

If you are going to be evil, don't be stupid at the same time.

ICASA committed the “thou shalt commit adultery” error in a grotesquely comical fashion, and chickens may come home to roost

Typographical, spelling and grammatical mistakes are an inevitable part of life. Some writers commit considerably more silly errors than others; and of course some individuals take great joy in pointing out errors of a minor nature. For this practice said people are given the overly kind description of grammar Nazis or pedants. As a serial abuser of the English language (and also as a person who struggles the urge to alternate between (i) making spelling and grammatical errors with (ii) the injecting of profanities, vulgarities and risqué innuendo into my work), I am usually the last person to point out an error in the work of others— especially if the error is one that arose from late night carelessness or is tantamount to a brain fart. Today is an exception, we need to start by laughing and then move into ridiculing the clowns. I spent part of yesterday reading over the regulations and amendments to the regulations to properly establish the conditions which would disqualify a company from bidding (apply in the language of the regulations) for the high demand spectrum which Vodacom and MTN propaganda claim explains South Africa's increasingly untenable data prices lead to a discovery that (as presently written):

- (3) An applicant shall be disqualified from the application process where such applicant:
- (d) has a minimum 30% (thirty percent) equity ownership held by persons from Historically Disadvantaged Groups; alternatively, in instances where an Applicant does not have such 30% equity ownership, must be a level 4 and above contributor (BBBEE status) in terms of the Codes of Good Practice published in terms of section 9(1) of the BBBEE Act.

You read that correctly – under the regulations as amended – being an empowered company is a mandatory basis for disqualification from securing spectrum. If ICASA had a track record of competence one might believe conspiratorially that this was a ploy by white monopoly capital (whatever that may mean) to apply apartheid principles to spectrum. Unfortunately (at least for racist white supremacists who would love nothing more than to control the airwaves) ICASA's track record is such that such an intention to protect white monopoly capital or re-introduce apartheid through some grand scheme cannot even be considered a remotely possible explanation. However the standard application of Hanlon's razor cannot ever be applied to ICASA either: ordinarily we should avoid attributing to malice those things which stupidity adequately explains – otherwise we give governments and large companies far too much credit of agency and intention.

But what of the incompetently malicious? In present times it seems that applying Hanlon's razor and discarding monumental failures of governance on explanations of stupidity is to give far too much cover under which an insurgency of evil takes place – it may be enough for evil to thrive if the populace fails to act because it fails to recognize the malice in its midst thinking that the malevolent is no more than a buffoon.

Of course it is possible to have a situation in which that which is evil, is both evil and incompetent and if we fail to understand that many of the most malicious schemes the devil may conjure are unsuccessful because the malicious are usually a lot stupider than they would like to believe: stupid

criminals are caught quickly; cocky criminals get stupid and then caught – not universally but more often than the malcontent assume when they begin on their merry path of malevolence. For various reasons – made clear in the history of the matter – ICASA’s prohibition (found in the regulation as amended but not practised – at least not yet) on black owned businesses acquiring high demand spectrum is an instance where the error can be explained with reference to stupidity (not reading the regulation that was being amended) but an explanation of stupidity only presents half of the story. And the other half of the story is actually more important – at least to anybody who is concerned about state and regulatory capture. We are dealing the situation in which ICASA and the dominant incumbents (or at least one of them) were trying to do something mischievous and did it badly.

To better understand the error, the first place to begin is the *Electronic Communications Act* of 2005 (the ECA). This statute sets out to regulate the entire field of “electronic communications” rather than having different laws for landline telephone services (a field in which Telkom enjoyed a legally protected monopoly and now suffers a *de facto* monopoly), mobile phone services (where Vodacom and MTN have embraced monopolistic practices and business strategy), Internet, broadcasting (where the SABC has embraced a strategy of undermining the public trust and pillaging the public purse and Naspers historically adopted monopolistic strategies with their Multichoice business but has evidently seen the light) and so on. This approach forms part of a legal framework that is predicated on the idea of convergence, of an industry in which there is competition at different layers and where interconnections between licensees forges a robust and dynamic multi-stakeholder sector. Many of the principles found in the legislative spell of a decade after the new Constitution were ahead of their time and have been found wanting to be embraced by politicians notwithstanding being codified into law. The ECA requires and calls upon regulations to be prepared and publicly commented on before ultimately being adopted. ICASA spent a considerable amount of time not bringing appropriate regulations into effect and the requisite regulations concerning spectrum were only passed in 2011. In March 2015 ICASA replaced the 2011 regulations with *The Radio Spectrum Regulations 2015* [<https://www.ellipsis.co.za/wp-content/uploads/2011/02/Radio-Frequency-Spectrum-Regulations-2015.pdf>] (the Radio Regulations). In terms of this regulatory framework in order for ICASA to hand out rights to use high demand spectrum (which of course is the spectrum which an operator needs to offer an LTE service) an “extended application procedure” is required and within this procedure there are both qualifying criteria and disqualifying conditions for everybody seeking to obtain the spectrum. ICASA need to invite prospective parties to apply for the spectrum in demand and hold an auction or similar rational manner to perform the handing out of a “lot” of spectrum to the successful applicant. In 2015 ICASA put out an information memorandum in preparation to hold an auction. For various reasons, undoubtedly one of which was that it had been pointed out to ICASA that none of the then entrenched market participants who were ready to part with a sizeable amount of money were eligible to participate in the spectrum auction. The reason was that the Radio Regulations included the following clause disqualifying potential bidders for high demand spectrum:

Reg 6.(3) An applicant shall be disqualified from the application process where such applicant:

- (a) has submitted an application and is an affiliate of another applicant, or has an ownership of financial interest in another applicant within the same application process;
- (b) has been granted a radio spectrum licence by the Authority within the designated range unless the licensee has less than the maximum bandwidth made available in line with these regulations in which case they will only be allowed to apply for additional spectrum which results in the total assignment not exceeding the maximum bandwidth made available;
- (c) has submitted more than 1 (one) application to the Authority for the grant of a radio spectrum licence within the designated range;

- (d) has less than 30% (thirty percent) equity ownership by Historically Disadvantaged Persons (HDP) or is below a level 4 contributor (BBBEE status) in terms of the Codes of Good Practice published in terms of section 9(1) of the BBBEE Act;
- (e) has submitted an application which contains false or misleading information;
- (f) is colluding or has attempted to collude with another applicant with the intention to distort or manipulate information;
- (g) has obtained or acquired confidential information relating to another applicant;
- (h) has failed to notify the authority of the changes referred to in the application forms;
- (i) has failed to comply with the terms and conditions of the application set out in the ITA; or
- (j) has failed to comply with a request in terms of these regulations.

It is of course regulation 6(3)(d) which creates a massive headache for Vodacom, MTN, Telkom and CellC. At this exact point in time I am uncertain as to what the exact percentage of each players “historically disadvantaged persons” is but considering that a year ago Vodacom announced plans to increase their black shareholder tally to 20% and Telkom has considerable government and PIC shareholding (neither of which help in satisfying this particular condition). It is understandable that the mobile network operators (MNO) , especially Vodacom and MTN, would do whatever they legally and ethically could to protect their shareholders interests in light of this provision. Unfortunately rather than revisiting their business plans to adjust to the landscape all evidence points to the MNO’s having adopted a *kragdadigheid* strategy and mentality and at least one MNO hired a smooth operator (as in a person of limited substance, some charm and a capacity to get the desired outcome regardless of the long term consequences). In mid to late 2016 ICASA pushed forward again with a plan to embark on a spectrum auction and all indications were that pesky things like regulations and an agreed upon legislated for transformation path would simply be ignored. Unfortunately for ICASA and the MNOs the then minister responsible for the sector decided to secure an interdict and a skirmish between the DTPS and ICASA waged for a while. Of course throughout 2015 and 2016 the MNOs were both waging a lobbying and a propaganda war (which they continue to wage) in which they seek to instil in the public conscience the idea that dominant MNOs should be given a free ride with respect to spectrum and that this will result in lower data prices for consumers. The truth is of course a lot more nuanced and the reality is that properly effected a strategy of introducing new market participants who hold spectrum licence assets and contract with incumbent operators to “farm” those rights has a significantly greater chance of maximizing long term consumer benefits as a consequence of competition. On the lobbying front a particular smooth operator boasted during a 2017 workshop on proposed amendments to the ECA that his team had managed to get ICASA to solve the problem posed by regulation 7(3)(d). It is worth pointing out that this requirement that high demand spectrum find its way to the control of firms which are significantly more transformed was present in the 2011 regulations already. Moreover the question of whether spectrum could be leased by a holder had been dealt with and it is trite that a spectrum holder can lease equipment from another firm and may outsource engineering and related functions but a firm with equipment cannot lease spectrum from the holder. It is helpful to think of network infrastructure as tractors and irrigation machines (and engineers as farm workers) and spectrum as land. Under the regulatory framework it is intended that the land will be used to enhance the empowerment of historically disadvantaged individuals. The landholders may therefore lease equipment and hire farm workers from the incumbents but the incumbents cannot acquire more land. The problem of course is that the incumbents don’t want to change their business, they want to own the land and claim that food shortages are because they aren’t being given the land – a claim which distorts the fact that a simple known adjustment to their business makes them no worse off and able to prosper. Quite simply the MNOs wanted to change the rules in order to serve their egos and to make the business plans they understood the law of the

land. They found an opportunity in the process of promulgating amendments to accommodate the V and E bands of spectrum – which are not high demand spectrum.

What had been done was that in an exercise of amending the Radio Spectrum Regulations 2015 in order to accommodate the developments taking place in the V and E band promulgated a document titled *Amendment of the Radio Frequency Spectrum Regulations, 2015* [<https://www.ellipsis.co.za/wp-content/uploads/2016/06/Radio-Frequency-Spectrum-Amendment-Regulations-2016.pdf>]. The work on the V and E Bands is laudable, but as often happens something stupid was stuck into an amending instrument that was unrelated to its actual purpose. In this case clause 3. Clause 3 reads:

Amendment of regulation 7 of the Regulations

Regulation 7, sub-regulation (3) of the Regulations is hereby amended by the substitution for paragraph (d) of the following paragraph:

“(d) has a minimum of 30% (thirty percent) equity ownership held by persons from Historically Disadvantaged Groups; alternatively, in instances where an Applicant does not have such 30% equity ownership, must be a level 4 and above contributor (BBBEE status) in terms of the Codes of Good Practice published in terms of section 9(1) of the BBBEE Act.

Should we be laughing though, or does laughing make tardy work accepted and ultimately lower standards? My approach is that it is as important to laugh at the folly of others, as to laugh at oneself and that while standards may be important, to err is human. Moreover it is better for journalism if a publication has an editor with integrity than a sub-editor who discovers every grammatical error. It amounts in my mind to a situation in which we laugh at failures of form and care about substance. I laugh at my own mistakes when discovered and so clerical errors of all shapes and forms make me giggle, they do not instil a sense of righteous indignation when made innocently or through folly. When errors are in religious or legal works they are a little more amusing. I disagree vehemently with the pedant who believes that identifying mistakes is an exercise of achieving superiority, or who is more concerned with form that they lose all sight of substance, or worse rhetoric and aesthetic: incorrect writing or speaking with idiosyncrasies add colour to the world. Reading case law is made significantly less tedious by a quest to find the occasional witticism from the bench or scrivener's error which will be attributed to a functionary but one imagines may have also come from the bench. Contracts can be meticulously drafted and contain a spelling mistake that is repeated throughout the document because the author simply did not know that there was supposed to be a “k” and a “z” in the name of the newest hipster establishment and the fact that one of my sisters is referred to as a “gril” in my parents divorce settlement is a cause of a chuckle. We really should only care a great deal about an error if it is material or leads to ambiguity or uncertainty. Perhaps the finest example of a scrivener's error is to be found in the aptly nicknamed *Wicked Bible* wherein the “not” is erroneously (at least it is presumed erroneously) omitted from the commandment. ICASA in 2016 made itself guilty of setting up a regulation that amounts to a “thou shalt commit adultery”. Part of the reason I need to justify laughing rather than rebuking clerical errors is because in 2015 in my submissions (on behalf of Crystal Web [https://www.ellipsis.co.za/wp-content/uploads/2015/10/Crystal_Web.pdf]) contained a consistent error of referring to regulation 6(3)(d) when 7(3)(d) was meant. In the context – and the fact that regulation 6(3)(d) does not exist – it was clear what was meant. But by all means giggle at the mistake.

My dislike of pedantry of a nasty kind (especially from a pedant who is actually wrong – if you are going to correct somebody make sure you are actually correct) tends to evaporate however when the reason for the mistake is not some form of carelessness or an overworked person failing at self-editing (when re-reading the same document a third time a person can genuinely think that what is

written is what they intended and not what was erroneously written), but rather arises because the person is trying to do something unethical or outright mischievous. We should be amused by innocent errors but ruthlessly ridicule errors induced by a combination of stupidity with malice. This error demonstrably arose not because of a typing error but because of a lack of any diligence, the regulator kowtowed to the demands of the large players whose propaganda has been a continuous ring of “we alone can deliver mobile data and so we must be given whatever we demand”. This error is of the same nature thus as the error of the magistrates in *Minister of Police v Vowana and Another* [2019] ZAECMHC 5 [<http://www.saflii.org/za/cases/ZAECMHC/2019/5.html>] where a magistrate abrogated judicial power to one of the parties (and the appellate court’s remarks are suitably scathing, although I fear the superior courts under-estimate how rife the practice of abrogating judicial power to attorneys is in our magistrate’s offices). It has a similar ring to the accusation of plagiarism against former NDPP Mpshe in his reasons for withdrawing charges against Jacob Zuma. This is the error that is committed when a public functionary abrogates its responsibilities and allows an inept third party to simply give it something to place its imprimatur on. This is not the error of the scrivener but rather the error that a malevolent vizier introduces. Quite simply one or more of the MNOs wanted the regulation to be changed such as to render a BBBEE level 4 qualification adequate and so they had somebody draft language of that they wished the criteria to bid to be. This language was then slipped into the amendment that was going to be made and because the amendments meaty sections addressing the V and E band are good for competition and progress little scrutiny of the caper would attract – it appearing a technical correction. The error is a simple logical error – writing a new paragraph that would fit in prescriptive conditions, and sliding it in to a section that sets out disqualifying conditions – but it betrays the deeper problem. At the time the amendment was passed a Ms Batyi was in the invidious position to sign what was sent to the government gazette as ICASA had been sitting without a chairperson for some time despite Ms Batyi meeting all of the criteria for such appointment simply because she had the integrity to reject corrupt pressure from the minister of communications Faith Muthambi. ICASA has a prolonged period under which an acting chairperson who Zuma later appointed in Rubben Mohlaloga whose fingerprints are on everything except the pen signing the signature line.

It is therefore a solemn duty to make fun of the parties involved in this SNAFU (including Mr Mohlaloga who has been removed from ICASA following a fraud conviction)– it would be nice if the MNO’s (particularly Vodacom and MTN) shareholders took them to task, but that is asking for a little too much. Instead what is likely to occur is that this little error will result in a delay or rushed amendment to repair and smooth operators who thrive in conditions of effecting state or regulatory capture will continue be evil and stupid. After all the country is presently dealing with certain elements of state capture at the Zondo commission and we are daily reading of the calamity from EOH. Quite simply there is so much pent up demand for high demand spectrum to be put to use that most South Africans have little concern about an outcome that sees an auction deliver the MNOs control of additional spectrum and no incentive for competition across verticles. Most South Africans are quite happy to not imagine the innovation which actually following the law and regulations as they stood prior to a nonsensical amendment would produce. But it is this lack of innovation and this preparedness to accept *kragdadigheid* that is the greatest threat to our nations future. The MNOs need to accept that disaggregation of network infrastructure and spectrum is happening and that the opportunity to see transformation of commercial rights in spectrum is here, but the problem of resistance to change in established players is an age old problem. A quote (translated) from Machiavelli appearing on a slide for an innovations seminar explains the challenge well: “There is nothing more difficult to plan, more doubtful of success, or more dangerous to manage than the creation of a new system. For the initiator has the enmity of all who would profit by the preservation of the old system and merely the lukewarm defenders in those wou would gain by the new one”. What I am suggesting is embracing a new system, but I am not the initiator here. The legislation itself is the initiator, it is simply inconvenient for many who are entrenched to

embrace it. However the pesky regulation 7(3)(d) is not the only reason why a proper reading of the regulations makes the case for new spectrum holding entities. Regulation 7(3)(b) requires interpretation as to what the “designated range” is and what the “ maximum bandwidth made available” is but any pro-competition reading requires the question to be asked whether MNOs should be given additional spectrum rights for LTE utilization (regardless of which 3GPP release) when they already have spectrum in that range. I would categorically argue that the MNOs are all dangerously close to committing the offence in paragraph (f) in distorting information as the clause doesn’t indicate a manipulation in the application itself.

It is my argument therefore that unless amended the regulations as they stand are in the open territory for an interested party to approach a court and that if a court were disinclined to hold that the regulator acted irrationally in passing the amendment and that the regulation before amendment stands ICASA created a horrendous mess for itself and was aided by at least one MNO in doing so.

Although this is a glimmer of hope that the current minister, Ms Stella Ndabeni-Abrahams, will have the fortitude to follow up on her directives concerning a WOAN with a clear message that the criteria for acquiring additional spectrum rights will not be amended to serve narrow interests and that if there are no licence holders able to bid for high demand spectrum in an auction that ICASA needs to lay the foundation for new spectrum holding entrants. Doing this will mean that only will there be a WOAN but there will also be an era of competition between MNOs as to serving the spectrum holding entities and we will see wholesale electronic communication services being taken up by the more than 400 licence holders. What is more is that South Africa will finally be implementing the spirit of the ECA and we will be among the first markets to really be embracing the ecosystem approach wherein a cornucopia of “cloud native” networks built by interdependent firms which 5G demands. It would be a good step in showing that South Africa is serious about a “fourth industrial revolution” as more than simply fanfare and spending state resources on appearing to be busy. Unfortunately I am not holding my breath, largely because the MNOs have had several years to adopt strategies in line with the changing landscape and have instead embraced the same sort of monopolistic mentality that one finds within Eskom and used to find in Telkom.

Paul used to advise and caution the ISP Crystal Web, the caution and advise was sadly not followed. He is presently a part time sand engineer (beach bum) and provides commentary and expertise on 5G and Broadband when specifically invited, or in the present instance when righteous indignation takes a hold. His expertise in recent years sees him address AfricaCom, London Tech Week and Broadband World Forum. He uses analogies to agriculture and cars frequently to explain concepts necessary to forward thinking about telecommunications despite being absolutely useless at all things concerning agriculture (he cannot even manage a vegetable garden) and not driving whatsoever.