THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 603/2011

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LIMITED **Appellant**

and

SMI TRADING CC **Respondent**

Neutral citation: *MTN v SMI* (603/2011) [2012] ZASCA 138 (28 September 2012)

Coram: Mthiyane DP, Malan, Tshiqi, Pillay JJA and Plasket AJA

Heard: **7 September 2012**

Delivered: **28 September 2012**

Summary: **Section 22 of the Electronic Communications Act 36 of 2006 – s 25 of the Constitution – power of licensee to enter upon land, construct and maintain base station – whether powers exercised 'arbitrarily' – administrative action – 'decision'.**

ORDER

On appeal from: the South Gauteng High Court, Johannesburg (Coppin J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Malan JA (Mthiyane DP, Tshiqi, Pillay JJA and Plasket AJA concurring):

[1] This is an appeal against the judgment and order of Coppin J that the appellant, Mobile Telephone Networks (Pty) Ltd ('MTN'), remove its base station on a farm belonging to the respondent, SMI Trading CC ('SMI'). The appeal is with his leave.

[2] The appeal concerns the construction of s 22 of the Electronic Communications Act 36 of 2005 (the 'ECA') and whether it infringes s 25 of the Constitution. A secondary question is whether a monthly tenancy came into existence after a written lease agreement concluded with a previous owner of the farm came to an end and, if so, whether SMI cancelled it.

[3] On 21 April 1998 MTN concluded an agreement for the lease of a site with one of the previous owners, Sisal Landgoed CC, of the farm, Langgewacht, in the district of Vryheid on which its base station is situated. Sisal sold the farm to Fynbosland 256 CC and the respondent, SMI, purchased it from the latter. Transfer of the property to SMI was registered on 31 March 2008. The lease expired on 31 January 2008.

[4] The base station was constructed on a site on the farm some 110 m^2 in extent. It consists of a mast, a container room and equipment. The farm itself comprises 1090,4565 hectares. The lease was for a period of 9 years and 11 months commencing on 1 February 1998 renewable at the option of MTN by giving 3 months' notice prior to its expiry. The agreement entitled MTN to construct and maintain a base station on the property and obliged it to pay to the lessor an initial rental of R100 per month, escalating at 10% per annum. MTN was entitled to enter onto the farm so as to gain access to the station. The lessor had to allow MTN's agents and employees 24 hour access per day but was entitled to require them to identify themselves. Clause 14 provided that MTN indemnified the landlord from any liability for personal injury or damage to property arising from its occupation of the property save where such arose from the intentional misconduct or gross negligence of the landlord, its employees or agents. MTN's equipment on the property was at its exclusive risk and the landlord incurred no liability in respect of it save where any damage to it was caused by its intentional misconduct or gross negligence or that of its employees or agents. MTN also accepted the responsibility for any damage to the road giving access to the station caused by its agents or employees, whether intentionally or negligently. It was expressly provided that the base station was a 'movable' which did not accede to the property, and by implication that it would be removed on termination of the lease. The lease, as I have said, expired on 31 January 2008, MTN not having elected to renew it.

[5] In August 2008 MTN proposed that a new agreement of lease be concluded. It was, at that time, under the impression that the previous owner of the property was still its owner. The attorney acting for SMI suggested that the rental be fixed at R17 500 per month with provision for escalation. This proposal was rejected and in the period from 16 September 2008 to 25 June 2009 the parties were engaged in negotiations to agree on the terms, particularly the rental, of a new lease. SMI's offers fluctuated from R17 500 to R12 000 and again to R14 000 per month. MTN offered rentals of R54 000 per annum and R2 500 per month. It substantiated its offers with tables setting forth comparable rentals for other sites and an expert evaluation. A new lease never materialised and MTN was on 18 November 2008 requested to remove the base station. It responded on 4 December 2008 that it had

identified a new site for the station and was in the process of obtaining the necessary regulatory approval. SMI, however, wanted to know what compensation MTN proposed paying for the period since termination of the initial lease and removal of the station. On 16 January 2009 MTN denied that SMI was entitled to any compensation but only to a rental of some R694 per month. It also stated that the removal of the base station would take approximately 10 months. In its email message of 30 June 2009 MTN drew the attention of MSI to the expert's report referred to above. The message referred to MTN's being a licensee in terms of the ECA entitled to take the action set out in s 22(1). The message concluded:

'We therefore, wish to reiterate that we will not be vacating the site due to the reasons furnished in our letter dated 6th of May 2009. We are however, prepared to pay an amount of R2 500,00 as per the valuation report. We will therefore instruct our leasing department to continue to effect the payment as soon as possible.' [The letter of 6 May 2009 was not before court being part of the without prejudice settlement negotiations.]

No agreement, however, materialised.

[6] On 25 June 2009 SMI gave notice of its intention to commence these proceedings in view of the failure of the parties to conclude a new agreement of lease. MTN responded by referring to its rights – perhaps more accurately described as its powers – in terms of s 22 of the ECA stating that although it was under no obligation to pay rental or compensation it had determined that an amount of R2 500 per month was fair and reasonable and would be paid. This offer was rejected, SMI stating that all monies paid would be returned.

[7] Coppin J found that MTN was not entitled to remain in occupation of the station whether by reason of s 22 or by virtue of a tacit lease. As far as the latter issue is concerned, I agree with his finding that the facts do not support the coming into existence of a monthly lease after MTN had intimated that it was moving its base station away from the property. There was never any tacit agreement of lease.

[8] Coppin J found that even if s 22 authorised some form of deprivation of property –

'it most certainly does not authorise arbitrary deprivation of property. Section 21 of the ECA clearly envisages fair procedures and processes to be put in place to facilitate any action authorised by s 22(1). It is accepted that any administrative deprivations of property have to be fair and must comply with the procedural prescripts of the relevant administrative justice provision.'

He continued:

'Licensees are not confined to public state organs but include private concerns which mainly have profit as a motive. To interpret s 22 to mean that such a private licensee may enter upon and/or encroach on any land and construct and maintain its communication network or facilities on any private land of its own will or its own behest, without a fair process and without taking into account the rights, inter alia, of the owner of that land in terms of the applicable law, is draconian and allows for arbitrariness which the Constitution does not countenance. The rationale for the proviso in s 22 is to prevent arbitrariness in the action of licensees in terms of s 22(1).'

…

'The proviso contained in s 22(2) ameliorates the crudeness of s 22(1) and brings s 22(1) in line with the dictates of the Constitution. The Constitution does not countenance arbitrary action. Section 25(1) of the Constitution, for example, provides explicitly that there shall be no deprivation of property except in terms of a law of general application and that no law may permit arbitrary deprivation of property.'

He concluded:

'Section 22 does not authorise occupation of the property based simply on the will of a licensee. [MTN] has provided no motivation why the property, in particular, has to be occupied and no other. Earlier on [MTN] appeared to be quite willing to move the base station from the property to an alternative location. An arbitrary deprivation is illegal and cannot serve as a defence against the landowner's enforcement of his rights.'

[9] The relevant provisions of the ECA are the following:

‘21. Guidelines for rapid deployment of electronic communications facilities.—(1) The Minister must, in consultation with the Minister of Provincial and Local Government, the Minister of Land Affairs, the Minister of Environmental Affairs, the Authority and other relevant institutions, develop guidelines for the rapid deployment and provisioning of electronic communications facilities.

(2) The guidelines must provide procedures and processes for—

(a) obtaining any necessary permit, authorisation, approval or other governmental authority including the criteria necessary to qualify for such permit, authorisation, approval or other governmental authority; and

(b) resolving disputes that may arise between an electronic communications network service licensee and any landowner, in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.’

‘22. Entry upon and construction of lines across land and waterways.—(1) An electronic communications 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, any 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.’

[10] The power to provide telecommunication services originally vested in the State through the General Post Office, and thereafter, the Post Office which became

the Department of Post and Telecommunications. The telecommunications enterprise of the State was incorporated in 1991 as Telkom SA (Pty) Ltd, a company wholly owned by the State. Telkom was given the exclusive right to provide telecommunication services although the Department continued to regulate it. Telecommunication services were regarded as a resource entrusted to the State for the public good. This led to earlier measures similar to those in s 22 of the ECA entitling the telecommunications service provider to enter onto land and maintain and construct its telecommunications infrastructure.[1] Major changes were introduced by the Telecommunications Act 103 of 1996: s 36 limited Telkom's exclusivity in the provision of telecommunication services to 5 years and s 37 granted MTN and Vodacom rights as licensees for the provision of mobile cellular services. Section 70(1) provided for the right of a fixed line operator to enter upon land but without requiring that compensation be paid to the owner (see also ss 70 to 77).[2] Section 69 required the Independent Communications Authority of South Africa, the regulator of the telecommunications industry, to prescribe regulations inter alia for the procedure to be followed and consultations to be held between an operator and any affected person or authority. No regulations were, however, made just as no 'procedures and processes' were prescribed in terms of s 21(2)(b) of the ECA for 'resolving disputes that may arise between an electronic communications licensee and any landowner'.

[11] The ECA was passed in 2005 as a result of developments in technology that made the convergence of different types of communication services, such as broadcasting and telecommunication services, possible. The preamble to the ECA provides explicitly that it is enacted to –

'promote convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors'.

---

[1] Section 82 of the Post Office Administration and Shipping Combination Discouragements Act 10 of 1911; s 80 of the Post Office Act 44 of 1958; s 70 of the Telecommunications Act 103 of 1996.

[2] Section 70(1) of Act 103 of 1996 read: 'A fixed line operator may, for the purposes of provision of its telecommunications services, enter upon any land, including any street, road, footpath or land reserved for public purposes, and any railway, and construct and maintain a telecommunications facility upon, under, over, along or across any land, street, road, footpath or waterway or any railway, and alter and remove the same, and may for that purpose attach wires, stays or other kind of support to any building or structure. Section 70(2) read: 'In taking any action in terms of ss (1), due regard must be had to the environmental policy of the Republic.'

The ECA deals with ‘electronic communications’ which is defined as

‘the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electromagnetic systems or any agency of alike nature, whether with or without the aid of tangible conduct, but does not include content service’.

An ‘electronic communications network’ is any system of electronic communications facilities including satellite, fixed and mobile systems and also fibre optic cables, electricity cable systems and other transmission systems. An ‘electronic communications service’ is

‘any service provided to the public, sections of the public, the State, or the subscribers to such service, which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network’ (excluding broadcasting services).

These services may be provided only by the holders of certain licences (s 7). The ECA granted the rights and privileges that in the past belonged to the fixed line operators, such as Telkom, to all electronic communications network service licensees. The rights contained in ss 70 to 77 of the Telecommunications Act came to be re-enacted as ss 22 to 29 of the ECA. The purpose of the older sections was to eliminate all possible constraints on the State in its providing of communication services. Due to the convergence of these services and the introduction of competition in the telecommunications industry the rights and privileges that existed under the older sections now had to be extended to persons other than the State or the fixed line operator. Hence the enactment of ss 22 to 29 of the ECA.

[12] The primary object of the ECA is ‘to provide for the regulation of electronic communications in the Republic in the public interest’ (s 2). Two of its other objects are to ‘promote the universal provision of electronic communications networks and electronic communications services and connectivity for all’ (s 2(c)) and to ‘promote an environment of open, fair and non-discriminatory access to … electronic communication networks and to electronic communications services’ (s 2(g)). The

ECA mandates the Minister of Communications to 'develop guidelines for the rapid deployment and provisioning of electronic communications facilities' (s 21). On behalf of the Minister the statement was made that the purpose of this was to 'provide connectivity to all the people in South Africa'. One of the functions of the Universal Service and Access Agency of South Africa established under s 58(1) of the Telecommunications Act 103 of 1996 (see s 80(1) of the ECA) is to 'promote the goal of universal access and universal service' (s 82(1)(a)). The Minister explained what 'universal access' meant –

'Universal Service for Electronic Communications Services is provided where all persons, if they require it, are able to obtain quality, affordable and usable access to a minimum set of electronic communications network service and electronic communications service, on either a household or individual basis, including a voice and data electronic communications service and, in the case of data, including a broadband connection, and access to emergency services using fee calls and messaging, where all services are offered on a non-discriminatory basis.'[3]

All licensees, including MTN, must achieve an average of 95 per cent network availability over a period of 6 months failing which they may incur a penalty of R 5 000 000 and R 50 000 for every repeated offence.[4]

[13] Section 22(1) empowers a licensee to enter upon public and private land, construct and maintain its network or facilities and alter and remove them. Section 22(2) provides that in taking these actions –

'due regard must be had to applicable law and the environmental policy of the Republic'.

It was contended on behalf of MTN that there was no reason to construe s 22 in such a way that a licensee had to have a legal basis such as a lease or servitude to be entitled to act in terms of s 22. Such an interpretation would render s 22 unnecessary. Section 22 had to be interpreted in a way that a licensee is allowed all the rights specified in s 22(1) but requiring it, when exercising those rights, to have

[3] See the *Determination issued under the Electronic Communications Act, 2005 (Act No 36 of 2005) with regard to universal access to and the universal provision of electronic communications services and electronic communications network services* (*GN* 85, *GG* 32939, 8 February 2010).
[4] Paras 4 and 7 of *GN* 774, *GG* 32431, 24 July 2009.

regard to the applicable law. The latter expression, it was submitted, meant all law that did not restrict or extinguish the rights created by s 22(1). Examples of the 'applicable law' include planning laws, the law of delict, nuisance etc. The construction contended for indeed gives effect to the purposes of the ECA and is also in harmony with other sections in the ECA.

[14] The powers given by s 22 are, as I have said, required to enable the providers of both fixed line and wireless telecommunications operators to achieve their objectives. It does not follow, counsel for SMI countered, that these operators may appropriate significant portions of land on which to construct permanent or semi-permanent installations as part of their networks. This is no doubt correct. The power given by s 22 is understandable in the case of a fixed line operator which would otherwise have to negotiate with thousands of land owners for permission to erect telephone poles and suspend cables across their land.[5] In *Telkom SA Ltd v MEC for Agricultural and Environmental Affairs, Kwazulu-Natal & others*[6] it was said:

'By contrast, to lay cables on land would require permission or servitudes from a huge number and variety of owners. Hence the need for an all-embracing permission such as is contained in s 70 [now s 22].'

The same need does not exist with regard to sites required to build base stations such as those of MTN and Vodacom. The phrase 'due regard must be had to applicable law' did not appear in s 70 of the repealed Act. Stricter requirements than before were thus introduced for the exercise of the powers now given by s 22(1).

[15] Counsel submitted that a purposive construction of s 22 would not authorise a licensee to *occupy* the land indefinitely but that s 22(2), by emphasising that the actions in terms of s 22(1) must be taken 'with due regard for applicable law', also referred to private land ownership. A proper, constitutional, interpretation thus meant that the consent of the land owner had to be obtained for an exercise of the rights in

[5] See para 10 above.
[6] 2003 (4) SA 23 (SCA) para 30.

terms of s 22(1). I find this interpretation 'unduly strained'.[7] It cannot be correct simply because the reason for the powers given by s 22(1) would fall away if consent of the owner were to be a requirement. Section 22(1) specifically dispenses with the need to obtain the owner's consent. It is no answer to suggest that because no provision is made for, for example, the delictual liability of the licensee, limitations on the liability of the land owner and responsibility to maintain access roads, an agreement of lease or other agreement is required. It seems to me that the general provisions of the law are sufficient to provide for these eventualities. The words 'with due regard' generally means 'with proper consideration'[8] and, in the context, imposes a duty on the licensee to consider and submit to the applicable law. This duty arises only when the licensee is engaged 'in taking any action in terms of subsection (1)': the 'action' referred to by s 22(1) is the entering, constructing and maintaining, altering and removing. These actions are authorised. It is 'in their taking' that due regard must be had to the applicable law. A fortiori the 'applicable law' cannot limit the very action that is authorised by s 22(1).

[16] Section 25 of the Constitution provides:

'(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.'

---

[7] *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) para 24.

[8] Cf *Joffin & another v Commissioner of Child Welfare, Springs & another* 1964 (2) SA 506 (T) at 508F-G where it was said that the words 'have regard to' meant 'bear in mind' or 'do not overlook'. In *Perry v Wright* [1908] 1 KB 441 (CA) at 458 Fletcher Moulton LJ, dealing with the expression 'regard may be had to', said that 'the facts which the Courts may thus take cognizance of are to be a "guide, and not a fetter"'. See also *Illingworth v Walmsley* [1900] 2 QB 142 (CA) at 144 where the phrase 'regard shall be had to' was said to mean 'bear in mind and have regard'.

[17] Property includes 'the bundle of rights that make up ownership such as the right to use property or to exclude other people from using it or to derive income from it or to transfer it to others.'[9] The 'deprivation' of property entails the limitation in respect of the acquisition, use of and control over property,[10] or, as it has been expressed, –[11]

'any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If s 25 is applied to this wide *genus* of interference, "deprivation" would encompass all species thereof and "expropriation" would apply only to a narrower species of interference.'

A 'substantial interference or limitation that goes beyond the normal restriction on property use or enjoyment found in an open and democratic society' is required.[12] The parties have accepted that the actions of MTN complained of do not amount to 'expropriation' but constitute a 'deprivation'. To my mind they are correct.

[18] Expropriation can be distinguished from other forms of deprivation in that it involves a 'real' taking away of the property from the owner and its transfer to the State or a third party.[13] In *Harksen v Lane NO & others*[14] it was said:

'The distinction between expropriation (or compulsory acquisition as it is called in some foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law.'

---

[9] *Geyser v Msunduzi Municipality* 2003 (3) BCLR 235 (N) at 249 cited by I M Rautenbach *Bill of Rights Compendium* (Service Issue 17) para 1A73.1.
[10] Rautenbach para 1A73.2.
[11] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57 (hereafter referred to as *First National Bank*). See *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) paras 12 ff (herafter referred to as *Agri South Africa*).
[12] *Mkontwana v Nelson Mandela Metropolitan Municipality & another; Bisset & others v Buffalo City Municipality & others; Transfer Rights Action Campaign & others v MEC, Local Government and Housing, Gauteng, & others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32 (hereafter referred to as *Mkontwana*) where it was stated that '[w]hether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation.' See *Offit Enterprises (Pty) Ltd & another v Coega Development Corporation (Pty) Ltd & others* 2011 (1) SA 293 (CC) para 39 (hereafter referred to as *Offit*).
[13] Rautenbach para 1A73.2. In *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) para 31 it was stated that the word 'is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation.' See also paras 32 ff and *Agri South Africa* paras 12-15.
[14] 1998 (1) SA 300 (CC) para 32.

The present case does not involve an acquisition or 'taking' of rights. It concerns deprivation by regulatory measures to 'enable the State to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation.'[15] Our courts have left open the question whether the doctrine of constructive expropriation should be part of our law.[16] Due to the seriousness of expropriation, property may only be expropriated subject to the payment of compensation.[17] There is no such requirement in the case of deprivation. However, compensation or the offer of compensation may well take the action complained of out of the realm of arbitrariness.[18]

[17] SMI did not challenge the constitutionality of s 22. Its objections were more limited. It submitted that MTN's reliance on s 22 was misconceived, first, because it did not and does not occupy the base station by virtue of s 22 (and s 22 does not by operation of law render its occupation lawful) and, secondly, because the manner in which it invoked s 22 was in violation of s 25 of the Constitution.

[18] The regulation of property to protect the common good must not amount to arbitrary deprivation. 'The idea is not to protect private property from all State interference, but to safeguard it from illegitimate and unfair State interference.'[19] The nature of the arbitrariness enquiry was summarised in *Reflect-All*: [20]

'Central to the arbitrariness enquiry is the relationship between the law in question, the ends it seeks to achieve and the impact restrictions have on the use and enjoyment of property. In

---

[15] *Reflect-All 1025 CC & others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government & another* 2009 (6) SA 391 (CC) para 63 (hereafter referred to as *Reflect-All*). In *Reflect-All* the Constitutional Court had to deal with the validity of ss 10(1) and (3) of the Gauteng Transport Infrastructure Act 8 of 2001. These sections allowed for the deprivation of land falling within road reserves. Nkabinde J said para 64: 'It must be emphasised that s 10(3) does not transfer rights to the State. What it does is this: it deprives the landowner of rights to exploit the affected part of the land within the road reserve and thus protects part of the planning process which has economic value and is in the long run in the public interest.' See *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 4; *Agri South Africa* paras 12-15.

[16] *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 8; *Reflect-All* para 65.
[17] Section 25(2)(b) of the Constitution.
[18] Cf Antonie Gildenhuis *Onteieningsreg* (2001) 2 ed at 24 ff.
[19] *Reflect-All* para 33 and see *Haffejee NO & others v Ethekwini Municipality & others* 2011 (6) SA 134 (CC) paras 30-1.
[20] *Reflect-All* para 49 and see *First National Bank* 2002 (4) SA 768 (CC) para 100.

some instances a deprivation will escape arbitrariness if a rational connection between the means adopted and the ends sought to be achieved is present. In other instances, however, the means adopted will have to be proportional to the ends in order to justify the deprivation in question. Marginal deprivations of property will ordinarily not be arbitrary if they are rationally connected to a legitimate purpose. More severe deprivations will ordinarily have to be shown to be proportionate. In this case, the deprivations are sufficiently serious to require a proportionality analysis. For present purposes, therefore, the following questions arise: does s 10(3) protect the hypothetical road network and if it does, is it proportional? In determining that, a court must have due regard to the purpose of the law in question, the nature of the property involved, the extent of the deprivation and the question whether there are less restrictive means available to achieve the purpose in question.'

[19] Any decision by MTN in terms of s 22 is, counsel correctly submitted, administrative action.[21] In the Promotion of Administrative Justice Act 3 of 2000, 'Administrative action' is defined in terms of 'a decision taken'.[22] The kind of action that will constitute a 'decision' is a matter of construction in the context of the case.[23] Administrative action which adversely affects the rights or legitimate expectation of any person must be procedurally fair. Section 3(2)(b) of PAJA contains detailed prescriptions concerning advance notice of any proposed administrative action to be taken and of the right to be heard before such decision is taken. The taking of a decision must be procedurally fair. Procedural fairness –[24]

'is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.'

[21] Section 1 of PAJA defines administrative action to include 'any decision taken, or any failure to take a decision, by – '(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision'. See *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange & others* 1983 (3) SA 344 (W) at 362F ff and Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 189 ff.

[22] Section 1 of PAJA. See *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) para 22.

[23] *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ) para 7 ff. See the discussion of R C Williams 'The Concept of a "Decision" as the Threshold Requirement for Judicial Review in terms of the Promotion of Administrative Justice Act' *PER/PELJ* 2011 (14) 5.

[24] Cora Hoexter *Administrative Law in South Africa* (2007) at 326-7 cited with approval in *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC) para 42; *Zondi v MEC for Traditional and Local Government Affairs & others* 2005 (3) SA 589 (CC) para 112.

[20] It was contended that the manner of MTN's reliance on s 22 and its reasons for so doing amounted to an arbitrary deprivation of property in violation of s 25 of the Constitution. For deprivation not to be arbitrary it must be both substantively and procedurally fair.[25] Procedural fairness is 'a flexible concept and … the requirements that must be satisfied to render an action or a law procedurally fair depends on all the circumstances.'[26] Arbitrary action is conduct which is 'capricious or proceeeding merely from the will and not based on reason or principle.'[27] Arbitrariness is inconsistent with the 'values which underlie an open and democratic society based on freedom and equality'.[28]

[21] As Coppin J remarked in the court below, s 22 does not mean that a private licensee 'may enter upon and encroach on any land and construct and maintain its communication network or facilities … of its own will or its own behest, without a fair process and without taking into account the rights … of the owner of that land'. While it is correct that MTN took occupation of the site in 1998 in terms of a lease, the lease had expired. Its continued occupation of the base station was thus unlawful and could only be justified by s 22. But s 22 is concerned with public power the exercise of which must not be arbitrary. After expiry of the lease MTN unilaterally held over and remained in occupation. When asked to vacate the site it agreed to do so but subsequently refused to leave. It explained its decision to remain only in the answering affidavit with the laconic statement that, although an alternative site had been identified, 'nothing has materialised with regard thereto'. There is no evidence that the objects of the ECA cannot be achieved without depriving SMI of its property. There was no intimation to SMI that MTN was no longer negotiating in order to reach agreement on the rental but was enforcing its statutory right. It was only when threatened with eviction proceedings that MTN sought to invoke s 22 and, again unilaterally, determined that it could remain in occupation without paying

[25] *First National Bank* para 100; *Mkontwana* para 65; *Reflect-All* paras 44 ff; cf A J van der Walt 'Procedurally Arbitrary Deprivation of Property' 2012 *Stellenbosch Law Review* 1.
[26] *Mkontwana* para 65.
[27] *Beckingham v Boksburg Licensing Board* 1931 TPD 280 at 282. See further *Livestock and Meat Control Board v R S Williams* 1963 (4) SA 592 (T) at 598A-C; *First National Bank* para 100; *Mkontwana* para 61 ff.
[28] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) para 33.

compensation. This is an abuse of a statutory power amounting to conduct that is arbitrary.[29]

[22] But there is another, decisive, reason why the appeal should be dismissed. MTN's original entry upon the site, its construction and maintenance of the base station took place pursuant to a commercial lease. Section 22 came into force only thereafter. These actions at that time could not have amounted to a 'decision'. The question is rather whether MTN, after expiry of the lease agreement, took a 'decision' to invoke its statutory rights to justify its continued occupation of the base station. There is no evidence that it did so. Not even its email message of 30 June 2009 referring to MTN's being a licensee in terms of the ECA and entitled to take the action set out in s 22(1) can be construed as a 'decision' to exercise its statutory powers: at best it is a threat to invoke them in future. Section 22 does not solely by operation of law render MTN's continued occupation lawful. Absent a 'decision' a judicial review is not possible.[30] But without a 'decision' having been taken lawfully, reasonably and procedurally fairly, MTN has no right to occupy SMI's property: it has not exercised its powers to do so in terms of s 22 of the ECA either properly or at all.

[23] In the result the appeal should be dismissed.

The appeal is dismissed with costs including the costs of two counsel.

_____

F R Malan

Judge of Appeal

[29] Unfortunately, no procedures or processes have been prescribed in terms of s 21(2)(b). This case illustrates the need for prompt action by the authorities in this regard.

[30] See *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ) paras 5 ff and authorities cited.

C Plasket (Mthiyane DP, Malan, Tshiqi and Pillay JJA concurring):

[24] I have read the judgment of Malan JA and agree with both his reasoning and his conclusion that the appeal must be dismissed with costs. I wish to add my comments on one issue dealt with by Malan JA, namely that the invocation of s 22 of the ECA by a licensee who is not an organ of state constitutes administrative action for purposes of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). This is, I believe, necessary because the issue as to when a private body exercises administrative power is a difficult one that has created definitional problems here and in comparable jurisdictions.

[25] As Malan JA has indicated in his judgment, MTN is a private company licenced to provide electronic communications services in terms of chapter 3 of the ECA. Being a licensee, it enjoys the powers set out in s 22(1) – the powers to enter upon land, construct and maintain electronic communications networks or facilities and alter or remove those networks or facilities. The ECA, in this way, vests in MTN the power to deprive people of their property, a power that s 25 of the Constitution only countenances if it is effected by a law of general application and is not arbitrary, both substantively and procedurally.

[26] Section 1 of the PAJA defines administrative action in two distinct ways. In the first instance, it defines administrative action when the actor is an organ of state and secondly it defines administrative action when the actor is not an organ of state. This case concerns this second aspect of the definition. It provides that administrative action means:

'. . . any decision taken, or any failure to take a decision, by –

(a) . . .

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision

which adversely affects the rights of any person and which has a direct, external legal effect . . .'

[27] The invocation of s 22 in any particular case would entail the taking of a decision, the effect of which would involve 'the imposing of a condition or restriction'

as envisaged by paragraph (d) of the definition of a decision, also in s 1 of the PAJA. As stated above, MTN is a private company. It is not an organ of state. It therefore qualifies as a 'natural or juristic person, other than an organ of state'. When it invokes its s 22 powers, it does so in terms of an empowering provision, namely the ECA. I shall return to whether it exercises a public power or performs a public function. Finally, in my view, there can be no doubt that when MTN invokes its s 22 powers it adversely affects the rights of the landowner whose land it wishes to utilise and that exercise of power also has a direct, external legal effect.[31]

[28] I return now to whether the invocation of s 22 by MTN would constitute the exercise of a public power. (I shall refer no further to the performance of a public function, because it seems to me that, in s 22, one is dealing with the exercise of a power.) It is notoriously difficult to define with any precision what is meant by a public power. Indeed, the concept is probably incapable of precise definition.[32] Furthermore, it is not static but changes over time as different forms of public administration are implemented.[33] (This case is a good example of how the administration of tele-communications has changed over time, from an organ of state providing the service, to a state-owned enterprise doing so, to both state-owned and privatised, but regulated, service providers doing so.)

[29] In *Police and Prisons Civil Rights Union & others v Minister of Correctional Services & others*,[34] I tried to capture the essence of the concept of public power as follows:

'In my view, however, the elusive concept of public power is not limited to exercises of power that impact on the public at large. Indeed, many administrative acts do not. The exercise of the power to arrest is a good example of an administrative action that would only have a significant impact on the arrestee and, perhaps, the complainant. Another example would be

---

[31] As to the meaning to be attributed to these last two elements of the definition of administrative action, see the judgment of Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) para 23, endorsed by the Constitutional Court in *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC) para 27 and *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & another* 2011 (1) SA 327 (CC) para 37.

[32] See the remarks of Du Plessis J in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another* 2004 (6) SA 557 (T) at 564B.

[33] Paul Craig 'What is Public Power?' in Hugh Corder and Tiyanjana Maluwa (eds) *Administrative Justice in Southern Africa* (1997) at 25.

[34] *Police and Prisons Civil Rights Union & others v Minister of Correctional Services & others* 2008 (3) SA 91 (E) para 53.

a decision by the Amnesty Committee of the erstwhile Truth and Reconciliation Commission to grant a person amnesty from the civil and criminal consequences of his or her politically motivated crimes. In these instances what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim. This is articulated clearly in the dissenting judgment of Schreiner JA in *Mustapha and Another v Receiver of Revenue, Lichtenburg, and Others*, now considered to be correct, in which he held that where a minister exercised a statutory power having a "contractual aspect" he acted "as a State official and not as a private owner, who need listen to no representation and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract". Instead, the minister, because he received his powers from the statute, could only "act within its limitations, express or implied". This passage encapsulates the essential difference between public and private power.'

[30] Although the *POPCRU* matter concerned an organ of state, the essential enquiry as to whether the power exercised by a private actor is a public power is similar. Does the power have to be exercised in the public interest? It was on that basis that Goldstone J, in 1983, held the Johannesburg Stock Exchange to a public law duty to act in accordance with its own rules in *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange & others*[35] when he held:

'Strictly speaking, a stock exchange is not a statutory body. However, unlike companies or commercial banks or building societies formed under their respective statutes, the decisions of the committee of a stock exchange affect not only its own members or persons in contractual privity with it, but the general public and indeed the whole economy. It is for that reason that the Act makes the public interest paramount. To regard the JSE as a private institution would be to ignore commercial reality and would be to ignore the provisions and intention of the Act itself. It would also be to ignore the very public interest which the Legislature has sought to protect and safeguard in the Act.'

[31] I am of the view that the power conferred on MTN by s 22 is indeed a public power. It is a power that is central to the attainment of the primary object of the ECA, namely 'to provide for the regulation of electronic communications in the Republic in the public interest'.[36] There can be no doubt that, even if MTN is motivated by the

[35] *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange & others* 1983 (3) SA 344 (W), 364H-365A.
[36] ECA s 2.

making of profit from providing its service, it is required by the ECA to provide that service in the public interest.

[32] It has been held in this court, in *Calibre Clinical Consultants (Pty) Ltd & another v National Bargaining Council for the Road Freight Industry & another*[37] that the enquiry centres on whether the power in question is of the nature of a governmental power, the reasoning being that governmental-type powers are quintessentially subject to a requirement of accountability. It is not necessary to comment on whether that approach has the potential to cast the net of accountability too narrowly because in this case we are dealing with what Hoffmann LJ in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan*[38] described as 'a privatisation of the business of government itself' in which the private body has been 'integrated into a system of statutory regulation'. Coercive powers to enter land, and even to deprive owners of the use of land, for public purposes is a typical governmental power that is provided for in democracies such as ours precisely in order to further the public interest.

[33] For the reasons set out above, I accordingly conclude that the invocation of the power vested in MTN by s 22 would constitute administrative action. That being so it attracts the fundamental rights that are vested in an affected landowner to administrative action that is lawful, reasonable and procedurally fair. That, in turn, has two effects: first, on the macro-level, because s 22 can only validly be exercised in accordance with administrative justice rights, it insulates the ECA against constitutional invalidity by serving as a hedge against arbitrary deprivation; and secondly, when a particular deprivation is challenged, the requirements of administrative justice determine whether it was, on the micro-level, arbitrary or not.

_____

C Plasket
Acting Judge of Appeal

---

[37] *Calibre Clinical Consultants (Pty) Ltd & another v National Bargaining Council for the Road Freight Industry & another* 2010 (5) SA 457 (SCA).
[38] *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909 (CA) at 931H-932A.

APPEARANCES:

For Appellant:	M Basslian SC
	T Manchu
	Instructed by:
	Mashiane Moodley & Monama Inc Johannesburg
	Lovius Block AtTorneys Bloemfontein
For Respondent:	C Watt-Pringle SC
	L Franck
	Instructed by:
	Eugene Marais Attorneys Johannesburg
	Symington & De Kock Bloemfontein