date fixed by Icasa is *ultra vires*

The Cooperative Governance Minister's 18 March disaster-management regulations authorise Ministers to issue directions to address the spread of COVID-19 including taking steps that may be necessary to minimise the effects of the national state of disaster.

And the Communications Minister's 26 March directions state that Icasa must relax spectrum regulations to enable "the temporary licensing" of "all available spectrum bands including the unassigned high-demand frequency spectrum" for "duration of the COVID-19 national disaster", and the temporary assignment of that spectrum must focus on licensees able to use it for duration of the disaster.

⁹¹ *MyBroadband*, 27 Jan 2021, "MTN launches legal action to fight spectrum auction issues", <https://mybroadband.co.za/news/cellular/384388-mtn-launches-legal-action-to-fight-spectrum-auction-issues.html>.

⁹² *BusinessDay* 8 Mar 2021 "Court halts spectrum auction again after complaint by Telkom and e.tv".

⁹³ Telkom SA SOC Ltd.

⁹⁴ e.tv (Pty) Ltd.

⁹⁵ *Telkom SA SOC Ltd and ano v Independent Communication Authority of South Africa and others* [2021] ZAGPPHC 120 (8 Mar 2021) per Baqwa J.

⁹⁶ *Inter alia*.

⁹⁷ *Telkom and ano v Independent Communication Authority of South Africa and others* (supra) par [23].

⁹⁸ *Inter alia*.

⁹⁹ *Telkom and ano v Independent Communication Authority of South Africa and others* (supra) par [45].

However, Icasa's regulations are to the effect that the high-demand spectrum bands are made available only until, whichever is earlier, three months after termination of the national state of disaster or (previously) "30 November 2020", (then) "31 March 2021", and (currently) "31 May 2021".

Icasa's regulations are subordinate, delegated measures, and must conform to the legal power or authority conferred on it.¹⁰⁰

Neither the Cooperative Governance Minister's 18 March regulations, nor the Communications Minister's 26 March directions, authorise Icasa to set "30 November", "31 March", "31 May" or any other specific date on which the high-demand spectrum must revert to Icasa, whether or not three months after termination of the national state of disaster has passed.

The reference in Icasa's regulations to "30 November 2020", "31 March" or "31 May" was thus *ultra vires* (beyond the legal power or authority conferred on Icasa by the Communications Minister's directions) and hence¹⁰¹ invalid, as is the present reference to "31 May 2021".

To ensure auction's lawfulness, Communications Minister should amend her directions to Icasa to permit auctioning of temporary spectrum during state of disaster

As mentioned, the Cooperative Governance Minister's disaster-management regulations authorise Ministers to issue directions to address the spread of Covid-19 including taking steps that may be necessary to minimise the effects of the national state of disaster. And the Communications Minister's directions require Icasa to enable temporary licensing of the high-demand spectrum for duration of the disaster.

It arguably therefore follows that the temporary allocation of the spectrum should continue for so long as is necessary to alleviate the effects of the disaster.

The unemployment rate at the end of the fourth quarter of 2020 rose to 42.6 percent.¹⁰² Economists have said that it could take South Africa three to seven years for employment to return to 2019 levels.¹⁰³

Arguably therefore, it follows that, only when it can reasonably be said that the effects of the disaster have been alleviated, should Icasa proceed with an auction.¹⁰⁴

But it is said that IMT (International Mobile Telecommunication) spectrum,¹⁰⁵ also commonly referred to as high-demand spectrum¹⁰⁶) should be released to the market as early as possible for operators to stay abreast of technological changes and demand, and that a three-year temporary assignment does not provide operators with the required certainty nor entice the massive investment required to extract full value from the spectrum.¹⁰⁷

¹⁰⁰ *Minister of Home Affairs v Liebenberg* 2001 (11) BCLR 1168 (CC) [2], [9], [13] per Skweyiya AJ (other members of the court concurring); *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and others (KZP)* [2010] ZAKZPHC 23 par 17.

¹⁰¹ See *Mulowayi and others v Minister of Home Affairs and ano* 2019 (4) BCLR 496 (CC) [19] per Mhlantla J (Mogoeng CJ, Cameron, Froneman, Khampepe, Theron JJ, Basson, Dlodlo, Goliath, Petse AJJ concurring).

¹⁰² *Reuters* 23 Feb 2021 "South Africa's unemployment rate jumps to new record high".

¹⁰³ *BizNews*, 28 Sep 2020. Prinesha Naidoo, "SA has highest unemployment rate in Bloomberg world survey".

¹⁰⁴ Icasa is focussing on its envisaged auction, not on its duty as directed to make unassigned high-demand spectrum available for duration of the disaster or any longer period necessary to alleviate its effects.

¹⁰⁵ See, e.g., Gen N 535 of 2020 (*Gazette* 43768 of 2 Oct). Icasa Invitation to Apply for licences for 700, 800, 2,600 and 3,500 spectrum bands to provide national broadband wireless access services for urban and rural areas: par 1.

¹⁰⁶ See *ITWeb* 25 Nov 2019 "ICASA welcomes ITU resolution on spectrum"; *IOL* 9 Oct 2020 "Unpacked: ICASA invitation to apply for High-Demand Spectrum and WOAN"; *ellipsis* 31 Jan 2021 "High-demand radio frequency spectrum".

¹⁰⁷ It is said that a sensible and reasonable auction that balances the needs of operators against the fiscal gains and socio-economic obligations should be completed as soon as possible.

Accordingly, and as a precautionary measure to ensure the lawfulness of Icasa's auctioning of the high-demand spectrum during the state of disaster and before the disaster's effects have been minimised, it would be prudent for the Communications Minister to amend her directions requiring Icasa to enable temporary licensing of the high-demand spectrum, so as to make expressly clear that the auctioning by Icasa of the temporarily-allocated high-demand spectrum during the state of disaster and before the disaster's effects have been minimised shall be lawful, provided the auction is subject to the condition that the successful bidder (and any transferee of the radio frequency spectrum licence concerned) shall, during the state of disaster and before the disaster's effects have been minimised, implement and use the frequency spectrum concerned for the duration of the COVID-19 national disaster and until the disaster's effects have been minimised.

Auction bidders should not be classified into tiers, with applicants in one tier being excluded from an opt-in round

Spectrum-auction applicants should not be classified into two tiers, with applicants in the one tier being excluded from an opt-in round of the spectrum auction.

(It is also submitted that the auction should be without reserve.

(The auctioneer should be obliged to accept the highest bid at the auction, and not be entitled to withdraw the lot from the auction.¹⁰⁸ In an unreserved sale the seller is bound to allow the lot to go to the highest bidder.¹⁰⁹)

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¹⁰⁸ See discussion in *Sugden and others v Beaconsur Dairies (Pty) Ltd and others* 1963 2 All SA 330 E 341.

¹⁰⁹ *Neugebauer & Co Ltd v Hermann* 1923 AD 564 574; *ABSA Bank Ltd v Universal Pulse Trading Figures 45 (Pty) Ltd and Others* 2011 (5) SA 80 (WCC) par 19.