THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1038/2018

In the matter between:

TELKOM SA SOC LTD **APPELLANT**

and

CITY OF CAPE TOWN **FIRST RESPONDENT**

ESTATE LATE BIRCH KALU **SECOND RESPONDENT**

Neutral citation: *Telkom SA SOC Ltd v City of Cape Town* (1038/2018) [2019] ZASCA 121 (25 September 2019)

Coram: Leach, Tshiqi, Wallis, Mocumie and Dlodlo JJA

Heard: 12 September 2019

Delivered: 25 September 2019

Summary: Erection of telecommunications infrastructure – public servitude in favour of licensee in terms of s 22(1)*(a)* of the Electronic Communications Act 36 of 2005 – whether entitling licensee to enter upon land and erect telecommunications infrastructure contrary to zoning provisions in municipal by-laws without obtaining consent to rezoning from municipality in terms of those by-laws – whether by-laws requiring such rezoning and consent unconstitutional – whether municipal policy in respect of the erection of telecommunications infrastructure an encroachment upon a national sphere of legislative competence.

ORDER

On appeal from: Western Cape Division of the High Court (Andrews AJ, sitting as court of first instance):

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Leach, Tshiqi, Mocumie and Dlodlo JJA concurring)

[1] In 2017, in order to extend its mobile electronic communication network coverage in and around Cape Town, the first appellant, Telkom SA SOC Ltd (Telkom), planned to develop 135 sites for the erection of freestanding base telecommunication stations (FBTS), commonly referred to as cell phone masts, and rooftop base telecommunication stations (RBTS). One of the sites, on which it proposed to erect an FBTS, was a property owned by the estate of Mr Birch Kalu, the second respondent,[1] situated in the suburb of Heathfield, Cape Town. The Municipal Planning By-Law (the by-law) of the City of Cape Town (the City),[2] the first respondent, makes provision, as part of the overall zoning of the city, for the establishment and erection of both FBTS and RBTS.[3]

[1] The estate played no role in the high court and has not participated in this appeal. We were informed from the bar that Telkom has indemnified the estate against any adverse order for costs arising from its involvement in these proceedings.

[2] Published under PN206 in Western Cape Provincial Gazette 7414 of 29 June 2015.

[3] See the definitions of a freestanding base station and a rooftop base telecommunication station in s 1 of Chapter 1 of Division 1 in Schedule 3 to the by-law.

However, the estate's property is zoned Single Residential Zone 1 under the by-law and that is a zoning that does not permit the erection of either an FBTS or an RBTS.

[2] In order to overcome this difficulty, Telkom applied on 18 January 2016 for the rezoning of a portion of the estate's property to Utility, which permits the establishment and erection of an FBTS. Telkom did not, however, wait for the City's approval of its application, but went ahead, two weeks later, and erected the FBTS. This prompted an outcry from local residents. The City then informed Telkom that it was in breach of the by-law and should seek an administrative penalty, before pursuing its application. Instead, Telkom launched the present proceedings to challenge the constitutional validity of the by-law and the City's related Telecommunications Mast Infrastructure Policy (the Policy).

[3] The city opposed the application and counter-applied for an order that the FBTS had been erected without its consent first being obtained, in breach of the National Building Regulations and Building Standards Act 103 of 1977 (the Standards Act). The application came before Andrews AJ who dismissed it and granted an order in terms of the City's counter-application, declaring that the erection, use and development of the FBTS on the Heathfield property was unlawful. This appeal is with her leave.

The issues

The counter-application

[4] Telkom originally opposed the counter-application on two grounds. The first was that Telkom was the State for the purposes of the Standards Act and therefore exempt from the need to comply with its provisions.

The second was that a mast was not a building as defined in s 1 of the Standards Act. This argument was advanced on the narrow basis that, contrary to the contentions of the City, it did not fall within sub-para *(a)*(iii) of the definition, which in material part defines a building as:

'any other structure, whether of a permanent or temporary nature and irrespective of the materials used in the erection thereof, erected or used for or in connection with—

…

(iii) the rendering of any service'

It is the latter element of its argument on the counter-application that requires some attention in this judgment.

[5] The argument was advanced in Telkom's answering affidavit in the counter-application on the basis that, if regard was had to a separate provision in the definition dealing with the incidental provision of services such as water supply, drainage, sewerage, stormwater disposal, electricity supply and similar services, services in this portion of the definition related to services to the building. It was submitted that all the other structures listed in the definition accommodated a human activity, whilst a telecommunications facility was an automated facility requiring no human intervention. On that footing it was submitted that:

'… an electronic communications facility such as the mast which forms the subject matter of this application, does not fit into the definition of *"building"* in terms of the Building Act.'

[6] The proposition in the affidavit was entirely general and not restricted to the particular mast being erected on the estate's property. It claimed that masts were not buildings for the purposes of the Standards Act. This argument was then abandoned in the High Court. The abandonment was recorded by the judge in the following terms:

'The Applicants indicated that they no longer persist in their opposition to the counter-application insofar as it relates to the absence of building plan approval for the telecommunications mast that was erected on the Second Applicant's property.
The First Applicant *conceded that unless exempted, a licensee must comply with the requirements of the Building Act and as such requires building plan approval for the mast on the Kalu property*.' (Emphasis added)

[7] Lest there could be any doubt about the effect of this concession, in its application for leave to appeal Telkom said:

'The court recorded the applicants' concession that approval under the National Building Regulations and Building Standards Act 103 of 1977 was required for a mast to be erected on the Kalu property … but then used this as a basis to grant declaratory relief … broader than the extent of the concession. This was an error. *The applicants' concession only went as far as the requirement for Building Act approval was concerned*.' (Emphasis added.)

Although the application for leave to appeal was granted in terms, the notice of appeal subsequently delivered did not persist in attacking the relief granted in the counter-application. As matters stood therefore when this appeal was heard there was no issue between the parties in regard to the proposition that the erection of masts without first obtaining the approval of the City under the Standards Act was unlawful.

[8] In the course of argument counsel for the City asked that we incorporate in this judgment an endorsement of the high court's order. The reason was that he was instructed that Telkom did not accept that a mast was a building requiring it to seek consent in terms of the Standards Act to erect either an FBTS or an RBTS. That attitude was reflected in a letter dated 12 July 2019 furnished to us after the hearing and addressed by Telkom's attorneys to the National Director of Public Prosecutions. The letter relied upon an unreported decision in the Gauteng Division of the High Court, Pretoria in which it was held that a telecommunications

mast was not a building under the Standards Act because it did not fall under sub-para *(e)* of the definition of 'building' in that Act.[4] The decision did not assist Telkom, because the judgment in this case in the High Court was based upon the proposition that a telecommunications mast was a building under sub-para *(a)*(iii) of the definition quoted above.

[9] At the hearing we raised the City's request with Telkom's counsel. After taking instructions he gave us the firm assurance that Telkom now accepts that it is obliged to obtain building plan approval under the Standards Act before constructing either form of base station.[5] The acceptance was expressly premised on both the high court order and the judgment of the Constitutional Court in *Link Africa*.[6] To our surprise, after this judgment had been prepared in draft and circulated among the members of the court, the registrar received a further letter from the City's attorneys repeating counsel's request. The request was made in the light of a letter from Telkom's attorneys dated 13 September 2019 asserting that counsel's undertaking was restricted to the estate's property and was not a general undertaking relating to the erection of all base stations. According to the letter of 13 September 2019, Telkom's attitude was that it wished to reserve the right to argue in due course that there may be a distinction between 'the structural features of a given mast and the definition of a building in the Building Regulations Act'.

[10] The letter of 13 September 2019 does not correctly reflect the assurance we were given. Notes of the argument show that counsel said

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[4] *Du Plessis and Another v City of Tshwane Metropolitan Municipality and Another* Case NO 26009/2018 dated 28 March 2019, unreported.

[5] A base station is a building for the purpose of the Standards Act. *Mobile Telephone Networks (Pty) Ltd v Beekmans NO and Others* [2016] ZASCA 188; 2017 (4) SA 623 (SCA).

[6] *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* [2015] ZACC 29; 2015 (6) SA 440 (CC) (*Link Africa*).

that, since the judgment in the court below 'Telkom concedes that it must comply with the building regulations'[7] He added that it was unnecessary for the declaratory order to be amplified or restated, as Telkom accepted it was bound. Finally he said 'The Constitutional Court has spoken.' There was no question in anyone's mind that he was referring to the statement in the final sentence of para 189 of the majority judgment in *Link Africa* that, if by-laws exist regulating the manner in which a licensee should exercise its powers, 'the licensee must comply'. What he conveyed to the bench was that Telkom accepted the application of the Standards Act and any building by-laws to the erection of masts. The endeavour to suggest in the letter to the registrar from Telkom's attorney dated 13 September 2019 that there may be circumstances in which that Act and any such by-laws do not apply in relation to obtaining building plan approval to the construction of either an FBTS or an RBTS, is inconsistent with the undertaking given by Telkom to this court. There is no reason why Telkom should not be bound by its undertaking, given that it meant that the court did not take further the request on behalf of the City.

The constitutional challenge

[11] Accordingly the appeal is solely concerned with the constitutional challenge. In addressing that challenge, nothing turns on the precise language of the relevant provisions of the by-law or, save in one respect, the terms of the Policy. It suffices to know that Cape Town is divided into various zones for planning purposes. In some of those zones the erection of either an FBTS or an RBTS is prohibited. In others, they may be erected with the consent of the City, with more zones permitting a consent user in respect of RBTS than FBTS. Finally there are zones

[7] One colleague's note read 'Building Act' but it is immaterial whether 'Act' or 'regulations' was used.

where both forms of base station are permitted users and may be erected without any special consent being required. Telkom objects to the fact that, in order for it to erect base stations, it is sometimes required by the by-law to obtain a change in zoning of the property and sometimes the City's consent.

[12] Telkom based its case on section 22 of the Electronic Communications Act 36 of 2005 (the Act), which reads as follows:

'**Entry upon and construction of lines across land and waterways.**

(1) An electronic communication network service licensee may─

(a) enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic;

(b) construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purposes, and railway and any waterway of the Republic; and

(c) alter or remove its electronic communications network or electronic communications facilities, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.

(2) In taking any action in terms of subsection (1), due regard must be had to applicable law and the environmental policy of the Republic.'

[13] The argument was that this section empowered Telkom to enter upon any land selected by it and erect base stations, without seeking the consent of the owner[8] or anyone else, including the City. Insofar as the by-law prevented it from doing that in certain zones, without obtaining municipal consent to a rezoning or consent to the property's use for that purpose, it contended that it was in conflict with s 22(1) of the Act and was therefore invalid.

[8] In regard to the Heathfield property of the estate it had concluded a lease with the current occupier, Mr Kalu's son.

[14] The Constitutional Court considered this particular section in *Link Africa* and Telkom relied upon the following passage in the majority judgment:[9]

'These provisions indicate that licensees, though empowered by national legislation, must abide by municipal by-laws. *The only limit is that by-laws may not thwart the purpose of the statue by requiring the municipality's consent.* If by-laws exist that regulate the manner (what counsel called the "modality") in which a licensee should exercise its powers, the licensee must comply.' (Emphasis added.)

[15] It is helpful to appreciate the narrowness of the right for which Telkom contended. It no longer contended, as it did before the High Court, that it might erect base stations without obtaining building plan approval in terms of the Standards Act from the City (or any other affected authority). Nor did it contend, before this court, that it was exempt from the operation of any by-law governing matters such as the dimensions of a structure, the materials from which it was made, the observance of safety regulations and the like. Its only argument was that it was free to select where to situate base stations without any interference from the City, or any need to obtain its consent to the use of the sites it chose for that purpose. It contended that the provisions of the by-law that gave the City the power to withhold consent to rezoning for such purposes or required its consent to the erection of a base station in certain areas, went beyond its legislative competence. Alternatively, it argued that these provisions gave rise to a conflict with national legislation governing telecommunications and that conflict fell to be resolved in favour of the national legislation.

[9] *Link Africa* para 189.

The City's legislative competence

[16] In terms of s 156(1) of the Constitution a municipality has executive authority and the right to administer the local government matters listed in Part B of Schedule 4. Relevant for present purpose is municipal planning. Municipalities may make and administer by-laws for the effective administration of these matters.[10] The by-law in issue in this case was made pursuant to that power.

[17] The nature of municipal planning has been explained in several authoritative judgments. Thus Yacoob J said:[11]

'The zoning of land and the question whether sub-division should be allowed in relation to any land is essentially a planning function in terms of Schedule 4 and Schedule 5 to the Constitution. … Our Constitution requires municipal planning to be undertaken by municipalities.'

In this court, Nugent JA said:[12]

It is clear that the word "planning", when used in the context of municipal affairs, is commonly understood to refer to the control and regulation of land use, and I have no doubt that it was used in the Constitution with that common usage in mind.'

In the Constitutional Court in the same case, Jafta J endorsed this approach and said:[13]

'Returning to the meaning of "municipal planning", the term is not defined in the Constitution. But "planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land. It must be assumed, in my view,

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[10] Constitution s 156(2).
[11] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC) para 131.
[12] *Johannesburg Municipality v Gauteng Development Tribunal and others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) para 41 *(Gauteng Development Tribunal* (SCA)).
[13] *The City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* [2010] ZACC 11; 2010 (6) SA 182 (CC) para 57 *(Gauteng Development Tribunal* (CC)).

that when the Constitution drafters chose to use "planning" in the municipal context, they were aware of its common meaning. Therefore, I agree with the Supreme Court of Appeal that in relation to municipal matters the Constitution employs 'planning' in its commonly understood sense.'

[18] This jurisprudence establishes in robust terms both the scope of the competence of municipal planning and that it is to be protected against intrusion by either national or provincial government. That appears from the following passage in the judgment in *Lagoonbay*:[14]

'This Court's jurisprudence quite clearly establishes that: (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved; (c) while the Constitution confers planning responsibilities on each of the spheres of government, those are *different* planning responsibilities, based on "what is appropriate to each sphere"; (d) '"planning" in the context of municipal affairs is a term which has assumed a particular, well established meaning *which includes the zoning of land and the establishment of townships*' (emphasis added); and (e) the provincial competence for "urban and rural development" is not wide enough to include powers that form part of "municipal planning".'(Footnotes omitted.)

[19] There can be no doubt then that the by-law was, in principle, a proper exercise of the municipal planning competence given to all municipalities by the Constitution. Recognising this, counsel for Telkom argued in their heads of argument that the by-law purported to regulate telecommunications and, to the extent that it did so, it went beyond the municipal competence. The essence of the argument was that, because the effect of the by-law's zoning provisions was to restrict Telkom's ability

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[14] *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39; 2014 (1) SA 521 (CC) para 46.

to locate base stations and other telecommunications infrastructure at sites of its own choosing, this amounted to the regulation of telecommunications. The point was summarised in the following terms in Telkom's practice note:

'The City of Cape Town has no legislative competence over telecommunication. To the extent, therefore, that the By-law regulates the roll-out of telecommunications infrastructure, it is beyond the municipality's competence and therefore invalid.'

[20] The difficulty with this approach was that, if applied in that fashion, it would effectively exclude the municipality from engaging in the zoning that has been held to lie at the heart of municipal planning. The exclusion would not be confined to telecommunications infrastructure. It would also extend to matters such as infrastructure for the provision of electricity or the supply of bulk water. In designating land as zoned for hospital purposes it would trench upon national and provincial areas of exclusive legislative competence in regard to public health and the provision and siting of healthcare facilities. The same would apply to zones demarcated for schools or education purposes. Zoning provisions directed at preventing the siting of casinos and gambling activities, in the vicinity of schools or places of worship, would infringe upon provincial powers in regard to the licencing of such establishments, a material part of which is always the location in which the premises are situated. Housing is a national and provincial area of legislative competence. Would that mean that the national and provincial housing authorities could override municipal zoning provisions setting out the areas in which housing can be constructed and determining the nature of the housing to be erected in each zone? The examples can be multiplied, but these should suffice.

[21] The flaw in the argument, as counsel for the City pointed out, is that, if it were correct, the breadth of the legislative competence of national and provincial legislatures when compared to municipalities, would subordinate the latter to the former to a point where the municipal competence would be deprived of any useful content and become a shell. But that is not the aim of the Constitution, which provides in s 41(1) that all spheres of government must:

'*(e)* respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere …'

In s 151(4) the Constitution provides that neither the national nor the provincial government may compromise or impede a municipality's ability or right to exercise its powers or perform its functions. Contrary to the argument addressed to us, the approach of the Constitution is to support the exercise by a municipality of its core competence and to preclude other spheres of government from interfering therewith.

[22] Telkom's argument amounted to national government removing, by way of s 22(1) of the Act, the power of municipalities to determine by way of zoning where provision was to be made within their areas of jurisdiction for the erection of telecommunications infrastructure. The impact of such facilities on the urban environment would be outside the regulatory powers of municipalities insofar as their positioning was concerned. That power would then be vested in the licensees under the Act.

[23] The starting point of the argument that telecommunications was a national legislative competence and therefore that all aspects of telecommunications, down to and including the location of telecommunications infrastructure, must therefore fall outside the scope of municipal planning, was wrong. As Nugent JA pointed out in *Gauteng Development Tribunal* (SCA)[15] this inverted the enquiry. In a passage that the Constitutional Court[16] said 'illuminated the proper approach to the Constitution's allocation of governmental powers' and bears repetition, he said:

'It is to be expected that the powers that are vested in government at national level will be described in the broadest of terms, that the powers that are vested in provincial government will be expressed in narrower terms, and that the powers that are vested in municipalities will be expressed in the narrowest terms of all. To reason inferentially with the broader expression as the starting point is bound to denude the narrower expression of any meaning and by so doing to invert the clear constitutional intention of devolving powers on local government.'

[24] Telkom's counsel accepted that generally speaking this was the correct approach, but submitted that there was an exception to the general proposition. This arose in part, he said, from the fact that municipal planning fell to be considered against the background that the entire country now falls within some or other local government area. The result, so he submitted, was that cross-municipal networks, such as the national electricity grid, telecommunications and roads, should be treated as being matters that could not be subjected to municipal planning regulation. He postulated the situation where one municipality required a telecommunications licensee to follow a particular route for the installation of its infrastructure across the area of that municipality to a

[15] *Gauteng Development Tribunal* (SCA) para 36.
[16] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v habitat Council and Others* [2014] ZACC 9; 2014 (4) SA 437 (CC) para 13, fn 19 (*Habitat Council*).

point I will call 'A', but the adjacent municipality would not, in accordance with its own planning by-laws, allow the infrastructure to enter its jurisdiction at 'A', requiring instead that it enter at 'B'.

[25] In substance the submission raised two arguments that the Constitutional Court dealt with and rejected in *Habitat Council*. The one was that when dealing with major planning issues, such as those arising in the scenario outlined by counsel, 'parochial municipal interests' would prevail. The answer given by the Constitutional Court was that, as a matter of constitutional design, parochial interests should prevail on subdivision and zoning decisions.[17]

[26] The second argument was that leaving these zoning decisions to every municipality served by a cross-municipal network would undermine the ability to engage in the national or provincial planning that underpins the provision of such networks. The Constitutional Court rightly said that this was a bogey that had to be slain.[18] It pointed out that national and provincial government have legislative competence over regional planning and development and provincial government has exclusive legislative competence over provincial planning.[19] These powers can be exercised in ways that address Telkom's concerns.

[27] The principal statute under this head is now the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). It does indeed address the concerns raised in counsel's argument. For example, in terms of s 52 of SPLUMA land development applications materially impacting upon an exclusive functional competence in the national sphere, must be

[17] *Habitat Council* para 23.
[18] *Habitat Council* para 19.
[19] *Habitat Council* para 19 fn 24.

referred to the Minister of Rural Development and Land Reform, and among other powers the Minister may, no doubt in an extreme case, direct that it should be decided by him or her.[20] In regard to zoning issues Schedule 1 of SPLUMA requires provincial legislation to establish a uniform set of land use zones to be used by municipalities (para *(a)*) and also to provide a single uniform system for land use and development, consistent with the provisions, objects, development principles, norms and standards prescribed in SPLUMA (para *(f)*). This should allay fears of inconsistent treatment by different municipalities, especially when it is recognised that all municipalities have a shared interest in the provision of adequate telecommunications services to their residents and businesses and public agencies operating in their area of jurisdiction.

[28] It must be borne in mind that Telkom's case is not that there is more than one planning system to which it is accountable and that this is hampering its ability to discharge its obligations as a licensee. Its argument is that it should be unfettered in determining where it should be able to erect its telecommunications infrastructure, including both FBTS and RBTS, save insofar as its decisions in that regard may be challenged on the grounds provided for the review of administrative decisions in PAJA[21] or under the principle of legality. This would lead to the curious result that the construction of major infrastructure that can be seen across our country and in many places in our cities, having a potentially major impact on the environment, would fall outside any regulatory control insofar as its location was concerned.

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[20] SPLUMA s 52(5)*(b)*.
[21] The Promotion of Administrative Justice Act 3 of 2000.

[29] For all those reasons the primary argument that the City had no competence to make a by-law dealing, by way of zoning, with where telecommunications infrastructure may be erected, must be rejected. Such a by-law does not involve legislation on telecommunications matters, but matters of municipal planning. I turn then to the alternative argument.

The by-law conflicts with s 22(1)

[30] Under this head it was accepted that the municipality's legislative competence was not restricted by s 22(1) in the manner contended for under the first head. Instead it was contended that the manner in which it had been exercised, by requiring Telkom to obtain the City's consent in certain circumstances to the erection of telecommunications infrastructure, nonetheless conflicted with s 22(1)*(a)* of the Act and was therefore invalid.

[31] It is by no means clear that this argument is distinct from the first argument. The attack on the City's legislative competence was based upon the proposition that the municipal planning competence did not extend to telecommunications. In its initial form the argument posited that this was because the zoning provisions regulated telecommunications. In its varied form, as advanced in oral argument, it was that there was an exception to the ambit of municipal planning in relation to cross-municipality infrastructural development, including telecommunications. Once it is held that neither argument is correct, the necessary conclusion is that s 22(1) does not operate to exclude from the ambit of municipal planning matters concerning the construction of telecommunications infrastructure. The reason is that this is a planning function, not a regulation of telecommunications. As the attack was addressed to the zoning provisions legislated for in the exercise of the

municipal planning competence, it would seem to follow that those provisions were legitimately enacted as part of the by-law in the exercise of a competence vested in the City. How it can then be said that they are nonetheless inconsistent with the powers afforded to licensees under s 22(1)*(a)* is unclear.

[32] Be that as it may, one must then turn to s 22(2) of the Act, which provides that in taking any action in the exercise of the powers vested in licensees under s 22(1) 'due regard must be had to applicable law'. A substantially similar provision fell to be considered in *Maccsand*.[22] There the issue was whether the holder of a mining right in terms of the MPRDA[23] was bound to obtain authorisation from the City of Cape Town to conduct mining operations in terms of that right by way of a consent use and a rezoning of certain land on which the mining operations were to be conducted. The requirement that it obtain such consent and rezoning, arose under the City's zoning scheme established under provincial legislation referred to as LUPO.[24]

[33] As with s 22(1)*(a)* of the Act, the holder of a mining right was given the right to enter upon property and act in terms of that right without the consent of the owner of the property.[25] In terms of s 23(6) of the MPRDA the exercise of the mining right was subject to 'any relevant law'. The expression is similar to that in s 22(2) of the Act, which refers to 'applicable law'. The first question addressed by the Constitutional Court was whether LUPO, in terms of which the City developed and

[22] *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* [2011] ZASCA 141; 2011 (6) SA 633 (SCA); *Maccsand v City of Cape Town and Others* [2012] ZACC 7; 2012 (4) SA 181 (CC).
[23] Mineral and Petroleum Resources Development Act 28 of 2002.
[24] Land Use Planning Ordinance, 15 of 1985.
[25] MPRDA s 5(3).

imposed the zoning provisions of its town planning scheme, was relevant legislation.

[34] The approach the court took is instructive. This court had held that the MPRDA and LUPO were directed at different ends and therefore there was no duplication of function between the Minister in granting the mining right and the City in granting consent to mining.[26] The Constitutional Court endorsed this and said that the MPRDA and LUPO 'serve different purposes within the competence of the sphere charged with responsibility to administer each law'.[27] As mining was conducted on land there was an overlap between the mining legislation and the planning legislation, but:

'This overlap does not constitute an impermissible intrusion by one sphere into the area of another, because spheres of government do not operate in sealed compartments.'[28]

[35] The Constitutional Court rejected the argument that the expression 'any relevant law' in s 23(6) related only to laws governing mining.[29] In the case before us it was not suggested that the expression 'any applicable law' was subject to any similar limitation. Accordingly, it encompasses any law governing actions taken by licensees, such as Telkom, when acting in terms of powers vested in them under s 21(1). That would include laws governing the siting of telecommunications infrastructure, such as the by-law with its zoning provisions.

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[26] *Maccsand* (SCA) para 34.
[27] *Maccsand* (CC) para 43.
[28] Ibid.
[29] *Maccsand* (CC) para 45.

[36] The further argument in *Maccsand* that the effect of LUPO was to permit a local authority to usurp the functions of national government was rejected in the following terms:

'46. … This argument is based on a misinterpretation of the judgment of the Supreme Court of Appeal. That Court did not find that LUPO regulates mining. Instead, it held that the MPRDA and LUPO have different objects and that each did not purport to serve the purpose of the other. The MPRDA's concern, the Court found, was mining and not municipal planning, hence it held that the two laws operate alongside each other. *Because LUPO regulates the use of land and not mining, there is no merit in the assertion that it enables local authorities to usurp the functions of national government. All that LUPO requires is that land must be used for the purpose for which it has been zoned.*

47. Another criticism levelled against the finding of the Supreme Court of Appeal by Maccsand and the Minister for Mineral Resources was that, by endorsing a duplication of functions, the Court enabled the local sphere to veto decisions of the national sphere on a matter that falls within the exclusive competence of the national sphere. At face value this argument is attractive but it lacks substance. The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.

48. The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. *It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed.* If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power, which does not extend to the power of the other functionary. This

is so in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through cooperation between the two organs of state, failing which, the refusal may be challenged on review.'(Emphasis added.)

[37] Finally an argument that the provisions of the MPRDA and LUPO were in conflict was rejected on the basis that there was no conflict between them. Each was concerned with its own subject matter – mining in the case of the MPRDA and planning in the case of LUPO. Relying on s 23(6) of the MPRDA the Court said that the rights conferred on the holder of a mining right by the MPRDA were subject to LUPO.[30]

[38] There is no material distinction between the statutory provisions or the facts in that case and the present one. Counsel sought to contend for one on the basis that telecommunications requires national infrastructure, while mining can only take place in one spot. The distinction has no merit. If anything the holder of a mining right is placed in the more invidious position as a result of being subject both to mining legislation and planning legislation, because mining by its nature is restricted to a specific place and site, whereas infrastructure for telecommunications is far more flexible. If one potentially desirable location for a base station cannot be used because of zoning provisions, it will ordinarily be possible to find another that conforms to zoning requirements and the network can be adapted accordingly.

[39] For those reasons, to the extent that the alternative argument differs from the main argument, it is in my view without merit. However, given the reliance that Telkom placed on the sentence from para 189 of the

[30] *Maccsand* (CC) paras 50 and 51.

judgment in *Link Africa* quoted in paragraph 8 above it is necessary to examine what that judgment held.

Link Africa

[40] The dispute in this case arose between the City of Tshwane and Link Africa concerning the latter making use of municipal infrastructure for the purpose of installing its fibre-optic cabling network. At a stage in the process Link Africa invoked its rights in terms of s 22(1) of the Act to contend that it was entitled to use the city's municipal infrastructure to install its cables without the consent of the city. Tshwane then brought proceedings for a declaratory order that its consent was required and in the alternative attacked the constitutional validity of ss 22 and 24 of the Act. The Court unanimously rejected the contention that the landowner's consent was required before a licensee could exercise the rights conferred by s 22(1).

[41] Insofar as the constitutional challenge was concerned, the majority judgment characterised the rights given to licensees under s 22(1) as a form of public servitude akin to a personal servitude. On that foundation, and the provisions of s 22(2), it held that the common law of servitudes, in particular that they be exercised *civiliter modo*, applied and that compensation would be payable for any deprivation of rights. For that reason it held that s 22(1) was not arbitrary and did not fall foul of s 25 of the Constitution.

[42] The portion of the majority judgment on which Telkom relied was paras 185 to 189 dealing with the powers and duties of municipalities. As the issues of the meaning of s 22(1) and the question of its constitutionality had already been disposed of, the precise status of these

paragraphs is unclear. They do not form part of the *ratio* of the decisions on either of the two issues decided in the judgment. As such they appear to constitute an *obiter dictum*, but one to which respect must be paid as emanating from a majority judgment of our highest court.

[43] In para 185 the majority said that as far as municipalities are concerned the 'applicable law' referred to in s 22(2) referred to laws made by the municipalities in the exercise of their own constitutional competence. It accepted that telecommunications is not an area of municipal legislative competence, but then turned to deal with an 'illuminating argument' raised by the Msunduzi Municipality that municipalities had rights and powers to regulate the manner in which licensees exercised the powers conferred by national legislation. For that reason Msunduzi argued that the licensee had to engage with the municipality before entering upon public land. Practical considerations of order and safety had to be taken into account. It contended that a licensee could not simply enter a municipality and without warning dig up a busy intersection, or lay cables on a pedestrian walk, without consulting the local authority.

[44] The majority judgment endorsed this approach with regard to the powers vested in municipalities under s 151 of the Constitution. It is against that background that it said in para 189:

'These provisions indicate that licensees, though empowered by national legislation, must abide by municipal by-laws. *The only limit is that by-laws may not thwart the purpose of the statue by requiring the municipality's consent.* If by-laws exist that regulate the manner (what counsel called the "modality") in which a licensee should exercise its powers, the licensee must comply.' (Emphasis added.)

[45] As already noted, Telkom seized upon the italicised sentence to argue that in no circumstances would it be necessary for it to ask consent from the municipality to the location of its base stations. I do not agree and am satisfied that this was not what was intended by the majority judgment. Its authors had commenced that paragraph by saying that licensees must abide by municipal by-laws. They can hardly have been unaware that among the most important of these so far as licensees were concerned were building regulations and planning by-laws. The latter are accompanied throughout South Africa by zoning provisions that regulate what may be built where. These must therefore have been among the municipal by-laws with which they said licenses had to comply.

[46] In the third sentence the majority said that licensees had to comply with by-laws regulating the manner in which they exercised their powers. One of those powers was the power to enter upon land for the purpose of erecting infrastructure. The manner in which that power could be exercised would to everyone's knowledge be regulated by building regulations and planning by-laws, especially zoning. Again the majority appear to be endorsing, not excluding, the application in full measure of municipal planning by-laws.

[47] So, at both the beginning and the end of this paragraph, the majority emphasised the need for licensees to comply with by-laws of which the obviously relevant would be building regulations and planning by-laws and their zoning provisions. Such by-laws conventionally require municipal consent for many forms of construction. Could they really have meant that the need for all such consents was dispensed with in consequence of the enactment of s 22(1)? Surely not. That would have

been entirely inconsistent with their accepting the validity of the point raised by Msunduzi.

[48] The answer is I think plain from reading the particular sentence as a whole. Mindful of the fact that planning can sometimes be used as a means of obstruction, a warning was inserted in this sentence that in the context of the power to consent to various developments and the construction of various buildings, the ability to grant or withhold consent should not be used to thwart the purpose of s 22(1). That was a significant use of language. According to the Shorter Oxford English Dictionary[31] 'thwart' when used as a verb means:

'1 Run counter to; go against; oppose, hinder.

2 Oppose (a person or a purpose) successfully; prevent the accomplishment (of a purpose); foil; frustrate.'

This is consistent with what was said earlier in the judgment, namely, that the right a licensee enjoyed under s 22(1) should not be 'defeated or eviscerated'.[32]

[49] The warning sounded in the majority judgment invoked a well-established principle of our law that, where a power to regulate is given, it may not be used to prohibit, either in whole or in substantial measure the activity in question.[33] Given the ordinary meaning of the word 'thwart' it is in my view clear that this was the concern of the majority in *Link Africa*. An occasional refusal of a rezoning, or a refusal of consent to the construction of a particular base station, would not thwart the purpose of s 22(1). Nor, as was said in the *Maccsand* case, would it amount to a veto. The licensee would simply have to find a suitable alternative

[31] *Shorter Oxford English Dictionary* 6 ed (2007) sv 'thwart'.
[32] *Link Africa*, para 126.
[33] *R v Williams* 1914 AD 460.

location for it. It was not suggested that this was not feasible. Such refusal would be nothing more than a proper exercise of the municipality's constitutional right to exercise its competence of municipal planning in accordance with a by-law properly adopted.

[50] There was not the slightest suggestion by Telkom that the City was thwarting its purpose. Instead, without testing the legitimacy of this approach, it went ahead and erected five FBTS in residential areas without obtaining a rezoning, and two more in areas where that was a consent user, but without obtaining consent. This was not a proper approach.

[51] My conclusion is that the passage from the majority judgment in *Link Africa* on which Telkom relied did not support its contentions or its general approach to the exercise of its rights in terms of s 22(1).

The Telecommunication Mast Infrastructure Policy

[52] This was a policy adopted by the City in 2002, and revised in 2105, in regard to the provision of base stations. Telkom suggested that it was invalid because it was a clear endeavour by the City to regulate telecommunications and therefore beyond its powers. Stress was laid on the objectives set out at the commencement of the policy and particularly the first three that were:

- To improve and maintain communication;
- To ensure that telecommunication mast infrastructure was placed in the best possible location;
- To ensure the co-location or sharing of telecommunication mast infrastructure wherever possible.

The remaining objectives related to the visual integrity of the city; landscaping so as to mitigate the impact of the construction of such infrastructure; and protecting the heritage and environment of the city.

[53] A reading of the Policy does not suggest that the City was endeavouring to deal with any aspect of telecommunications infrastructure outside its legitimate concerns for the development of the city, its planning and minimising the impact of such infrastructure on the city and its environs. The argument that improving and maintaining communication was outside the City's powers ignored the constitutional objectives of a municipality in terms of s 152 of the Constitution. These include the provision of services to communities in a sustainable manner and the promotion of social and economic development. Clearly these include a concern for the provision of the best possible telecommunications network to serve the people and the businesses of the City. Concern for the visual impact of telecommunications infrastructure in a city renowned internationally for its natural beauty and as such a haven for tourists, domestic and international, underpins many of the objectives of the policy. The objective of promoting a safe and healthy environment is another factor.

[54] Properly and fairly considered the Policy does not affect the realm of telecommunications, save in the context of matters that are the central concern of municipalities in regard to which their legislative competence is protected by the Constitution. There is in my view no merit in the attack on the Policy.

Result

[55] In the result the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	M Chaskalson SC (with him K Hofmeyr)
Instructed by:	Hogan Lovells (South Africa) Inc, Johannesburg; Matsepes Inc, Bloemfontein
For respondent:	G Budlender SC (with him R Paschke SC)
Instructed by:	Webber Wentzel, Johannesburg; Symington & De Kok, Bloemfontein.