

DISPUTE RESOLUTION ALERT

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With a growing clarion call by consumers for “data to fall” and mixed responses from the Information and Communication Technology (ICT) sector to these proposed changes, this article highlights a few of the key issues that arise.



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This draft bill was open for public comment by stakeholders until 31 January 2018. Its inordinately brief comment period should not belie the enormity of change it proposes. The policy and objectives upon which the draft Bill is based, include, amongst others, economic growth and transformation, the cost of communication and the need to create a digitally inclusive information society capable of addressing the demands of what many are now referring to as the “fourth industrial revolution”. The draft Bill claims to give effect to this vision by offering to radically transform the ICT sector by:

- providing for the enforcement of broad-based black economic empowerment;
- reducing duplication of infrastructure by encouraging service-based competition through the establishment of a wholesale wireless open access network (WOAN);
- providing a much-needed open access framework for communications licensees to deploy networks and facilities; and

- implementing new approaches to grow and allocate high demand spectrum (where demand exceeds supply) on an open access basis.

With a growing clarion call by consumers for “data to fall” and mixed responses from the Information and Communication Technology (ICT) sector to these proposed changes, this article highlights a few of the key issues that arise.

A welcome innovation in the draft Bill is chapter 4 which stipulates the rights and obligations of licensees, landowners, municipalities, landlords, tenants and customers regarding how licensees deploy their networks and facilities on public and private land in respect of approvals for rights of way and the granting of wayleaves. While the Bill includes proposals for areas that are already “adequately served” by existing fibre in the ground and for new “single trench” rules to be enforced in order to avoid duplication of facilities and disruption to public roads, the proposals still require some specificity on key considerations such as terms and the compensation payable for access. It is precisely such issues that



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The varying approaches to rules of access and the compensation payable, taken by different municipal and private land owners continues to perpetuate a piecemeal approach infrastructure deployment in the sector.



led to the Constitutional Court's 2015 decision in *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* (CCT184/14) [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) (23 September 2015). Further, it is precisely the varying approaches to rules of access and the compensation payable, taken by different municipal and private land owners that continues to perpetuate a piecemeal approach infrastructure deployment in the sector.

The Chapter also proposes new statutory structures although their precise mandates and legal authority on which they are established still require detail: a Rapid Deployment National Coordinating Centre and a Rapid Deployment Steering Committee. Through regulations, the committee, in conjunction with the centre will:

- Oversee and ensure coordination of activities and processes for rapid deployment of networks and facilities;
- Set out dispute resolution procedures;
- Set out standard processes and procedures for wayleaves and approvals;
- Coordinate the planning and roll-out of ICT infrastructure at a municipal level; and
- Set out the requirements for single-trenching for fibre deployment.

The Bill proposes the licensing of a new entity, known as "the WOAN", anticipated to receive all unallocated high-demand spectrum, which will be made available through the WOAN to other licensees on a wholesale open-access and non-discriminatory basis.

The draft Bill also proposes significant changes to how spectrum policy is developed, how spectrum is planned, allocated and assigned, all of which anticipates changes to the roles of the Minister and the Independent Communications Authority of South Africa. These proposals have massive ramifications for the sector and we await the outcome of the commentary as there are still persistent questions as to the potential impact of the draft Bill on the sector, to competition, pricing, existing high-demand spectrum and the requirements for minimum capacity purchase commitments to the WOAN for licensees, amongst others.

The draft Bill has other proposals that require attention, including:

- increasing and revising universal service obligations;
- the role and responsibility of the Minister in respect of policies and regulations;
- regulating roaming in SADC;
- how the industry is consulted;
- spectrum trading, sharing and re-farming; and
- the management of competition issues between ICASA and the Competition Commission.

Notably, the draft Bill requires numerous regulations to be gazetted within specified periods and an increased requirement for inter-governmental co-ordination on ICT matters. As submissions have closed, the next steps include an analysis of the comments on the draft ECA Bill and further engagement with the National Treasury, Competition Commission, Department

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of Planning, Monitoring and Evaluation, and Chief State Law Adviser. After this process, the ECA Bill may be submitted to cabinet and introduced into Parliament to be discussed – in the Department of Telecommunications and Postal Services Annual Performance Plan 2018/19.

The draft Bill clearly raises many issues and has a considerable way to go in a subsequent iteration. Its shortcomings, specifically its possible unintended outcomes and potentially negative impact on competition in the sector, will need to be addressed in order for it to be capable of a meaningful implementation.

*Tracy Cohen
and Keitumetse Makhubedu*



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INSOLVENCY STATISTICS: A TRUE REFLECTION OF THE BUSINESS ENVIRONMENT IN SOUTH AFRICA

In 2017, the total number of liquidations decreased by 3,4% compared to 2016. There were 1868 liquidations in 2017 compared to 1934 in 2016.

The financing, insurance, real estate and business services industries remain the sectors with the highest number of insolvencies in 2017, with 611 in total.

On 22 January 2018, Statistics South Africa released a report for the period January to December 2017 on insolvencies in South Africa. This report reveals a general decrease in liquidations.

In 2017, the total number of liquidations decreased by 3,4% compared to 2016. There were 1868 liquidations in 2017 compared to 1934 in 2016. This conforms to the general trend of a decrease in the total number of liquidations each year for the past nine years. This can be attributed to many companies utilising the business rescue process to seek to turn businesses around alternatively seeking to manage the liquidation process within a business rescue.

The margin of the decrease, however, seems to be getting smaller each year. The decrease between 2011 and 2012 was 23,4% and roughly 12% between 2012 and 2013. This trend finds similar application in voluntary liquidations, with 3178 in 2011, 1734 in 2016 and 1657 in 2017. The picture is, however, somewhat different in terms of compulsory liquidations. The number of compulsory liquidations has fluctuated between 381 and 200 each year for the past nine years. This may be as a result of creditors opting to engage in other

methods of recovery such as a simple money judgment application or negotiated settlements as opposed to lengthy liquidation proceedings.

The financing, insurance, real estate and business services industries remain the sectors with the highest number of insolvencies in 2017, with 611 in total. Mining and electricity, gas and water are the two sectors with the fewest liquidations for 2017, with eight each. Again, many of the mining entities have utilised the business rescue process to seek to turn their fortunes around. The lower figure of insolvencies in the mining sector may also be attributable to the fact that there are simply fewer mining companies than the other categories listed in the report.

Insolvencies of individuals and partnerships remain significantly higher than liquidations, with over 2535 in 2017. These have also gradually decreased over the years, with 6078 in 2009. The decrease in the number of sequestrations can be attributed to



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the National Credit Act, No 34 of 2005 imposing stricter lending requirements coupled with the debt review process.

This begs the question as to what lies in store for 2018 given the looming governmental reform, resulting in a stronger rand and an increase in foreign investor confidence. These factors will hopefully lead to a decrease in sequestrations and liquidations in 2018.

Informal business rescue processes have also had a noticeable impact on the number of liquidations. In 2016 and 2017, many large companies underwent informal restructurings as an alternative to business rescue. In this regard, companies (and appointed restructuring specialists) work with their creditors in an attempt to reach a mutually satisfactory, negotiated solution to a company's financial predicament.

Research has shown that informal restructures have a higher success rate than business rescue. This success may be attributable to the fact that the solutions sought under an informal restructuring are mutually satisfactory to the company and all of its creditors. One of the major disadvantages of this process is that the companies do not enjoy the benefit of the legal moratorium as envisaged in the Companies Act, No 71 of 2008. Any legal proceedings can be instituted against a company which is engaged in informal restructuring. However, we expect this trend to increase in 2018 especially for large companies who are just "too big to fail".

Julian Jones, Roxanne Wellcome and Courtney Jones

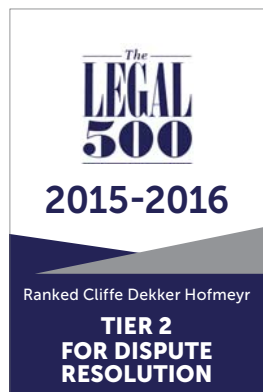
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Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.



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OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Tracy Cohen
Director
T +27 (0)11 562 1617
E tracy.cohen@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Janet MacKenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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