

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: 217/2019
SCA Case No: 1028/2018
High Court Case No: 10354/2017

In the matter between:

TELKOM SA SOC LTD

Applicant
(Appellant in the court a quo)

and

CITY OF CAPE TOWN

First Respondent
(First Respondent in the court a quo)

**HILDA ISABEL KALU N.O. in her
capacity as THE EXECUTRIX OF THE
ESTATE LATE BIRCH KALU**

Second Respondent
(Second Respondent in the court a quo)

**CITY'S ANSWERING AFFIDAVIT
IN TELKOM'S APPLICATION FOR LEAVE TO APPEAL**

I, the undersigned,

FIONA JANE OGLE

do hereby make oath and say that:



INTRODUCTION

1. I am employed by the City of Cape Town as the Head: Urban Legislation and Enforcement in the City's Development Management Department. I am duly authorised to depose to this affidavit on behalf of the City.

2. The facts in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct. Where I make averments not directly within my knowledge, I do so on the basis of information made available to me by other staff in the City, which information I verily believe to be true and correct, and/or which has been ascertained from documentation which falls under the control of the City.

3. Unless the context indicates otherwise, I use the following abbreviations in this affidavit.

Abbreviation	Definition
Building Act	National Building Regulations and Building Standards Act 103 of 1977
City	City of Cape Town, the first respondent
ECA	Electronic Communications Act 36 of 2005
licensee	person to whom an electronic communications network service licence is issued in terms of the ECA
mast	electronic communications base station or freestanding base telecommunications station
Mast Policy	City of Cape Town Telecommunication Mast Infrastructure Policy, April 2015
By-Law	City of Cape Town Municipal Planning By-Law, 2015
Telkom	Telkom SA SOC Ltd, the applicant

4. In this affidavit, for brevity, I refer to a communication written, and an action taken, by the attorneys or other representative of one of the parties as having been written or taken by the party itself.

SUMMARY OF THE CITY'S POSITION

5. While an appeal in this matter has no reasonable prospect of success, the City submits that it is in the interests of justice for the appeal to be heard, as there are ongoing disputes, and the matter is one of considerable public importance which needs to be finally resolved. The City accordingly agrees that leave to appeal should be granted. If leave is granted, the City will argue that this Court should (a) dismiss the appeal and (b) declare that a licensee acting under authority of the ECA must comply with laws which the Constitution empowers and requires local government to administer.
6. Section 22 of the ECA requires that a licensee acting under authority of the ECA must comply with all applicable laws when installing electronic communication facilities such as telecommunication masts. Apart from s 22, the rule of law also requires a licensee to comply with all applicable laws. When installing a mast in Cape Town, those laws include the Building Act (which Telkom's application neglects to mention) and the By-Law (the relevant municipal planning law).
7. Telkom accepts that all other land uses, including land uses which fall within the exclusive competence of national government, such as mining, require municipal



consent. However, Telkom argues for telecommunications exceptionalism. The City submits that this Court should reject that proposition.

FACTS

8. This matter concerns a freestanding base telecommunications station (the mast) which is installed on the property of the second respondent (the Kalu property), a private residential property in Heathfield, Cape Town. The Kalu property is zoned Single Residential Zone 1 in terms of the Cape Town Municipal Planning By-Law (the By-Law). A freestanding base telecommunications station may not be erected on land with that zoning.
9. On 18 January 2016 Telkom accordingly applied for rezoning of the relevant portion of the Kalu property. However, Telkom did not wait for the City's approval of its rezoning application, but went ahead, two weeks later, and erected the mast – to the outrage of local residents. Telkom also failed to obtain the building plan approval which is required by the Building Act.
10. Telkom's unlawful erection of the mast on the Kalu property is not an isolated incident. It 'fits into a pattern of systematic conduct by Telkom of erecting masts without obtaining either planning authorisation or building plan approval, and which leads to complaints from the public' (SCA record p 155 para 48). Telkom admits a series of other cases in which it made application for land use approval to accommodate the erection of masts, but unlawfully erected the masts without obtaining that approval.



11. Telkom instituted an application in the High Court challenging the constitutional validity of the By-Law only after the City commenced enforcement proceedings by applying for an administrative penalty in terms of the By-Law. The High Court dismissed Telkom's application, and granted a counter-application by the City declaring that the erection, use and development of the mast on the Kalu property was unlawful. The SCA dismissed Telkom's appeal.

12. In paragraph 38 of its judgment (p 57), the SCA dealt with Telkom's attempt to distinguish *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) on the basis that telecommunications require national infrastructure while mining can only take place in one spot. The SCA pointed out that a party which wishes to undertake mining is in a more invidious position than the holder of a licence under the ECA, because mining is limited to the place stipulated in the mining right, whereas an ECA licence does not limit where the telecommunications infrastructure may be erected. The SCA stated that 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.

13. Telkom claims in its application to this Court that paragraph 38 of the SCA judgment is 'patently incorrect' and that there is 'no basis on the papers' for finding that there is ordinarily some flexibility to the positioning of cell phone towers (FA p 13 para 14). Ironically, it is Telkom that has no regard to the papers before the SCA. Telkom misleadingly ignores the facts of the matter before the SCA.

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14. Without regard to the requirements of this Court's rule 31, Telkom now attempts to introduce new evidence, alleging that changing the location of a base station 'will have a major impact on quality of service' by creating a coverage gap and increased inter-cell interference, which can 'cause a poor signal quality which will impact negatively on user experience' (FA paras 15-18).

15. The fact is that the mast at issue in this matter can be placed at a network-viable, alternative location on land which does not need to be rezoned and which is not residential. The alternative location is Remainder Erf 81290, which is zoned Open Space 2 and permits a freestanding base telecommunication station with a consent use. It is 50 m to the east of the Kalu property, 100 m from the nominal position. The City asked Telkom to explain why the mast cannot be placed on Erf 81290 (FO6 SCA record p 239 para 6). In response, Telkom stated that Erf 81290 would require 'a 25m monopole to accommodate the targeted area and this will have unnecessary cost plus unnecessary coverage to the east', and the land would cost more to lease and involve unspecified 'environmental issues' (FO7 SCA record p 242). The evidence before the SCA thus shows that positioning the mast on the alternative location would create no interference, and that a coverage gap can be avoided by increasing the size of the mast. With a taller (albeit costlier) mast, the alternative position would not 'negatively impact on user experience'. The truth is therefore that because of cost, rather than network-coverage reasons, Telkom avoided a viable, alternative location which does not require rezoning.

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16. Accordingly, and contrary to Telkom's submission to this Court in para 19 of its founding affidavit, the SCA did not base its judgment on factual errors or on facts not included in the papers before it.
17. Telkom's application to this Court is founded on a bogey. It asserts that if municipal planning governs land uses in terms of national functions which depend on trans-municipal networks, then 'at the very least, the efficient performance of national functions would be compromised; and at worst, the performance of national functions may be frustrated completely' (FA p 19-20 paras 33-34). Yet twenty-three years after the Constitution came into operation, Telkom does not point to a single instance in which the municipal regulation of land use planning has ever compromised or frustrated the installation of bulk electricity or water supply, national roads, provincial roads or telecommunications (or any other trans-municipal network) has ever compromised or frustrated the performance of those functions.
18. Telkom's application to this Court suggests, without evidence, that a municipality may refuse municipal planning approval for necessary telecommunications infrastructure. This is doubly misguided. First, it ignores the remedies (such as review) which a dissatisfied provider will have. Second, Telkom fails to deal with the evidence on the papers. This includes the details of the City's Telecommunication Mast Infrastructure Policy (FO1 SCA record pp 388-434).
- 18.1. The 'overarching premise' of the Mast Policy 'is to facilitate the growth of new and existing telecommunications systems and facilitate the

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provision of [masts] in an efficient, cost-effective, environmentally appropriate and sustainable way' (p 177).

18.2. The very first objective of the Mast Policy is that the 'telecommunications network should be as comprehensive and accessible as possible'. It expressly recognises that 'masts provide a radio signal which is dependent on line of sight for good reception [and that] the signal becomes weaker with distance or obstructions' (para 1.2.2). The Mast Policy also accommodates the fact that, due to developments in technology, 'the coverage that each mast is able to provide has shrunk', there is a 'continual need to provide more masts' and 'the distance between the masts is reducing' (para 1.2.4). An objective of the Mast Policy is to ensure that a mast is placed in the best possible location considering, among other factors that 'the coverage area that a mast can reach needs to be maximised' (Objective 2).

18.3. While the Mast Policy discourages the erection of a mast 'as far as possible' in an area of environmental or heritage significance where the mast would interfere with the view of or from the site, with an adverse impact on the environmental or heritage resource, a mast may be erected even at such a sensitive site where 'this is unavoidable for network and technical reasons' (Objective 7.1).

18.4. There is accordingly no basis for Telkom's professed concern that the City's exercise of its function of municipal planning and land use will

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unreasonably compromise or frustrate the establishment of telecommunications networks.

- 18.5. If the City or another municipality does act in this fashion, the licence holder has its remedies. The remedy to this alleged problem cannot be to deny municipalities their constitutionally allocated functions.
- 18.6. Telkom focuses only on the location of masts. However, that is not the only municipal planning consideration. The Mast Policy also promotes co-location or sharing of masts (Objective 3), and the use of modern mitigation measures to minimise visual impact, for example: integrating telecommunications infrastructure into existing structures, using concealment, camouflage, appropriate finishes and colours, architectural features in keeping with the character of the area and appropriate landscaping (Objectives 4-7).
19. The City's Mast Policy is reasonable, balanced and sound. Telkom has not suggested that any of the considerations in the Mast Policy are inappropriate or that any provision in the Mast Policy or its implementation compromises or frustrates the roll out of its network. Telkom has not attacked the Mast Policy as being unreasonable.
20. In its application to this Court, Telkom objects to the time taken to decide municipal planning applications. In doing so, it misrepresents that the decision time for an application is between 8 and 18 months (FA p 12 para 9). The City

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explains that this is incorrect (SCA record p 367 para 21). Planning applications are in fact decided in 5 to 6 months, which can be further reduced on request (SCA record p 368 para 26).

21. In any event, there are further reasons why the time taken to decide a municipal planning application does not impede the roll-out of a telecommunications network. Telkom has a two-year rollout plan. The evidence on the papers is that 'given that Telkom knows well in advance where it must erect masts, through diligent planning, proper management and by making timeous application for the necessary approvals, Telkom has it within its power to avoid delays in its roll out' (SCA record p 367 para 22). Telkom's difficulties stem not from the need to apply for planning approval, but from its poor management. In this matter, Telkom inexplicably waited until just two weeks before erection date of the Kalu mast before submitting its application to the City. Tardy management by a licensee is not a valid reason to limit the constitutional ambit of municipal planning.

22. The City objects to the attempt by Telkom to introduce new evidence which seeks to show that the SCA judgment will substantially retard the ability of licensees to ensure the effective and efficient rollout of a 5G network (FA pp 13-17 paras 15-24; pp 35-36 para 75-76). The allegations are not 'common cause or otherwise incontrovertible', or 'of an official, scientific, technical or statistical nature capable of easy verification' as contemplated in this Court's rule 31. Telkom has not suggested that any of the new evidence relates to events subsequent to the proceedings before the High Court.



BUILDING ACT

23. Telkom conceded in both the High Court and the SCA that it must obtain building plan approval from the relevant municipality in terms of the Building Act before erecting a mast (SCA judgment paras 4-7).
24. Contrary to those concessions, Telkom argues that a mast is not a building under the Building Act. In a letter to the National Director of Public Prosecutions dated 12 July 2019 ('AA1.'), written after its concession in the High Court, Telkom contends that in 'all instances' telecommunication masts are not buildings (paras 6.6, 8.2 and 8.3). In a letter to the SCA dated 13 September 2019 ('AA2.'), written after the hearing in which its counsel had made an unqualified concession that masts are buildings, Telkom sought to backtrack on the concession by arguing that the concession related only to the Kalu property (para 2). Telkom reserved the right to argue 'in due course' that some masts are not buildings and that this Court and the SCA have not made 'a binding determination on this issue in relation to all types of masts given their different physical characteristics' (paras 3 and 4).
25. Telkom's approach is duplicitous. At each hearing, by tactically conceding the point, Telkom seeks to avoid a binding determination in the judgment that the erection of a mast without approval in terms of the Building Act is unlawful. At the same time, Telkom wishes to reserve the right to argue that it is not bound to comply with the Building Act.



26. The City accordingly requested the SCA to incorporate in its judgment an express endorsement of the High Court order and to make a determination that it is unlawful to erect a mast without approval in terms of the Building Act. However, due to Telkom's concession, the SCA judgment did not take this request further and instead stated that 'there is no reason why Telkom should not be bound by its undertaking' (para 10).
27. Unfortunately, the SCA judgment does not unequivocally lay the matter to rest. The City submits that it is in the interest of justice for leave to appeal to be granted in order for this Court, in the words of Telkom, to make 'a binding determination on this issue', and to declare that Building Act approval is required for the erection of a mast.

MUNICIPAL PLANNING BY-LAW

28. Telkom argues that the By-Law (a) exceeds the legislative competence of the City, alternatively (b) conflicts with s 22 of the ECA.

(a) Legislative competence

29. Telkom's main argument on legislative competence is that the local government functional area of 'municipal planning' in Schedule 4B to the Constitution excludes 'network planning powers of the national or provincial governments' (FA paras 43, 44, 51). The constitutional provision which creates this exclusion is not identified.



30. The City contends that 'municipal planning' includes the control of the zoning of all land for all land uses and that there is no 'network planning' carveout. The City relies on this Court's decisions in, among other cases, *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC); *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC); and *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC).
31. Telkom places misplaced reliance on *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) (FA pp 23-25 paras 45-49). As this Court recorded in *Reflect-All*, s 9 of the Gauteng Transport Infrastructure Act recognised that town planning laws continue to apply in a road or rail reserve, and prohibited development in a reserve (para 23). That Act did not purport to say that town planning permission would not be required for a development in a reserve. This Court's finding that the development prohibition in the Act is not unconstitutional does not support Telkom's conclusion that 'that the municipal planning function did not extend to planning functions covering provincial road networks' (FA page 25 para 49).
32. The City contends that it has the constitutional power and right (and in fact duty) to regulate the zoning of land to determine whether it may be used for telecommunication masts. This is a matter of fundamental importance to both the administration of 'municipal planning' by local government throughout the



country, and the national rollout of telecommunications infrastructure. The City submits that it is in the interests of justice that this Court provide a definitive judgment on the issue.

(b) There is no conflict

33. The City submits that there is no conflict between the By-Law's consent requirement and s 22 of the ECA. That conclusion is supported by *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) which considered whether a planning law requirement, under the Land Use Planning Ordinance (LUPO), to obtain municipal land use approval conflicts with rights of a licensee granted under the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). Para 51 of *Maccsand* concludes that:

'there is no conflict between LUPO and the MPRDA. Each is concerned with different subject matter. And, as stated earlier, the exercise of a mining right granted in terms of the MPRDA is subject to LUPO.'

34. Telkom seeks to distinguish *Maccsand* on the grounds that it concerned provincial legislation and not municipal bylaws, and *Maccsand* did not concern a national government network function (AA para 63). The City rejects those distinctions.

35. A matter which has caused some dispute, which the SCA judgment has not satisfactorily resolved, arises from para 189 of this Court's judgment in *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 (6) SA 440 (CC). After referring to the powers of municipalities to make by-laws, para 189 states:



'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.'

36. Telkom contends that *Link Africa* para 189 supports its argument that the provision in the By-Law which requires municipal planning consent for a mast conflicts with s 22 of the ECA.
37. The City contends that a reading of the whole of the *Link Africa* judgment shows that the issue considered in *Link Africa* was the statutory purpose of s 22(1), namely to allow a licensee access to land without 'the landowner's consent'. Having regard to this context, para 189 means that by-laws may not thwart the right under s 22(1) of licensees' access to access land without 'the landowner's consent'. The reference in para 189 to 'municipality's consent' is only because that part of the judgment was considering access to streets where the municipality is the landowner.
38. The City accepts that if a municipality made a by-law which prohibits a licensee from accessing municipal land without the consent of the municipality as landowner, that by-law would thwart the purpose of s 22(1).
39. However, there is a fundamental difference between a municipality giving consent as landowner, and the municipality deciding an application in its capacity as local government. As landowner, a municipality exercises its common law property rights like any other landowner acting in its own interest. Those rights

are limited by the ECA. When a municipality makes a by-law in the exercise of its original legislative power, it is constrained by the Constitution.

40. The SCA judgment fails to recognise this distinction. Contrary to the City's interpretation, the SCA appeared to accept that para 189 contemplated a restriction on a municipality's power to require regulatory consent. The suggestion that para 189 contemplated any form of regulatory consent is unfounded. And contrary to Telkom's interpretation, the SCA held that '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) (SCA judgment para 49).
41. The City submits that the confusion arising from the different interpretations of *Link Africa* para 189, and how it should be applied, make it in the interests of justice for leave to appeal to be granted.

CONCLUSION

42. In all the circumstances, the City asks for Telkom's application for leave to appeal to be granted. The City agrees with Telkom that the costs of the application for leave to appeal should be costs in the cause of the appeal.
43. If leave to appeal is granted, the City asks this Court to:

43.1. dismiss Telkom's appeal with costs including those of two counsel;


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- 43.2. declare that the erection of a freestanding base telecommunications station on Erf 80708, 47 Fourth Road, Heathfield, Cape Town (the property) in or about April 2016 without approval in terms of the National Building Regulations and Building Standards Act 103 of 1977 was unlawful; and
- 43.3. declare that the development and use of the property for purposes of a freestanding base telecommunications station in contravention of the City of Cape Town Municipal Planning By-Law, 2015 was and is unlawful.



FIONA JANE OGLE

I certify that the deponent signed the affidavit in my presence and declared that the deponent knows and understands its contents, has no objection to taking the prescribed oath and considers the oath to be binding. Thus signed and sworn before me on ~~30 November 2019~~ at the address set out below.

October
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COMMISSIONER OF OATHS

Adv Mark Greig
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