

Now we're talking

How Altech's court case will allow SA telecoms to move into the real world

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WINNERS AND LOSERS

POTENTIAL BENEFICIARIES...

- In the listed environment: Altech, Vox Telecom, Dimension Data (through subsidiary Internet Solutions).
- ECN, Telfree, Smile Telecomms (Irene Charnley's company), Uninet (in which former Telkom CEO Papi Molotsane's company Synglo has a 65% stake) and other Vans operators, particularly those with access to finance and with empowerment credentials.
- Dark Fibre Africa (CIV and VenFin-owned).
- Consumers (hopefully, although ECN CEO John Holdsworth maintains the ruling will have little actual effect until the licences have been issued and the pro-competitive regulations are in place).

NOT SO GOOD FOR...

- Incumbent operators Telkom, Vodacom, MTN, Neotel and, possibly, also Cell C.
- M-Web. Although it will also qualify for an I-ECNS licence and could be in line for WiMax spectrum, the fact that others will also qualify lessens its competitive advantage and means it could potentially be worth less to suitors in the current auction process being undertaken by Naspers.

THE RECENT HIGH COURT ruling in favour of Altech Autopage is a landmark one. It means value-added network service (Vans) licensees can roll out their own telecoms networks instead of being forced to buy from the incumbent operators. It's undoubtedly the most exciting development in South Africa's telecoms sector for years.

Those that opposed Altech's decision to go the legal route did so mostly because they feared it would slow the deregulation of the sector. However, it had the opposite effect – effectively throwing the floodgates wide open to anyone with the financial wherewithal to compete.

Altech CEO Craig Venter was naturally pleased that, in hindsight, the company had the backbone to stand up to Government and the regulator. "The liberalisation process has been substantially speeded up by this ruling," he said following the judgment.

That doesn't necessarily mean there will be hundreds of new operators. The market is relatively small, and even if there were a proliferation of new players there would inevitably be consolidation down the line. It's incredibly expensive to build a network, and not all those that set out to do so would necessarily be able to stand on their own two feet.

Quoting from their respective presentations, Judge Davis said MWEB intended to spend R700m over five years, while another respondent (which trades under the name "24") said a "very small network" of just 60 stations would cost up to R300m. Meanwhile, Altech says it intends to operate a network with 1 500 base stations.

However, enabling market forces to determine who joins the fray is a crucial ingredient that's been missing in SA's telecom sector. So, if the judgment stands, prices should come down.

However, there are still some important, unresolved matters. Neither Communications Minister Ivy Matsepe-Casaburri nor regulator Icasa have yet responded fully on the judgment that went so horribly against them – they were even ordered to pay Altech's costs – other than to say (via their spokesmen) that they were studying its contents.

If either decides to appeal – although on what grounds they would do so isn't clear, as the judgment was overwhelmingly conclusive – that could put a spanner in

the works. But even if there's no appeal, or they lose on appeal, Icasa must still complete the licence-conversion process by January next year at the latest in terms of the timetable set out for it in SA's Electronic Communications Act (ECA).

Icasa promised to convert some licences by month-end and last week told *Finweek* that had been done. However, at the time of writing Vans were still saying they'd yet to receive their Electronic Communication Service (ECS) licences.

At least, in terms of the judgment, Icasa doesn't have to continue with its competitive process to determine who qualifies for an Individual Electronic Communications Service (I-ECNS) licence. It simply needs to ask which former Vans licensees want one and give it to them.

Some believe the industry will move quickly to take advantage of its new-found right to roll out networks without waiting for either the minister or Icasa to make their next move.

Judge Davis said Altech's "existing [Vans] licence permitted it to self-provide its own telecoms facilities... which include the right to provide network and connectivity services". He added it had had the right to do so since 1 February 2005, as did SA's other Vans.

Some operators went ahead and began self-providing based on the "ministerial determinations" of September 2004, but those that did were widely regarded as doing so illegally. However, they took advantage of a fact that hadn't been tested in court, so it represented a grey area. Those that dithered will now want to make up for lost time.

Once the licence conversion process is complete, Icasa must also put a host of other pro-competitive regulations in place, including non-discriminatory numbering, fixed-line number portability, cost-based interconnection and facilities leasing, carrier pre-selection and local loop unbundling (See box).

Some, such as ECN CEO John Holdsworth, say having the licence in the absence of those regulations is almost useless.

I'd be willing to bet there will be more litigation if Icasa takes too long deliberating some of the new regulations. But back to the judgment and what led up to it. The matter dates back SA's old Telecommunications Act and the Department of Communication's (DoC's) policy of "managed liberalisation".

In terms of the old Act, Minister Matsepe-Casaburri had to set a date by which Vans could obtain the telecoms facilities from operators other than Telkom, once its monopoly expired in May 2002, and from operators

other than Telkom and the second national operator (Neotel) thereafter. She fixed the date by way of a "ministerial determination" (published in September 2004), on 1 February 2005.

Icasa interpreted that as that Vans could self-provide, but later backtracked – after apparent ministerial intervention – by not including self-provision in the final Vans regulations.

The minister argued she had never intended for the Vans to be able to self-provide and that's the line both she and Icasa fought in response to Altech's court application.

The ECA was promulgated in July 2006 and it was Icasa's role to breathe life into the Act by converting old licences into their new categories and making various other pro-competitive regulations. The old licences remain valid in the meantime.

Icasa started its licence-conversion process, publishing a number of drafts of how licensees would look post-conversion, and inviting public comment.

In the midst of that the minister published more "determinations" to – among other things – "guide" Icasa on how to proceed with the conversion process. Her September 2007 "determination" directed Icasa to "urgently consider whether none, or only certain, of the existing Vans licensees can be authorised to provide services as well as provide and operate electronic communications facilities or networks to ensure that such licensees are issued electronic communications network service licences..."

In other words, Icasa had to decide who would be allowed to self-provide.

Justice Davis was scathing of the way the minister went about prescribing to Icasa how that should take place. "Clearly, such direction oversteps the line of interference and encroaches upon the second respondents' (Icasa's) independence."

On the minister's instruction, Icasa issued a statement saying it would undertake a competitive process for



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Ivy Matsepe-Casaburri

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Craig Venter



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Ajay Pandey



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Pieter Uys



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Richard Came



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Tony van Marken

these I-ECNS licences.

Altech and some other Vans weren't pleased with Icasa's stance on the conversion process but participated at the public hearings. Altech also wrote to Icasa on a number of

CUTTING THROUGH SOME OF THE TECHIE-SPEAK

- Non-discriminatory numbering: all operators having access to geographic numbers rather than the current, inferior 087 numbering range the Vans have been allocated.
- Fixed-line number portability: for example, switching from Telkom to Neotel, while keeping your landline number.
- Cost-based interconnection: the cost of connecting a call from one network to another. It's currently set by the industry. Prohibitive for the small operators to compete, as they'll naturally terminate fewer calls than they'll route to the incumbents' networks.
- Facilities leasing: having affordable access to essential facilities, such as submarine cables.
- Carrier pre-selection: being able to choose which operator you want to route a call via – no matter whose network the call is travelling over.
- Local loop unbundling: the so called-local loop is the "last mile" of a telecoms network that connects homes and offices to the network backbone. Telkom owns that infrastructure and the Telecommunications Minister has set down 2011 as the date by which it must share that with the rest of the market on a cost-based arrangement.

occasions objecting to the process and maintaining it had the right to see its Vans licence converted into an I-ECNS (one enabling it to self-provide), as well as an ECS.

Those Vans that seemed the most likely beneficiaries of I-ECNS licences when Icasa had adjudicated – such as Vox Telecom and Internet Solutions – were critical of Altech for launching its court application so late in the process.

Subsequent to the judgment, Vox CEO Tony van Marken conceded it had instead yielded a positive outcome and said the ruling "levelled the playing field".

However, the ruling doesn't mean that anybody can roll out a wireless network. Spectrum (the airwaves) is a scarce commodity and only an estimated five or so new operators would be allocated spectrum to roll out a WiMax network. WiMax is a relatively cost-effective, high-speed wireless technology that incumbents such as Telkom, Neotel, Sentech and Wireless Business Solutions (iBurst) have access to. Others, including Altech and MWEB, have tested the technology.

Altech's victory doesn't mean it will necessarily build a national network. "But at least the process (for it and the entire industry) is now clear and transparent," Venter says. The Altech board would now consider all its options, which could include rolling out a wireless network (subject to obtaining the necessary spectrum) and a fixed-line network, as well as consolidating or partnering with other players. "There are only a handful that would have the financial wherewithal to build a national network. Altech would be one of those," says Venter.

Having an I-ECNS licence is the first ticket to the prospective wireless feast. The second is having the right black economic empowerment

credentials. Icasa says applicants for WiMax spectrum must have 51% empowerment ownership in order to qualify. Venter says the industry is taking that up with Icasa, after Icasa raised the bar from 30% ownership: "We don't believe the 51% is a *fait accompli*."

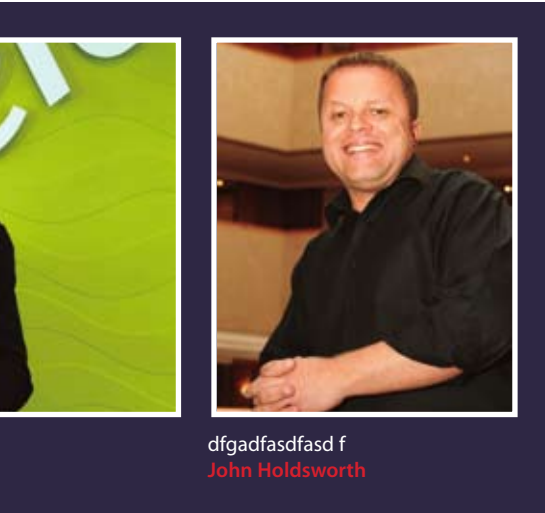
Van Marken says with its empowerment credentials (it will be 51% black owned before year-end), Vox would be well placed to qualify for WiMax spectrum. But it would also look at some high-traffic metropolitan routes and could consider leasing fibre optic capacity "selectively" along those from Dark Fibre Africa, a fibre capacity provider to operators. He says Vox would study the judgment and decide how and when to proceed.

ECN, another Vans licensee and VoIP (Internet-based networks) operator to corporates, was also surprised but elated by the ruling. CEO John Holdsworth says the landscape has been fundamentally changed. "Now it's open season," he says. ECN had never intended to roll out its own network, so the ruling doesn't necessarily affect it directly. However, Holdsworth says it could, for example; consider renting capacity from a player such as Dark Fibre Africa instead of one of the incumbents.

The court ruling was also important as it set the trend. "I think Icasa and the DoC will now be more reluctant to oppose attempts to open up the market," says Holdsworth.

Greg Massel, MD of Switch Telecom (another Van that recently launched its services, mostly to small businesses), says it had no intention of rolling out a large-scale network. But the ruling would give it the ability to roll out specific, ad hoc links when the existing operators couldn't provide that capacity. It would also consider talking to Dark Fibre Africa, he says.

The Internet Service Providers' Associa-



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John Holdsworth

tion (ISPA), a representative body for Vans licensees, also welcomed the ruling, saying it would study it and advise its members.

Dark Fibre Africa CEO Richard Came says the ruling broadens its client base from a pool of five to possibly 10 or 15 players. The company is jointly owned by Community Investment Ventures (70%) and VenFin (30%) and has raised R2bn to meet its capital requirements over the next three years.

Came doesn't believe there will be a massive free-for-all of 600 Vans operators all rolling out networks and digging up the roads – given the cost of doing so. But he agrees the ruling broadens the landscape and gives some alternative telcos a chance to compete. Came says some of those could now pool their resources and buy capacity from it on a wholesale-type basis.

Some of the major operators – such as Neotel and Vodacom – are already using Dark Fibre Africa or have used it for select routes. It still hopes to get all of them on board. Came says there's more than enough capacity to cater for all their current and future bandwidth requirements for years to come.

MTN has been more cautious (and hence started later) than Vodacom in self-providing its own links but its rollout is now also in full swing. CEO Phuthuma Nhleko recently alluded to finding less disruptive ways of rolling out its infrastructure when speaking at MTN's recent interim results presentation.

Came says it had been happy to hear MTN speak like that. He says MTN would be able to come on board with it in a matter of months rather than the year or two it would take to replicate its infrastructure. Came estimates the biggest portion of capital expenditure required to build telecoms infrastructure lies in the actual trenching, or civil engineering component.

Being able to cut that out means more players could feasibly afford their own networks.

Since it started laying fibre optic cabling in October last year Dark Fibre Africa has put roughly 200km of ducted cabling in the ground in the metropolitan areas of Gauteng, KwaZulu-Natal and Cape Town, and anticipates it could have laid as much as 700km by year-end. However, that would depend on getting the right of way to do so from SA's metros, which are becoming stricter about granting access, Came says. It also plans a national backhaul network.

Dark Fibre Africa uses a shared infrastructure model that should prevent too many operators from digging up roads. To speed things up it uses a fibre-laying machine that cuts a narrow trench into a road. Came says it currently has eight Cleanfast machines on metro roads (they're owned by Muvoni Weltext, a CIV subsidiary) and anticipates doubling that number by year-end.

But while the prospective new operators celebrated the consequences of the Altech judgment, the ruling is arguably a blow to the incumbents, which could see a significant increase in competition almost overnight. A managed liberalisation process would, by its very nature, favour the incumbent operators. Anything that has the effect of accelerating that is not in their favour.

However, most seem to maintain (as Telkom did for years in the run-up to Neotel eventually being licensed) that competition is a good thing. Speaking on Talk Radio 702's the World at Six programme, Vodacom CEO-designate Pieter Uys said it had long anticipated additional competition with the passing of the ECA. But with extra competition also came new opportunities and choices. That would also help keep Vodacom on its toes, he said. "We aren't afraid of competition."

Neotel CEO Ajay Pandey holds a similar view. Speaking as part of a CNBC Africa panel discussion called "Telco Talk" (in which this journalist also participated), Pandey said the market was relatively small and, as such, wouldn't support too many operators. But he did say competition was good for the market and Neotel welcomed that.

MTN South Africa MD Tim Lowry says (as part of a written response to *Finweek*) that the judgment "doesn't alter MTN SA's self-provision plans".

Telkom's acting group executive for corporate communication Nabintu Petsana said in response to the ruling the company was "assessing the judgment and will consider its options once the full assessment has been completed".

LICENSE CATEGORIES UNPACKED

LICENCES UNDER THE OLD TELECOMMUNICATIONS ACT

1. Public Switched Telecommunications Network (PSTN). That licence initially only related to Telkom but was later extended to include Neotel. Such licensees have various rights and obligations, such as meeting universal access targets
2. Mobile Network Operator (MNO). That licence was given to Vodacom, MTN and Cell C. Although there was talk of inviting a fourth bidder the Electronic Communications Act – with its technology neutral stance – seems to have negated the need for it.
3. Private Telecommunications Network (PTN). Such licensees were typically large corporates with a significant branch infrastructure and could build a network for internal use. From February 2005 they could also on-sell spare capacity to operators.
4. Value Added Network Service (Vans). A licence category created to accommodate Internet service providers and other service providers with few rights or corresponding obligations. They had to buy capacity from other licensed operators and, consequently, were largely at the mercy of Telkom.

NEW LICENSE CATEGORIES UNDER THE ECA

Each can be national (called an individual licence) or local (a class licence) in scope:

1. ECS – Electronic Communications Services. A licence to offer value added services. All operators who provide services, ranging from telephony to Internet connectivity, etc, qualify for such a licence, including the incumbents. Icasa had also maintained it's the licence the old Vans would be entitled to.
2. ECNS – Electronic Communications Network Service. A licence entitling the holder to roll out its own network and use those facilities over which to provide a service in terms of its accompanying ECS licence. The Altech judgment says all Vans should qualify for that licence.
3. Broadcasting services. Self-explanatory: radio and television broadcasters.