IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT _____

SCA Case No: 1028/2018

High Court Case No: 10354/17

In the matter between:

TELKOM SA SOC LIMITED — Applicant
(Appellant in the court a quo)

and

CITY OF CAPE TOWN — First Respondent
(First Respondent in the court a quo)

HILDA ISABEL KALU NO in her capacity as
THE EXECUTRIX OF THE ESTATE
LATE BIRCH KALU — Second Respondent
(Second Respondent in the court a quo)

FOUNDING AFFIDAVIT

I, the undersigned,

GEORGE CANDIOTES

do hereby make the following statements under oath:

1 I am the Group Executive: Legal Services at Telkom SA SOC Limited, the applicant in this application for leave to appeal.

2 I am duly authorised to represent the applicant in this application and to depose to this affidavit on its behalf.

3 The facts to which I depose are true and correct and are within my personal knowledge except where it is apparent from the context that they are not.

4 The submissions of law I make in this affidavit are made on the advice of the applicant's lawyers.

5 This is an application for leave to appeal against the judgment and order of the Supreme Court of Appeal handed down on 25 September 2019 in the matter of *Telkom SA SOC (Ltd) v City of Cape Town* (1028/2018) [2019] ZASCA 118 (25 September 2019) in which it dismissed Telkom's appeal against the judgment and order of the Western Cape High Court in Case No. 10354/17. A copy of the SCA judgment is attached as "**FA1**".

6 The case concerns the roll-out of telecommunications networks in South Africa and the conflict between national powers over telecommunications and municipal powers over municipal planning. In the High Court, Telkom applied for a declaration that:

6.1 the City of Cape Town Municipal Planning By-law 2015 (*the by-law*); and

6.2 the City of Cape Town's Telecommunications Infrastructure Mast Policy (*the Telecommunications Policy*)

were unconstitutional and invalid to the extent that they require the City's consent for the erection of any telecommunications infrastructure in its area of jurisdiction.

7 Given that the case involves a direct constitutional challenge to the provisions of the by-law and the Policy, it squarely raises a constitutional matter. It also engages directly with a number of prior judgments of this Court. These include:

7.1 *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) (*Habitat Council*)

7.2 *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) (*Maccsand*)

7.3 *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and others (Dark Fibre Africa (RF) (Pty) Ltd and others as Intervening Parties)* 2015 (11) BCLR 1265 (CC) (*Link Africa*)

8 The case requires these judgments to be applied in a new factual setting.

9 The factual setting is the roll-out of telecommunications networks across the country. These networks require, amongst other things, telecommunication base stations to be erected. The by-law and the Policy that Telkom challenged in the High Court divide Cape Town into certain zones for planning purposes. In some of those zones, the erection of base stations is prohibited. As a result, the only way to erect a base station in such a zone is to apply to the City for its consent to have the area re-zoned so that the base station may be erected. On the papers, the evidence shows that a rezoning process in

Cape Town takes at least 8 months in cases of no opposition and at least eighteen months in cases where there is opposition. The present case therefore concerns the constitutional validity of a by-law requiring the City's consent to the erection of base stations at specific locations in circumstances where even if such consent is ultimately granted, it will materially delay the roll out of telecommunications networks.

10 The SCA's judgment has a far-reaching impact because the roll-out of telecommunications networks is essential to meeting the telecommunications' needs of the people in South Africa and is directly related to their right, under section 16 of the Constitution, to receive and impart information or ideas.[1]

11 The SCA found that the by-law was not constitutionally invalid and also upheld the Policy. It erred in fact and in law in coming to this conclusion.

12 I set out below these errors of fact and law in order to show that it is in the interests of justice for leave to appeal to be granted in this matter.

Errors of fact

13 In paragraph 38 of its judgment, the SCA held that the location of infrastructure for telecommunications is far more flexible than mining because mining, by its nature, is restricted to a specific place and site. It held that:

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1 *Link Africa* para 120 and para 36

"*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*".[2]

14 There was no factual basis whatsoever for this finding on the papers before the SCA. Moreover, it is patently incorrect.

15 Licensees under the Electronic Communications Act 36 of 2005 (*the ECA*) are required to engage in detailed network design activities in order to ensure the effective and efficient roll-out of telecommunications. In order to achieve this, a number of inputs are collected and analysed to determine the number of base stations that are required to cover a geographical area. The location of each base station is then designed precisely on the basis of this information. The location of the base station is designed to deliver optimal performance to the consumers that are utilizing the service.

16 If a base station location changes, it will have a major impact of the quality of service to consumers. Moving a base station a mere 200m down the road, for example, can have a substantial impact on service delivery. This is depicted in the images below which seek visually to represent the impact of moving a base station 200m.

17 The diagram below shows how a network roll-out plan is designed. The red circles represent the coverage areas for each base station. These are called "cells". The cells are planned with minimum overlap in order to ensure mobility while at the same time minimizing inter-cell interference. Inter-cell interference occurs when base stations

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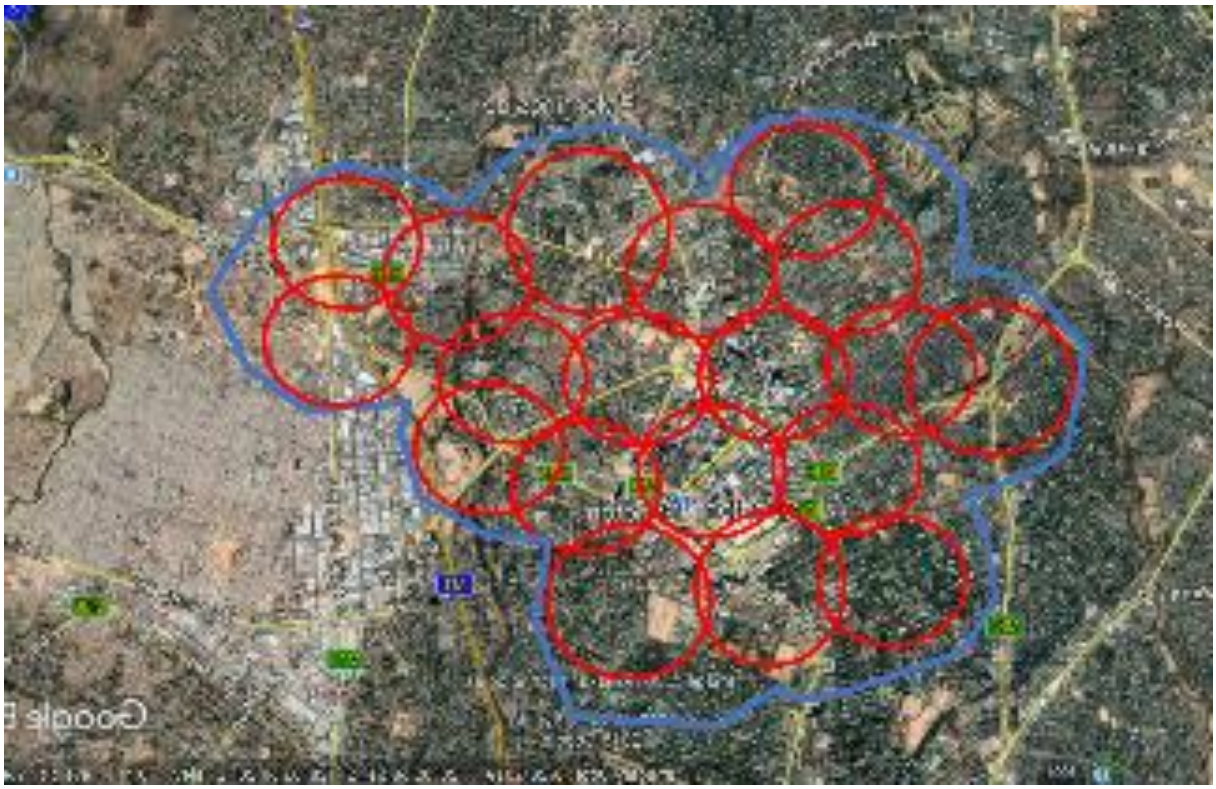
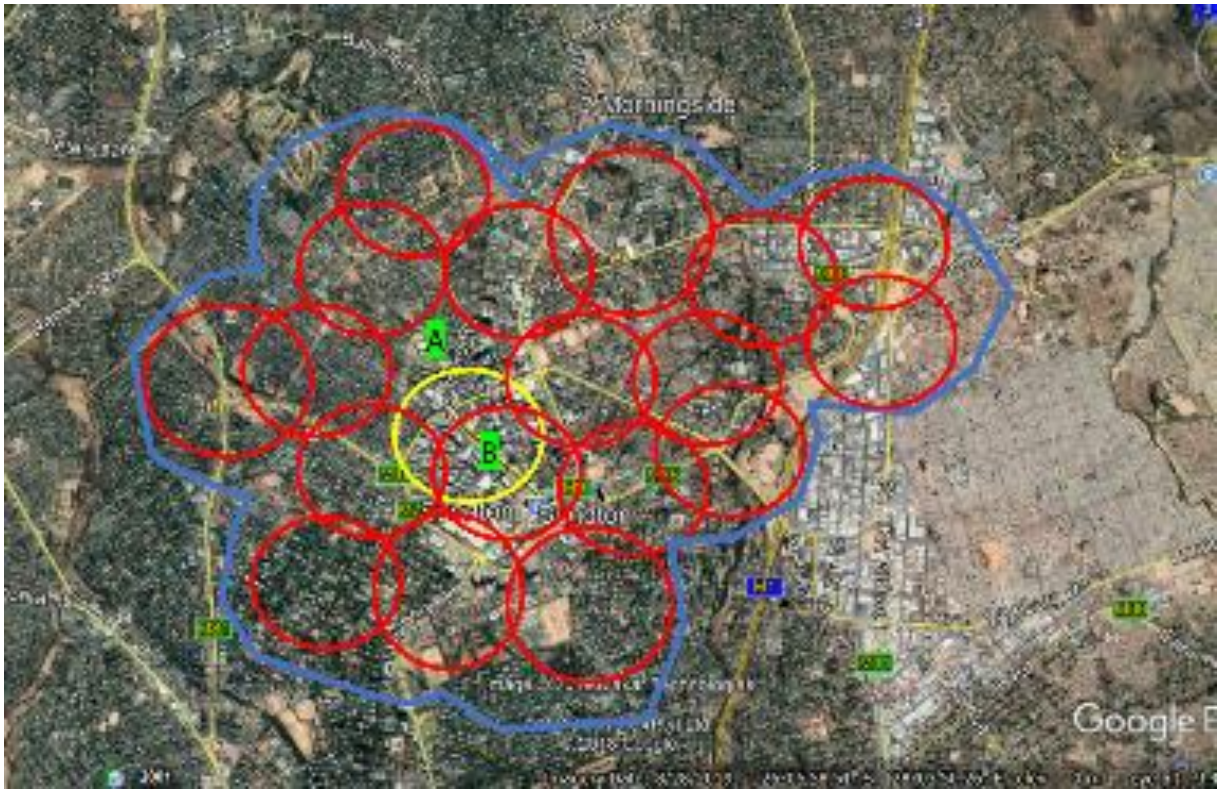
[2] SCA Judgment para 38

overlap in the same coverage area. If inter-cell interference is very high, it can cause a poor signal quality which will impact negatively on user experience.



18 In the diagram below, one of the cells has been moved a notional 200m in order to represent the impact of such a change in the location of the base station. The diagram shows that a coverage gap has been created in area A and there is increased inter-cell interference in area B because of the high overlap of coverage. Both of these impacts will diminish the quality of service for consumers in areas A and B.



19 The SCA therefore erred in basing its judgment on facts that were simply not included in the papers before it and were, in any event, wrong.

20 The SCA's errors will have a substantial impact on all network licensees under the ECA because each of them engages in a careful network design programme such as the one set out above. This impact will be compounded because of the technical requirements for the 5G telecommunication networks which are soon to be rolled out.

21 5G networks bring higher capacity and lower latency than the existing 4G networks. Several hundreds and thousands of computers will be able to access simultaneous connections at very high speeds on the 5G networks. If allowed to roll out without unnecessary impediments, the 5G networks will benefit the telecommunication sector to a great extent. They will provide better usage of smartphones and computers by

increasing network speed. They will also create the necessary environment for the era of the impending digital economy with advances for society at large, such as driverless smart cars, smart homes, countless applications enabled by the so-called “internet of things” and many other benefits.

22 Although there will be many advantages for consumers and the economy in general with the roll out of the 5G networks, there are certain technical features of the 5G networks that will impact on network design and, in particular, on the location of base stations. 5G network base stations will have to be located closer to each other than existing 2G, 3G or 4G base stations because the radio frequency waves used for 5G networks cannot propagate as far as those used for existing networks. Thus, the number of 5G base stations required to cover any fixed area will be much higher than the number of base stations required to cover that area with existing 2G, 3G or 4G networks. For the purposes of the present case, this means that 5G will present a need for more base stations which are located closer together and there will be less flexibility in relation to the positioning of these new 5G base stations. Given the time delays for rezoning applications and the dependence of overall network roll out design on the approval of the location of individual network base stations, the SCA judgment has the capacity materially to impede the roll out of 5G networks in South Africa.

23 Mr Josef Johannes Smit, Telkom’s executive responsible for Spectrum and International Regulations, has deposed to a confirmatory affidavit in which he confirms the correctness of the facts set out above. The confirmatory affidavit is attached as "**FA2**".

24 The roll-out of the 5G networks in South Africa will be the next important development in meeting the telecommunications needs of the country. If the SCA's judgment is not overturned on appeal, it will substantially retard the ability of network licensees to ensure the effective and efficient roll-out of this new network capability in South Africa, apart from impeding the roll-out of existing 3G and 4G networks. These facts, together with the reasonable prospects of success that Telkom addresses below, make out a clear case that it would be in the interests of justice for this Court to grant leave to appeal in the present matter.

Errors of law

25 Telkom challenged the constitutionality of the City's by-law and Telecommunications Policy on two alternative grounds.

26 The first was that the by-law and Policy were beyond the legislative competence of the municipality. The second ground of attack was that even if the by-law and Policy fell within the municipality's legislative competence, it was in conflict with section 22 of the ECA and therefore invalid.

27 The SCA found against Telkom on both these arguments. I address each of them in turn below.

Municipal competency

28 The SCA held that the by-law fell within the City's legislative competence of municipal planning.[3] It relied on this Court's judgment in *Habitat Council* for this conclusion.

29 However, in *Habitat Council*, this Court explained the rationale behind the constitutional vesting of power over zoning and sub-division decisions in the local sphere of government:

> "*Municipalities are responsible for zoning and subdivision decisions, and provinces are not.*
>
> *This makes sense, given that municipalities are best suited to make those decisions. Municipalities face citizens insistent on delivery of governmental services, since they are the frontiers of service delivery. It is appropriate that they should be responsible for zoning and subdivision. For these entail localised decisions, and should be based on information that is readily accessible to municipalities. The decision-maker must consider whether services - that are provided primarily by municipalities - will be available for the proposed development. And it must consider matters like building density and wall heights. These are best left for municipal determination*."[4]

30 This purposive approach to the rationale for including "municipal planning" in Part B of Schedule 4 of the Constitution was also highlighted in this Court's judgment in *Maccsand*. There, the Court held that "the Constitution allocates powers to the three

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[3] SCA Judgment paras 17 to 19

[4] *Habitat Council* paras 13 and 14

spheres of government in accordance with the functional vision of what is appropriate to each sphere". [5]

31 Telkom therefore submitted that in order to determine the proper ambit of municipal planning, it is necessary to consider the functional capacities of the three spheres of government.

32 The 1996 Constitution, which first vested local governments with original power over municipal planning, was also the first constitution to require back-to-back local government for the entire country. The ambit of "municipal planning" must therefore be informed by the fact that it was designed to operate in a context where there would be back-to-back local government across the country.

33 In this context, municipal planning cannot be interpreted to encompass decisions that will trench on national or provincial functions which depend on trans-municipal networks. Examples of such competencies are:

33.1 bulk electricity and water supply

33.2 national roads and provincial roads; and

33.3 telecommunications.

34 Road networks, bulk electricity, water networks and telecommunication networks all require continuity across municipal boundaries. So "planning" decisions in relation to these networks cannot be delegated to a municipal level and do not fall within the ambit

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[5] Maccsand para 47

of "municipal planning" in Part B of schedule 4. If municipalities were entitled to decide where in a municipality national bulk electricity, water, road or telecommunication networks could be rolled out:

34.1 at the very least, the efficient performance of national functions would be compromised; and

34.2 at worst, the performance of national functions may be frustrated completely.

35 For example, a decision by municipality A that all national and provincial roads may enter its boundaries only at particular points before travelling along municipally determined routes and exiting at particular points designated by the municipality may have serious negative consequences for the national and provincial roads networks.

36 This might add hundreds of millions of Rands onto national or provincial road construction projects. Moreover, in circumstances where neighbouring municipalities adopt similar decisions but the points that they want the roads to enter their boundaries do not match the points where municipality A wants the roads to exit their boundaries, the national and provincial roads would be incapable of construction.

37 Planning decisions in relation to these national and provincial "network" functions, therefore, fall outside the ambit of municipal planning. They are national and provincial planning decisions.

38 The SCA rejected this approach to the proper ambit of “municipal planning”. It relied on two paragraphs of this Court’s judgment in *Habitat Council* for this conclusion. It held that

in paragraph 23 of *Habitat Council*, this Court had already determined that "parochial municipal interests" should prevail when they are dealing with subdivision or zoning decisions. However, this, with respect, misunderstands paragraph 23 of *Habitat Council*.

39 The full paragraph reads as follows:

> "*The provincial minister also urged us to accept that good government requires that it should be able to 'safeguard provisional and regional interests' while the province's Land Use and Planning Bill is enacted and made ready for implementation. This, it urged, was because, if municipalities alone consider zoning and subdivision applications, 'parochial municipal interests' will triumph. The contention cannot be sustained. The Constitution envisages, subject only to the oversight and support role of national and provincial governments, and to the planning powers vested in them, that parochial interests should prevail in subdivision and zoning decisions*". (emphasis added)

40 Contrary to the SCA's finding, this is a clear endorsement of Telkom's submission that municipal planning does not include those matters that require national and provincial planning. In *Habitat Council*, this Court recognised that the Constitution allowed for parochial municipal interests to prevail over national and provincial interests, *except where national and provincial planning decisions were at stake*.

41 The roll-out of telecommunications networks is one such national planning initiative. It necessarily requires a broader perspective than municipalities are capable of. It requires the country to be mapped for telecommunications infrastructure to ensure that all people across the nation receive adequate access to quality telecommunications networks.

42 The SCA also relied on paragraph 19 of the *Habitat Council* judgment. According to the SCA, this Court has already rejected Telkom's argument that leaving 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.[6] But this Court did no such thing in *Habitat Council*. *Habitat Council* did not concern cross-municipal networks. It dealt with the question of zoning and subdivision decisions that may have impacts beyond the borders of a municipality, but it did not deal with network planning. It held, in respect of those non-network decisions, that there was no veto power that the province exercised in relation to those "big" planning decisions of municipalities, such as where to approve a major new town development. It held that the municipality and the province each had their own planning powers that would be exercised. The provinces therefore had "co-ordinate powers to withhold or grant approvals of their own".[7]

43 *Habitat Council* was therefore a case about the overlapping spheres of provincial and municipal planning. This is not such a case. This case is about the national planning power over networks such as telecommunications, in respect of which the municipalities exercise no legislative competence.

44 Although the SCA's judgment refers to a number of this Court's previous decisions on municipal planning, none of the judgments referred to by the SCA deals with these network planning powers of the national or provincial governments.

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6 SCA Judgment para 26

7 *Habitat Council* para 19

45 The one previous decision of this Court that has dealt with this issue was not referred to in the SCA's judgment at all. This is the decision of *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC).

46 *Reflect All* concerned two features of the Gauteng Transport Infrastructure Act:

46.1 First, the Act provided that when the province published preliminary designs for its provincial road network (preliminary designs that may not turn into roads for many years), no municipality may exercise any planning powers over the area covered by a preliminary design.

46.2 On this aspect, this Court held as follows:

> "*The legal restrictions in s 9 on land affected by a preliminary design appear sweeping … The restrictions in s 9 prohibit the granting of applications for the establishment of townships, the subdivision of land, any change of land use in terms of any law or town- planning scheme, or any authorisation contemplated in the Environmental Conservation Act 73 of 1989 or the National Environmental Management Act 107 of 1998. Additionally, as under s 7, no service provider may lay, construct, alter or add certain services over or below the affected area, except with the written permission of the MEC or in terms of an existing registered servitude. Effectively, the area within the road or rail reserve is frozen. It*

can only be used for its designated purpose at the time the MEC chooses to publish notification of a preliminary design."[8]

47 Second, section 10(3) of the Act treated all existing preliminary designs (2593 kilometres of route across Gauteng) as having been approved under the Act and thus subject to the sterilization of all municipal planning powers over the land covered by those preliminary designs.

48 This Court rejected a complaint that the incorporation of these restrictions to previously unrestricted land traversed by these 2593 kilometres violated the constitutional competence of local government over municipal planning. The reasoning of this Court in this regard is instructive:

> "*The road network that forms the subject of this litigation comprises provincial roads. The Constitution vests authority with regard to municipal planning in the local government.*
>
> *The applicants lost sight of the fact that provincial roads are, in terms of Part A of Schedule 5 to the Constitution, an exclusive provincial sphere of activity in respect of which it has legislative competence. These functional areas (provincial roads and traffic), as they have been included in the Constitution by its drafters, remain under the exclusive provincial sphere until they are assigned to municipalities. There is no indication in the record to suggest that those functional areas have been assigned to the*

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[8] *Reflect All* para 23

relevant municipalities. In any event, the Infrastructure Act requires the MEC to consult with municipalities whose areas will be affected by route determinations and preliminary designs.

Having analysed the relevant constitutional provisions, I conclude that ss 7 and 9 of the Infrastructure Act do not therefore interfere with the performance by local governments of their constitutionally ordained functions. The applicants' challenge must therefore fail"[9]

49 This Court therefore held that the municipal planning function did not extend to planning functions covering provincial road networks, which was an exclusively provincial competence.

50 By parity of reasoning, the municipal planning function does not extend to planning functions covering national telecommunications networks, which are an exclusively national competence.

51 I therefore respectfully submit that the SCA erred in finding that municipalities have the constitutional power to regulate the zoning of land for use of base stations. Municipal planning powers do not extend to the types of planning, such as national and provincial road networks, bulk electricity and water, and telecommunications, that require cross-municipal networks in order to be efficiently and effectively implemented. Those network planning decisions fall within the exclusive legislative competency of the national and provincial governments.

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[9] *Reflect All* paras 74 to 76

52 The SCA judgment ought, therefore to be overturned on appeal.

53 If, contrary to what is set out above, this Court were to find that regulating the location of telecommunication base stations falls within the ambit of the municipal planning power under Schedule 4 of the Constitution, then I deal in the next section with the second ground on which Telkom attacked the by-law and the Policy.

The conflict with s22 of the ECA

54 Section 22(1) of the ECA gives electronic communications network service licensees the right to enter upon any land, railway or waterway of the Republic; and to construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across that land, railway or waterway.

55 The section reads as follows:

> "*(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."

56 This Court dealt with section 22 of the ECA in its decision in *Link Africa*. It held that the right of access and construction given to licensees is "good for economic growth, education and public-service delivery".[10] It has the potential to "improve the quality of life of all people in South Africa".[11] According to this Court, the powers that section 22(1) of the ECA gives to licensees are necessary to achieve these ends.[12]

57 Section 22 of the ECA is Parliament's exercise of its national network planning power in the field of telecommunications. It vests the power to determine the location of telecommunication base stations with the persons (network licensees under the ECA) who are functionally equipped to consider the footprint of the national network and to determine where it is best to locate each base station in order to achieve maximum coverage and minimal interference with existing infrastructure.

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10 *Link Africa* para 180

11 *Link Africa* para 121

12 *Link Africa* para 180

58 Telkom's second ground of attack on the by-law was that it was in conflict with this section of the ECA because it requires the municipality to give consent before a telecommunications base station may be erected. This, it contended, was inconsistent with the right that is given under section 22 of the ECA to licensees to erect telecommunications infrastructure.

59 The SCA rejected this argument on two grounds. In the first place, it held that there was no conflict because this case, like the case of *Maccsand*, involved complementary requirements for consent and not a conflict. In the second place, it held that Telkom had misconstrued this Court's judgment in *Link Africa*.

60 I deal with each of these grounds, in turn below.

Maccsand

61 The SCA held that the impugned by-law was not in conflict with section 22 of the ECA because this Court rejected a similar argument in *Maccsand*.[13]

62 In *Maccsand*, the issue was whether the holder of a mining right under the Mineral and Petroleum Resources Development Act 28 of 2002 (*MPRDA*) was bound to obtain authorisation from the City of Cape Town to conduct mining operations by way of a consent use and rezoning of the land on which the mining was to take place. This Court

[13] SCA Judgment paras 332 to 39

held that there was no conflict between the two sets of requirements because they were directed at different subject matter.[14]

63 The SCA held that there was no material distinction between the statutory provisions in *Maccsand*, and those in the present case. It erred in this regard. There are two important distinguishing features of *Maccsand* that make it inapplicable to this case.

63.1 First, *Maccsand* concerned provincial legislation not municipal by-laws. It therefore did not engage section 151(4) of the Constitution which provides that any by-law that conflicts with national legislation is invalid.

63.2 Second, *Maccsand* did not concern a national government network function like telecommunications or roads. This meant that there was no issue, in *Maccsand*, of frustrating the purpose of the MPRDA by imposing an additional requirement of local government land use consent before the holder of a prospecting or mining right could exercise those rights. Moreover, if one has regard to the history of mining legislation, the holders of mining and prospecting rights had long historically been restrained from exercising their rights in townships and urban areas (as opposed to elsewhere in the country) without additional permissions (see for example section 7(1)(a) of the Minerals Act, 1991).

64 The SCA did not deal with the first distinction at all in its judgment. In so far as the second distinction is concerned, the SCA purported to engage with it, but did so on the basis of plainly erroneous assumptions in relation to facts not before it, which I have addressed in the first section of this affidavit. In essence, the SCA rejected the second

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[14] *Maccsand* paras 50 and 51

ground of distinction because it held, on the basis of no evidence before it, that network licensees have flexibility in relation to the location of telecommunications infrastructure.[15] However, as I have set out above, this is not correct. Requiring municipal consent to the erection of a base station in any given location can have a material and negative impact on the roll-out of telecommunications' infrastructure, and is much more likely to do so now that 5G networks are soon to be rolled out.

Link Africa

65 In *Link Africa*, this Court recognised the limitation on municipalities' powers over telecommunications. In five important paragraphs of the *Link Africa* judgment, the majority of the Court held as follows:

> "Powers and duties of municipalities
>
> *"[185] Local authorities are in a distinctive position from private landowners. As far as municipalities are concerned, 'applicable law' in s 22(2) refers to laws that they may make within their constitutional legislative competence in terms of ch 7 of the Constitution. If laws fall within that competence, they must be complied with before s 22(1) may be exercised. In each case where a local authority asserts that it has the constitutional competence to require compliance with its own laws, it must be tested against the provisions of ch 7 of the Constitution to determine whether it really has that constitutional competence.*

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[15] SCA judgment para 38

[186] Telecommunications is not an area over which local authorities hold constitutional competence. Here we agree with the minority judgment that the City failed to make out a case that any of its competencies under the Constitution or legislation have been infringed.

[187] But Msunduzi advanced an illuminating argument that commands attention. Although it conceded that electronic communications fall within the national domain, it urged that municipalities have rights and powers to regulate the manner in which the national power is exercised. Hence, Msunduzi argued, the licensee has some obligation to engage with the local authority when it plans to enter upon public land. It must take into account practical considerations about order and safety.

[188] In argument Msunduzi propounded that a licensee cannot simply come into a municipality and without warning dig up a busy intersection, or lay cables along a busy pedestrian walk without consulting the local authority. Counsel for all the licensees were quick to agree. And rightly so. We think Msunduzi's argument is sound. Section 151(4) of the Constitution provides that national or provincial government 'may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions'. This must be read with s 151(3), which provides that '(a) municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution'. And s 156(3) provides that '(s)ubject to section 151(4), a bylaw that conflicts with national or provincial legislation is invalid'.

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

66 In these paragraphs of the Court's majority judgment in *Link Africa*, it held that having regard to the ECA's purpose of facilitating an unhindered universal roll out of electronic communications services, the power to enter land and to construct telecommunications infrastructure conferred by section 22 was not one that could be made subject to municipal consent. It therefore held that "applicable law" referred to in s 22(2) included municipal by-laws that regulated the manner in which a licensee exercised those powers but not by-laws which purported to "thwart the purpose of the statute by requiring the municipality's consent". Any such by-laws would be inconsistent with s 22(1) and thus invalid.

67 Contrary to what I have set out above, the SCA found that this is not what paragraphs 185 to 189 of the judgment in *Link Africa* meant. According to the SCA, when this Court held that municipal by-laws may not "thwart the purpose of the statute by requiring the municipality's consent", all it meant was that there could not be laws enacted by a municipality that prohibited the roll out of telecommunications infrastructure.[16] The

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[16] SCA judgment para 49

occasional refusal of a rezoning application, according to the SCA, would not thwart the purpose of the statute.[17]

68 However, this reading of *Link Africa*, is supported neither by its language nor its context. This Court's discussion of "thwarting the purpose of the ECA" appears in a section of the judgment in which it is clearly understood that telecommunications is a national competence. It also appears in a section of the judgment in which the purpose of ensuring the rapid roll-out of telecommunications infrastructure is being discussed. In that context, a municipal by-law that requires a network licensee to obtain the consent of the municipality before erecting a base station, does thwart the legislative purpose of giving the national telecommunications network planning responsibility to network licensees and ensuring that those networks are rapidly rolled out to the benefit of consumers.

69 The SCA's understanding of these passages in *Link Africa* is also inconsistent with the distinction that this Court drew between by-laws that regulate the modalities by which telecommunications infrastructure can be installed and those that regulate where the infrastructure is to be installed.

70 Municipalities are empowered to make reasonable by-laws prescribing such modalities as:

70.1 the building specifications with which telecommunications infrastructure must comply;

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[17] SCA judgment para 49

70.2 the time of day and week that s 22(1) powers can be exercised;

70.3 environmental requirements with which constructors and owners of telecommunications infrastructure must comply; and

70.4 prohibitions to ensure that telecommunications infrastructure and their construction do not create a nuisance.

71 However, this Court's majority judgment clearly holds that municipalities may not enact by-laws that require their consent to the erection of a telecommunications base station at a particular location. When municipalities enact such by-laws, the by-laws will be inconsistent with section 22 of the ECA and, in terms of section 151(4) of the Constitution, invalid.

Interests of justice

72 Telkom seeks leave to appeal to this Court on the basis that the SCA erred both in fact and in law in dismissing its appeal.

73 The errors of fact formed the basis for the SCA's rejection of the argument that planning decisions, which require a national or provincial network such as telecommunications infrastructure, do not fall within the ambit of the municipal planning competence. Because the SCA erroneously found that the specific location of a given telecommunication base station is not relevant to the roll-out of telecommunications, it was able to find that municipalities are functionally equipped to make decisions about where telecommunications infrastructure should be installed. As the facts set out above

show, that is not the case. Municipal planning therefore does not include planning for the roll-out of trans-municipal networks such as telecommunications infrastructure.

74 The errors of law derive, with respect, from an incorrect understanding of:

74.1 the rationale for this Court's decision in *Maccsand*;

74.2 this Court's previous "municipal planning" decisions, such as *Habitat Council*; and

74.3 paragraphs 185 to 189 of *Link Africa*.

75 The SCA's judgment has important and far-reaching consequences for all network licensees under the ECA. If it is not overturned on appeal, it will mean that the roll-out of telecommunications infrastructure in the country will be at the mercy of municipal planning permission processes. Those processes have no role to play in relation to national network planning areas such as telecommunications. The impugned by-law in this case is therefore beyond the legislative competence of the City. In the alternative, the provisions of the by-law, which require the municipality's consent before a base station may be erected, are in conflict with section 22 of the ECA which vests all network licensees with the right to erect telecommunications infrastructure at locations that they determine are best suited to the network requirements.

76 As pointed out above, these far-reaching consequences will be experienced in a particularly acute form in relation to the imminent roll out of 5G networks which are so important to the development of the telecommunications sector in South Africa and the benefits that development can bring to the South African public. This is because 5G networks

76.1 will require many more telecommunications masts to be constructed than those that are capable of serving the existing 3G and 4G networks, and

76.2 are far less flexible than the existing 3G and 4G networks in their ability to accommodate deviations from the chosen positions of telecommunications masts.

Telkom therefore prays for an order granting it leave to appeal and upholding the appeal.

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DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at …… on this the day of ……. 2019 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

_____
COMMISSIONER OF OATHS

FULL NAMES:

ADDRESS:

EX OFFICIO: