



LAW

consumer protection & council support

Link FM Trust

Link FM Trust (a community of interest applicant based in East London) applied for a four year community sound broadcasting licence in the Eastern Cape and was competing with Imonti FM (a geographic applicant in the same coverage area) for the frequency. The Authority, having evaluated the applicants, decided to award the licence to Imonti FM. Link FM Trust launched an application for judicial review in the Eastern Cape Provincial Division of the High Court on the grounds that the IBA had not advised that it was competing for the same FM Frequency with Imonti FM.

The Court ruled that the IBA, in spite of having published material particulars of the applicants in the Government Gazette as required by the IBA Act, ought to have informed the competitors that they were competing against each other to enable both applicants to make representation on each other's applications. Failure by the IBA, to notify the applicants of the competing applications tainted the licence application process and the court referred the matter back to ICASA (successor of the IBA) for reconsideration.

Isorian FM

Isorian FM was refused a one-year temporary sound broadcasting licence for the period 1 April 2000 to 31 March 2001. Isorian FM launched judicial review proceedings and the matter was set down for hearing on 5 February 2002 at the Witwatersrand Local Division of the High Court.

ICASA and Isorian FM settled the matter out of court. This settlement was based on the view that as the Isorian FM application was refused without an oral hearing, ICASA would consider a fresh application from Isorian FM for a one-year temporary sound broadcasting licence for the period 1 April 2002 to 31 March 2003. ICASA would, if this application was submitted by 5 March 2002, exercise its discretion and decide whether or not to hold an oral hearing.

The Law, Consumer Protection and Council Support Programme is divided into three business units, i.e., Law; Consumer Protection; and Council Support. The responsibility of this programme includes, *inter alia*; legal advice on a broad range of communications and general administrative law issues including a wide array of statutes, regulations, and procedures; assistance and recommendations in adjudicatory matters before Council; management of all complaints lodged with Council in terms of sections 53 and 100 of the Telecommunications Act; secretariat support to Council and its Sub-Committees; co-ordination of Council's public hearing schedule; co-operation and consultation on international telecommunications matters with other regulators; development of plans for consumer safeguards, in the form of, *inter alia*, Customer Service Guarantees Standards; and the management of public education and awareness programmes on key issues affecting consumers.

Law

The core business of ICASA is rulemaking and licensing. Law is one of three key support services playing a critical role in upholding and supporting the rulemaking and licensing wheel as articulated in the CEO's report. The support provided by the Legal Department to ICASA's core business programmes, takes the form of opinions on various legal subjects, litigation, legal checks and scrutiny of all regulations passed by the ICASA Council, as well as the publication of notices in the Government Gazette.

During the year under review, the Legal Department managed various legal disputes, instituted either by or against ICASA. These include:

Radio Kingfisher

During the evaluation of four year community sound broadcasting applications in the Eastern Cape, ICASA refused Radio Kingfisher (a community of interest applicant based in Port Elizabeth) a four-year community licence and awarded it to Radio Nkqubela (a geographic community applicant in the same geographic area), which was competing for the same frequency. Radio Kingfisher brought a judicial review application against ICASA's decision in the Eastern Cape Provincial Division of the High Court on the following grounds: (a) lack of prior notice that Radio Kingfisher was competing for the same frequency with Radio Nkqubela; and (b) failure by ICASA to make the Licensing Unit's assessment report available to Radio Kingfisher.

The Court ruled that Radio Kingfisher was not afforded a fair hearing due to ICASA's failure to notify it of Radio Nkqubela's competing application as well as the non-disclosure of the assessment report compiled by its Licensing Unit.



Radio Pretoria

Radio Pretoria applied for a one-year temporary sound broadcasting licence together with 13 signal distribution licences to cover various areas of the country.

- > The Annual General Meeting (“AGM”) of the Association be held and properly constituted;
- > A new board be elected at the AGM; and
- > A new constitution be drafted and adopted at the AGM.

The application was brought to restrain the licensee from holding a planned public meeting and from representing that such meeting was an AGM. The application was based on averments that the licensee was not serving the community it was licensed to serve.

As the licensee had not met the conditions, ICASA did not oppose the matter and the licence lapsed on 30 November 2001.

ICASA/Megawan (Pietermaritzburg)

In response to a complaint received from Telkom SA, ICASA appointed and delegated inspectors, in terms of Section 98 of the Telecoms Act, to conduct an inspection on the site of the alleged radio interference. In response to ICASA Inspectors’ actions of searching and sealing equipment used by Megawan in terms of a warrant, Megawan lodged a High Court application in Pietermaritzburg seeking interim relief through the release of the sealed and seized equipment. ICASA filed papers opposing the application.

The Court set the warrant of the Magistrates Court aside on the basis that it had been incorrectly issued in terms of the Criminal Procedure Act instead of the Telecoms Act. It ordered that the decision to seal and seize equipment be set aside and that ICASA return the equipment. The Court further ordered that if there were interferences detected within thirty days of the date of the Court Order, such interference would have to be rectified by Megawan.

ICASA/Megawan (Gauteng)

Telkom SA complained to ICASA about radio interferences it was experiencing in various parts of the country. Upon investigation, ICASA found that the interference emanated from Megawan’s network operations. ICASA applied to the Transvaal Provincial Division of the High Court for a search warrant to carry out inspections of the sites from which the interference emanated. The High Court Application for a warrant was lodged in terms of section 99(1) of the Telecoms Act.

The judge declined to grant the application and held that such application should have been made after placing Megawan on notice.

ICASA refused the application on the following basis: (a) the Board of Directors of Radio Pretoria was not a product of a democratic election process as envisioned by section 32(3) of the Broadcasting Act; and (b) Radio Pretoria’s practice of employing “Boere-Afrikaners” was inconsistent with the Constitution and the Employment Equity Act.

Radio Pretoria launched judicial review proceedings, still to be heard by the Transvaal Provincial Division of the High Court, against ICASA’s decision.

Campus Bay FM

Campus Bay FM applied for a four year community sound broadcasting licence in Port Elizabeth in the Eastern Cape. It defined the community that it proposed to serve as being the youth and students around the Port Elizabeth area. ICASA refused this application on two grounds: (a) Campus Bay FM’s lack of support from schools situated in previously disadvantaged areas; and (b) lack of community participation in Campus Bay FM’s controlling structures.

Campus Bay FM launched judicial review proceedings against ICASA’s ruling in the Witwatersrand Local Division of the High Court and the case was heard on 29 November 2000. As at the end of the year under review, the Court had still not handed down a judgement.

Teks FM

Teks FM (a community broadcaster based in Secunda, Mpumalanga) which failed to submit an application for a four year community sound broadcasting licence brought an application before the Transvaal Provincial Division of the High Court for permission to broadcast without a licence. The application was set down for hearing on 26 March 2002.

The Court ruled that this case could not be decided on papers alone and remanded the case for oral evidence in a Trial Court. At the time of writing this report a trial date had not been set.

Phoenix Community Radio/ICASA and Others

ICASA was served, as an interested party, with an urgent application, brought by The Voluntary Association of the Greater Durban Metropolitan Region, issued out of the High Court of the Durban and Coast Local Division, against the licensee, Phoenix Community Radio, after it was granted a one-year temporary sound broadcasting licence provided that the following conditions were met by 30 November 2001:



ICASA/Telkom SA (Rate Regime)

Around June 2000, ICASA embarked on a consultative process to develop regulations on Fees and Charges ("Rate Regime Regulations") as required in terms of section 45 of the Telecoms Act. These regulations were supposed to replace the 7 May 1997 Ministerial determination on Fees and Charges, which lapsed on 7 May 2000. The effect of the new Rate Regime Regulations was the setting of new rules for fees and charges that a fixed line operator with market power could levy.

As part of the consultation process, ICASA put out a discussion document in the public domain for three months. Comments were received from stakeholders, including Telkom. Hearings were then held. On completion of the public participation process the new Rate Regime Regulations were submitted to the Minister on 10 September 2001 for approval and gazetting. The Minister signed and gazetted the Rate Regime Regulations on 26 November 2001.

On 14 November 2001, guided by the legal requirement that tariffs must be filed at least 30 business days before their implementation, Telkom filed its tariffs with ICASA for the year 2002. ICASA rejected the filing and insisted that Telkom, as it had been aware through its participation in the development of the new tariffs, should file its tariffs for 2002 in accordance with the Rate Regime Regulations gazetted by the Minister on 26 November 2001. Telkom refused to comply with ICASA's decision and made pronouncements in the media of its intention to implement tariffs based on the 1997 Ministerial Determination.

At this point, ICASA approached the Transvaal Provincial Division of the High Court seeking an urgent interdict to prevent Telkom from implementing its proposed tariffs without ICASA's approval and obliging Telkom to conform with the Rate Regime Regulations of 26 November 2001. Telkom responded with a counter-claim contesting that ICASA's new Rate Regime Regulations should be declared void for vagueness and set aside.

On the application for an urgent interdict, the Court ruled against ICASA on the grounds that: there was no possibility of irreparable harm being caused or suffered by consumers as a result of Telkom's new tariff given Telkom's offer to re-imburse consumers in the eventuality of a court finding against it; and further that the balance of convenience favoured Telkom, especially relating to the potential loss in revenue if the new tariff was not implemented.

In preparation for the return date, papers were supplemented but the matter had to be settled in consideration of the public interest. The terms of the settlement were:

- > Telkom's rate increase would remain as per its tariff filing of 14 November 2001;
- > ICASA would amend the Rate Regime Regulations on or before 15 September 2002 and Telkom will file its tariffs for 2003 in accordance with the amended regulations;
- > From 1 January 2003 to 31 December 2004, Telkom would forfeit R320 million from the allowable tariff increase for the period.
- > Telkom will provide a virtual telephony service in terms of which a telephone number will be allocated to under-served users to access voicemail.
- > Subject to certain conditions, Telkom will offer a "lifeline" service to defaulting residential customers whereby such customers may make and receive calls to and from specific emergency telephone numbers.

Startrack Communications Africa (Pty) Ltd/ICASA

Startrack Communications Africa (Pty) Ltd ("Startrack") applied to ICASA for a Radio Frequency Spectrum Licence to provide a telecommunications service, comprising asset tracking and monitoring. In this application the signal to be transmitted emanated from South Africa and travelled to Perth in Australia where the data received would be processed and transmitted back to South Africa. ICASA refused the application on the following grounds:

- > Startrack had to possess a telecommunications service licence as required by section 32(1) of the Telecoms Act.
- > The service provided by Startrack was an international telecommunications service, and therefore the licence for such a service could only be considered after an ITA, issued by the Minister as contemplated in section 34(2) of the Telecoms Act.
- > The service was a new category of telecommunications service, which required the development of regulations by ICASA as envisioned in section 34(2) of the Telecoms Act.

Startrack launched review proceedings in the Transvaal Provincial Division of the High Court, seeking to set aside ICASA's decision on the grounds that:

- > The service it wished to provide was not a telecommunications service and was therefore not subject to the provisions of section 32(1) of the Telecoms Act; and
- > It had invested large sums of money into its asset tracking business.

The Court granted an interim order setting aside ICASA's decision on the basis that the balance of convenience favoured Startrack given the large amounts of money invested by Startrack in anticipation of the spectrum licence.

The Court is now considering the merits of this case and ICASA is opposing Startrack's application.



Section 100 complaints adjudicated by ICASA

Telkom SA Ltd/AT&T Global Network Services SA (Pty) Ltd

Telkom filed a complaint with ICASA on 20 November 2000, in terms of section 100(1)(a) of the Telecommunications Act against AT&T Global Network Services South Africa (Pty) Limited ("AT&T"), VANS licensee. Telkom's principal complaint was that AT&T was providing a PTN Service to IBM, which was not authorised by its licence. AT&T filed a counter complaint in terms of section 53 of the Telecommunications Act, alleging that Telkom's failure or refusal to provide AT&T with telecommunications facilities violated sections 43(1) and 44 read with section 100 of the Telecommunications Act and was inconsistent with section 53 of the Act because it was likely to have the effect of giving undue preference to Telkom's own VANS operations. After an analysis of the provisions in the Act and a study of the evidence and arguments by counsel for Telkom and AT&T, ICASA reached the following conclusions:

- > Managed Data Network Service ("MDNS") does not consist of managing PTNs which customers use for data communications;
- > MDNS is a form of VANS to be licensed and regulated under section 40 and not section 41 of the Telecommunications Act;
- > AT&T was not operating PTN services;
- > A PTN is not the same as a VPN, which is a form of technology that may be used to construct MDNS;
- > Whether MDNS are marketed as a VPN Feature Service is irrelevant from a regulatory perspective;
- > AT&T offers MDNS services to IBM and Telkom did not produce any convincing evidence to demonstrate that there was no value add or that the service provided by AT&T was a PSTS; and
- > AT&T's MDNS fell within the scope of a VANS in terms of section 40 of the Telecommunications Act.

ICASA further held that Telkom was competing with AT&T in the competitive VANS market. By withholding the provision of facilities from AT&T, Telkom had taken an uncompetitive stand in terms of section 53 of the Telecommunications Act. This was likely to have the effect of giving undue preference in the VANS market to its own VANS supplier and had caused undue discrimination against AT&T by limiting its capacity to compete with Telkom in the VANS market.

ICASA, accordingly invoked the provisions of sections 43(1) and 44 of the Telecommunications Act, and directed Telkom to provide AT&T with the telecommunications facilities it required.

Telkom SA/Internet Solutions (Pty) Ltd

Telkom SA Limited ("Telkom"), filed a complaint against Internet Solutions on 21 December 2000, in terms of section 100(1)(a) of the Telecommunications Act. Internet Solutions (Pty) Ltd ("IS") is a VANS licensee, which provides Internet access services to its customers in terms of section 40 of the Telecommunications Act. Telkom alleged in its complaint that IS was making its telecommunications facilities available to customers through a

service called IP-Net for the purpose of a PTN. Telkom argued that the provision of a PTN is dependent on the use of facilities provided by a PSTS, which prior to 7 May 2002, only Telkom was licensed to provide. In the event that such a service (provision of telecommunications facilities) is provided by a VANS like IS, that practice conflicts with section 40(4) of the Telecommunications Act. In its complaint, Telkom also alleged that IS was providing a private international link from the United Kingdom to KVV Ltd on the IS network. Telkom alleged that by doing this, IS was making telecommunications facilities available to KVV Ltd. In this manner, Telkom alleged that IS 'resold' the bandwidth it leased from Telkom in contravention of section 40(4)(a) of the Telecommunications Act. Telkom further alleged that the service offered to KVV Ltd contravened section 32 and 36 of the Telecommunications Act and is in contravention of IS's Licence.

In its response, IS stated that the IP-Net service is an enhanced Internet service, which, in addition to providing a customer with access to the Internet also provides security and performance through the utilisation of Multiprotocol Label Switching ("MPLS") software. IS denied that it made telecommunications facilities available to a PTN or that it ceded or assigned or sublet or parted with control of, or otherwise disposes of facilities in violation of section 40(4) of the Telecommunications Act. IS stated that it allowed its IP-Net customers to make 'due and proper use' of the telecommunications facilities leased from Telkom in accordance with section 40(4) of the Telecommunications Act. IS also denied Telkom's allegation with respect to KVV Ltd. IS stated that it provided KVV Ltd with an Internet access service and not a 'private international link'. IS denied that this involved any resale of bandwidth in contravention of section 40(4)(a) of the Telecommunications Act. IS alleged that both services offered to KVV Ltd and IP-Net services were VANS.

ICASA dismissed Telkom's complaint as unfounded and concluded that:

- > IS offered a legitimate Internet access service as a VANS licensee in terms of section 40 of the Telecommunications Act;
- > IS is not in violation of s32 and s36 of the Telecommunications Act;
- > IS is not operating a PTN in terms of section 41 of the Telecommunications Act;
- > The service IS delivers to KVV Ltd is a VANS service and not a PSTS service;
- > IS is not permitting the service provided to KVV Ltd to be utilised for the carrying of voice;
- > The intended IP-Net service is a VANS service in terms of section 40 of the Telecommunications Act.

Consumer Protection

The Consumer Protection Department continued to play an important role in the areas of consumer education, public awareness and consumer complaints. During the year under review, the Department intensified its public education of the disadvantaged communities of South Africa. It is important that the Authority informs and educates the public about their rights and the recourse available in cases where operators fail to meet their obligations. Resources by way of print and electronic media and other facilities such as transport remain a challenge for the achievement of these goals.

In the recent court case between ICASA and Telkom SA Ltd in which Telkom refused to file its tariffs in terms of the Rate Regime Regulations of 26 November 2001, ICASA decided to take action against Telkom in the interest of the consumer. In its decisive stand, ICASA's credibility was enhanced in the eyes of the general public. Support was received from members of the public, economists, lawyers and other major stakeholders. The settlement reached signalled to the industry and the consumer that the regulator was indeed committed to regulating in the public interest.

The Department continues to deal with complaints received from consumers. The complaints relate to billing, installation, line transfer, disconnection, faults, service, network coverage and migration. During the year under review this department received and processed a total of 258 complaints. Of these, 193 were registered against Telkom, 21 against Vodacom, 12 against MTN and two against Cell-C. It is interesting to note that the majority of complaints against these operators related to service.

Council Support, Secretariat and International Relations

The Council Support, Secretariat and International Relations Department performs the following functions: provision of secretarial support to Council and its subcommittees; co-ordination of Council public hearing schedules; co-ordination of the participation of ICASA in international events; and all logistical arrangements. During the year under review, a total of 23 hearings were held from 24 April 2001 through to 27 March 2002.

ICASA also participated in the following international meetings and events during this period:

ITU

- > Africa Regional preparatory meeting for the World Telecommunications Development Conference ("WTDC-02"): Cameroon on May 29-31, 2001;
- > Global Symposium for Regulators held in Geneva on December 3, 2001;
- > The World Telecommunications Development Conference ("WTDC-02") held in Istanbul on March 18-27, 2002.

TRASA

- > Type approval - ICASA hosted INCM (Regulator of Mozambique) telecoms regulator from Mozambique in July, 2001;
- > SADC sharing study between the FWA and TV Broadcasting : Zambia on August 16, 2001;
- > TRASA AGM: Zambia 4 to 5 September 2001;
- > TRASA meetings on wholesale pricing: Zambia 3 to 4 September 2001;
- > African Forum for Utility: Ghana - 1 to 4 May 2001;
- > Human Resources And Empowerment Committee meeting: Arusha - 23 to 26 July 2001;
- > Fair Competition and Wholesale Pricing meeting hosted by ICASA - 7 to 8 March 2002;
- > Development of guidelines and model legislation for universal services access.

