



DISPUTES

Untangling the mischief of section 43 of the Electronic Communications Act: A missed opportunity in the Amendment Bill

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On 12 March 2026, the Minister of Communications and Digital Technologies, Mr Solly Malatsi, published for public comment the Draft Policy Direction on Matters Relevant to Electronic Communications Network Deployment Pursuant to the National Policy on Rapid Deployment of Electronic Communications Networks and Facilities, 2023 (“the Draft Policy”).

The Draft Policy largely concentrates on the rapid deployment of electronic communications facilities with the objectives being to give effect to existing national and sector policy pertaining to access required to use of both public and private land in order to facilitate the rollout of nationwide affordable high-speed broadband networks, it directs the Independent Communications Authority of South Africa (“ICASA”) to review and if necessary, strengthen the Facilities Leasing Regulations promulgated under the Electronic Communications Act, 2005 (“ECA”) having particular regard to:

- the qualifying criteria for licensees who wish to exercise their section 22 rights. As a minimum, ICASA is directed that this qualifying criteria must include that the licensee holds a valid electronic communication network service license and is in compliance with their obligations in accordance with the license; there are no other suitable forms of access requested to the facilities identified; and the requesting licensee has made available to ICASA the location of all of the facilities;
- the determination of essential facilities and the terms on which access to essential facilities will be granted;
- the concept of open access;
- improving the time within which requests must be considered and approved, and agreements finalised by licensees in terms of chapter 8 of the ECA; and
- monitoring, enforcement and implementation of the amended Facilities Leasing Regulations, which shall include the filling of all agreements with ICASA.

The explanatory memorandum to the Draft Policy, in respect of facilities leasing, further records that whilst the Facilities Leasing Regulations have been helpful in facilitating network-sharing and network access to enable competitors to avoid duplicating infrastructure, reducing the strain on the environment and reducing costs, the impact of the Regulations on network deployment and affordable access has not been assessed.

Although ICASA is yet to amend the Facilities Leasing Regulations, on 20 April 2026, the Minister introduced, in the National Assembly, the Electronic Communications Amendment Bill (“**Amendment Bill**”). In respect to facilities leasing, the Amendment Bill proposes the following amendments to the ECA:

- the addition of “AND WHOLESALE PRICING RULES OR STANDARDS” in the heading of Chapter 8 of the ECA;
- the inclusion in section 43(8) of an obligation on ICASA to prescribe the list of essential facilities within 12 months of the coming into operation of the Amendment Act;
- the amendment of the days provided for in section 43(8A) (b) for licensees receiving requests for leasing facilities to agree on non-discriminatory terms and the conditions for facilities leasing within 60 days and no longer 20 days and where there is a dispute on the non-discriminatory terms, that such conditions be imposed by ICASA within 60 days of receiving notification of the failure to reach an agreement; and
- the review of the Facilities Leasing Regulations at least once every 24 months with due regard to market and legal developments.

Similar to the memorandum to the Draft Policy, the memorandum on the objects of the amendment bill indicates that the Amendment Bill seeks to improve the facilities leasing framework. Hopefully the introduction of the Amendment Bill (and to some extent the Draft Policy) will lead to a more defined process for purposes of implementing section 43 (1) of the ECA read with Regulation 3 of the Facilities Leasing Regulations.

Section 43(1) of the ECA provides an obligation on licensees to, **on request**, lease electronic communications facilities (i.e. infrastructure) to another licensee (including exemption holders) subject to terms and conditions of an electronic communications facilities lease agreement which the parties must enter into, unless the request is considered unreasonable (often arising from economic or technical feasibility). A clear issue that has arisen is the interpretation of section 43(1) of the ECA relating to which party must initiate the process of facilities leasing and the corresponding rights and/or obligations of the respective parties, namely, the “facilities seeker” and the “facilities provider”.

The issue raised above is compounded by the conflicting judgments handed by the Gauteng Division of the High Court, Pretoria in *Octotel (Pty) Ltd v Chairperson, Independent Communications Authority of South Africa and Others* 2026 JDR 0307 (GP) and *Metrofibre Networx (Pty) Ltd v Independent Communications Authority of South Africa and others* 2024 JDR 4018 (GP), on the interpretation of the said section insofar as which party must trigger the process, and further on the issue as to whether ownership of the electronic facilities, is an element to be considered in determining the process under section 43(1) of the ECA.

While both of these cases are currently on appeal in the Supreme Court of Appeal, it may have been beneficial for the drafters of the Amendment Bill to use the opportunity to add clarification language in the Amendment Bill which clarifies the interpretative mischief.



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