CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 287/19

In the matter between:

TELKOM SA SOC LIMITED Applicant

and

CITY OF CAPE TOWN First Respondent

HILDA ISABEL KALU N.O. (in her capacity as the executrix of the estate late Birch Kalu) Second Respondent

Neutral citation:	*Telkom SA SOC Limited v City of Cape Town and Another* [2020] ZACC 15
Coram:	Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ
Judgments:	Jafta J (unanimous)
Heard on:	12 March 2020
Decided on:	25 June 2020

Summary: Electronic Communications Act 36 of 2005 — exercise of rights held in terms of section 22 — compliance with bylaws — licensee to pay "due regard to applicable law"

ORDER

On appeal from the Supreme Court of Appeal, the following order is made:

1. Leave to appeal is refused.
2. Telkom SA SOC Limited is ordered to pay costs including costs of two counsel.

JUDGMENT

JAFTA J (Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring):

Introduction

[1] This is an application for leave to appeal against the decision of the Supreme Court of Appeal, which dismissed with costs an appeal by Telkom SA SOC Limited (Telkom). Telkom had appealed against the dismissal of its application by the Western Cape Division of the High Court.

[2] The matter concerns the question whether the exercise of rights held in terms of section 22 of the Electronic Communications Act[1] is subject to compliance with municipal bylaws and policies. Differently put, whether a holder of those rights must comply with municipal bylaws before exercising those rights.

[3] In terms of section 22, a licensee under the Act is entitled to enter upon any land in the Republic for purposes of constructing and maintaining an electronic communications network or facility. The licensee may also enter such land for purposes

[1] 36 of 2005.

of altering or removing the network or facility it had constructed. But the exercise of these rights is subject to the condition that the licensee pays due regard to applicable law and the environmental policy of the Republic.[2]

Factual background

[4] Telkom is a state-owned company and a leading communications services provider in the Republic. It is licensed under the Act to provide both fixed line and cellular phone services. Therefore it is a licensee envisaged in section 22 of the Act and enjoys all rights conferred by that section. To be able to provide services, Telkom builds its own electronic communications network on land, including privately-owned land.

[5] Telkom supplies communications network services not only to the general public but also to companies and organs of state like departments in all spheres of government. These services are available throughout the country. Having noted the need for improved electronic communication services in the country, Telkom developed a fibre-optic network consisting of approximately 147 000 kilometres of fibre-optic cables and copper cables. This infrastructure was to be rolled out rapidly countrywide.

[6] The roll-out was subject to strict conditions imposed by the Regulator which granted licences to Telkom and other licensees. These conditions included penalties for

[2] Section 22 of the Act provides:

> "(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."

delays in relation to the roll-out of certain infrastructure needed for the supply of specified services.

[7] During 2015 Telkom wanted to improve its infrastructure so as to supply better services in the area of Cape Town. It decided to build 135 cellular phone masts and rooftop stations. It identified a property that belonged to the estate of Mr Birch Kalu, as one of the sites suitable for erecting a mast. This property is in the suburb of Heathfield in Cape Town. Telkom concluded a lease agreement with the property owner in terms of which Telkom was permitted to erect the mast on the property.

[8] But the difficulty was that under the bylaws of the City of Cape Town, the property was zoned as single residential zone 1 which did not allow the construction of cellular masts. In January 2016, Telkom rightly applied for the rezoning of a portion of the property so as to permit the construction of a mast. Two weeks later, Telkom went ahead and built the mast even though it had not received the City's approval of rezoning. Local residents objected to the mast and complained to the City. The City responded by imposing an administrative penalty on Telkom and put its application for rezoning on hold pending payment of the penalty.

Litigation

[9] Aggrieved by the City's decision, Telkom launched an application in the High Court in which the validity of the City's bylaw and the policy were impugned. In the main, two grounds were advanced as basis for attacking the bylaw and the policy. First, Telkom contended that the bylaw and the policy were not competent. It asserted that the City had no power to make the bylaw and the policy which impacted on electronic communications that fall under the competence of the national sphere. Second, Telkom argued that both the bylaw and the policy were in conflict with section 22 of the Act. As a result, Telkom submitted that the bylaw and the policy were invalid.

[10] The City opposed the relief sought by Telkom and lodged a counter-application. The City sought an order declaring that Telkom had built the masts unlawfully in breach of the National Building Regulations and Building Standards Act[3] (Building Standards Act). The Building Standards Act required that the City's consent be obtained before the mast was erected.

[11] The High Court rejected Telkom's submissions and dismissed its application. But the City's counter-application was successful. The High Court declared that the construction of the mast on the Kalu property was unlawful.

[12] Dissatisfied with the outcome, Telkom appealed to the Supreme Court of Appeal. That Court summarily dealt with the issues that arose from the counter-application. Before the High Court Telkom had argued that the Building Standards Act did not apply to it because it was part of the state. It had further submitted that the mast was not a building as defined in the Building Standards Act. Apparently this argument was abandoned in the High Court.

[13] The Supreme Court of Appeal was satisfied that the argument was abandoned in the High Court and rejected Telkom's attempt to resuscitate it. That Court proceeded to consider the constitutional attack mounted by Telkom against the bylaw and the policy which was taken as the only issue that arose on appeal.

[14] The Supreme Court of Appeal understood Telkom's argument to be that the City exceeded its legislative competence when it adopted the bylaw that empowered it to require its prior consent for the construction of masts. Alternatively, that the bylaw in question was in conflict with the Act, which prevailed over the bylaw.[4]

[3] 103 of 1977.

[4] *Telkom SA SOC Ltd v City of Cape Town* [2019] ZASCA 121; 2020 (1) SA 514 (SCA) (Supreme Court of Appeal judgment) at para 15.

[15] The Supreme Court of Appeal, with regard to the main argument, traced the City's competence to section 156(1) of the Constitution read with Part B of Schedule 4. That Court proceeded to consider its decisions and decisions of this Court which interpreted "municipal planning" as it appears in Part B of Schedule 4. Those decisions had held that municipal planning usually defined the control and regulation of the use of land, including zoning and the establishment of townships.[5] While Telkom accepted the authority of those decisions, it argued that cross-municipal boundary networks were not subject to municipal planning regulation, as these fell under the competence of provincial and national spheres. Relying on *Habitat Council* and the Spatial Planning and Land Use Management Act[6], the Supreme Court of Appeal rejected the argument advanced by Telkom. The Court held that the impugned bylaw regulates municipal planning and not telecommunications matters.

[16] The Supreme Court of Appeal went further to consider the alternative argument pertaining to the alleged conflict between the bylaw and section 22(1) of the Act. Taking into account section 22(2), especially the words "due regard must be had to applicable law", Wallis JA rejected the contention that there was a conflict between the bylaw concerned and section 22(1) of the Act. Reliance was placed on the decision of this Court in *Maccsand*.[7]

[17] In contending that a conflict existed, Telkom had invoked the decision of this Court in *Link Africa*.[8] With reference to paragraph 189 and in particular the statement "that bylaws may not thwart the purpose of the statute by requiring the municipality's consent", Telkom had argued that here the bylaw that required the City's prior consent

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[5] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* [2014] ZACC 9; 2014 (4) SA 437 (CC); 2014 (5) BCLR 591 (CC); *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC); *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC). Reliance was also placed on the Supreme Court of Appeal decision in *Johannesburg Municipality v Gauteng Development Tribunal* [2009] ZASCA 106, 2010 (2) SA 554 (SCA).

[6] 16 of 2013.

[7] *Maccsand (Pty) Ltd v City of Cape Town* [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC).

[8] *Tshwane City v Link Africa* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC).

thwarted the purpose of the Act. The Supreme Court of Appeal was not persuaded by the argument. That Court pointed out that the statement in question was *obiter* and when read in proper context, it did not mean what Telkom says it means.

[18] With regard to the challenge against the policy, the Supreme Court of Appeal held that "[p]roperly and fairly considered", the policy does not impermissibly regulate the roll-out of infrastructure on telecommunications. This attack too was rejected as having no merit. Accordingly, the appeal was dismissed with costs.

In this Court

[19] Telkom seeks leave to appeal against the dismissal of its appeal by the Supreme Court of Appeal. It cannot be gainsaid that the matter raises constitutional issues and as a result it engages the jurisdiction of this Court. What needs to be determined though is whether it is in the interests of justice to grant Telkom leave.

Interests of Justice

[20] It must be pointed out at the outset that this Court is not called upon to establish new principles or traverse new ground. It is apparent from the judgment of the Supreme Court of Appeal that all the issues raised have somehow received the attention of this Court in the past. Therefore, the real issue is whether principles emerging from those decisions have been correctly applied here. Consequently, prospects of success on the merits are decisive of the question of interests of justice, in the present circumstances. In addition, Telkom advances the same submissions that it raised and were considered by the Supreme Court of Appeal.

Prospects of success

This enquiry requires us to consider each submission and how it was addressed by the Supreme Court of Appeal. It is the evaluation of the reasons furnished by that Court which will reveal to us whether there are reasonable prospects of success. Telkom raises

two main contentions in this Court and we were informed that if one of them is upheld, the appeal must succeed. These were the competence and the conflict points.

Competence

[21] Telkom argued that the City had no legislative power to regulate telecommunications, and to the extent that the impugned bylaw, read with the policy, regulates telecommunications it is invalid. While accepting that the City is constitutionally competent to regulate municipal planning, Telkom urged this Court to construe that planning as not encompassing the control and use of land for laying down telecommunications infrastructure. It argued that such infrastructure extends beyond the boundaries of a particular municipality and as a result a licensee like Telkom ought not to be required to comply with bylaws of each municipality in whose jurisdiction it seeks to establish infrastructure. Telkom argued further that compliance with different bylaws is unworkable. It cited the example of a provincial government that seeks to build a road across the province. It was submitted that the first municipality may insist that the road exits its boundary at point "A" and a difficulty would arise if the next municipality also insists that the same road should enter its boundary at point "T", which is at the opposite end in relation to "A". This, it was submitted, would frustrate the province's plan to build a road.

[22] Telkom argued that a solution to this constitutional conundrum is to assign a restrictive meaning to the phrase "municipal planning". The scope of this municipal competence must not cover cross-municipal boundary networks.

[23] As mentioned, the Supreme Court of Appeal in addressing this argument commenced with reference to section 156(1) of the Constitution read with Part B of Schedule 4. That Court adopted the meaning assigned to municipal planning in decisions of its own and of this Court.[9] The Court then concluded that the impugned

[9] Above n 4 at paras 17-8.

bylaw constituted "a proper exercise of the municipal planning competence given to all municipalities by the Constitution".[10]

[24] Turning particularly to the argument that the bylaw is beyond the City's competence and is invalid to the extent that it regulates the roll-out of telecommunications infrastructure, Wallis JA reasoned:

> "The difficulty with this approach was that, if applied in that fashion, it would effectively exclude the municipality from engaging in the zoning that has been held to lie at the heart of municipal planning. The exclusion would not be confined to telecommunications infrastructure. It would also extend to matters such as infrastructure for the provision of electricity or the supply of bulk water. In designating land as zoned for hospital purposes it would trench upon national and provincial areas of exclusive legislative competence in regard to public health and the provision and siting of healthcare facilities. The same would apply to zones demarcated for schools or education purposes. Zoning provisions directed at preventing the siting of casinos and gambling activities, in the vicinity of schools or places of worship, would infringe upon provincial powers in regard to the licensing of such establishments, a material part of which is always the location in which the premises are situated. Housing is a national and provincial area of legislative competence. Would that mean that the national and provincial housing authorities could override municipal zoning provisions setting out the areas in which housing can be constructed and determining the nature of the housing to be erected in each zone? The examples can be multiplied, but these should suffice."[11]

[25] The cross-boundary networks point was also rejected. Relying on *Habitat Council*, the Supreme Court of Appeal held that the cross-municipal projects which form part of regional, provincial or national planning do not displace municipal planning which is the sole preserve of municipalities. The zoning and subdivision of land remains, as this Court observed in *Habitat Council*, the competence of

[10] Id at para 19.

[11] Id at para 20.

municipalities, regardless of whether the land in question is to be used for provincial or national purposes.

[26] In this Court Telkom lifted the last sentence of paragraph 13 and the entire paragraph 14 of *Habitat Council*[12] and invoked them as the authority for the restrictive meaning of municipal planning. However, the statement in paragraph 14 which links zoning and subdivision decisions to developments by municipalities must be read in context. The real issue in *Habitat Council* was the appellate interference by provinces with municipal decisions pertaining to zoning and subdivision. This Court made plain that those matters are the exclusive competence of municipalities. This Court did not limit municipalities' competence over zoning and subdivision to developments by municipalities themselves. What the statement in paragraph 14 indicates is that it is the responsibility of municipalities to provide resources within their areas of jurisdiction. This is the position whether a development was made by the provincial or national sphere.

[27] But Telkom's approach to the interpretation of municipal planning is also flawed for disregarding the importance of the language chosen by the framers of the Constitution. There is nothing in the text of the relevant Schedule which suggests that provincial planning and national planning carry a meaning that includes zoning and subdivision of land. On Telkom's approach, each sphere is competent to zone and subdivide land for the use of that land to achieve purposes which form part of the sphere's competence. This is not only unworkable but it is also not consonant with the

[12] In this regard *Habitat Council* states–

> "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."

Constitution and its scheme of establishing wall-to-wall municipalities with powers to control and regulate land use within their areas of jurisdiction. Therefore, the interpretation advanced by Telkom lacks merit.

[28] It would be unworkable because under the Constitution there is no provision for dividing the land in accordance with planning that attaches to each sphere. Since the control and use of land falls under the jurisdiction of a municipality, it makes perfect sense for municipalities to hold the power to determine to what use land may be put. Otherwise a municipality would be required to zone and subdivide land in relation to its own projects only and perhaps also for private use. But even that zoning on Telkom's approach would be overturned by the national sphere if the latter wants to use the same land for its own projects.

[29] That interpretation is the antithesis of the Constitution as construed by this Court and the Supreme Court of Appeal in a number of cases.[13] Our jurisprudence shows that it is municipalities alone which may exercise the power to zone and subdivide land. And the exercise of that power is insulated from interference by other spheres, even on appeal. The notion that these spheres could disregard municipal zoning schemes or bylaws giving effect to municipal planning and use land as they wish, would amount to a serious breach of the Constitution.

[30] Our jurisprudence on the interpretation and application of section 22 of the Act illustrates that licensees must comply with municipal bylaws when they exercise the rights conferred on them by that provision. This is what we held in *Link Africa* and in *Johannesburg Metropolitan Municipality.*[14] Therefore, here the Supreme Court of Appeal cannot be faulted for applying that interpretation of section 22.

[13] Some of the cases are cited in footnote 5.

[14] *Johannesburg Metropolitan Municipality v Chairman National Building Regulations Review Board* [2018] ZACC 15; 2018 (5) SA 1 (CC); 2018 (8) BCLR 881 (CC).

[31] Moreover, the difficulty alluded to by Telkom in its argument as set out in paragraph 21, is not a matter of interpretation. It is an issue of coordination and cooperation between spheres of government and organs of state which is prescribed by section 41 of the Constitution.[15] This section requires spheres of government and organs of state within each sphere to cooperate with "one another in mutual trust and good faith" by among other things: (a) assisting and supporting one another; (b) informing one another of and consulting one another on matters of common interest and (c) coordinating their actions and legislation with one another.

Conflict

[32] With reference to section 156(3) of the Constitution,[16] Telkom submitted that the impugned bylaw was invalid because it was in conflict with section 22(1) of the Act. In terms of section 156(3), a bylaw that is in conflict with national legislation like

[15] Section 41(1) of the Constitution provides:

> "All spheres of government and all organs of state within each sphere must—
>
> (a) preserve the peace, national unity and the indivisibility of the Republic;
>
> (b) secure the well-being of the people of the Republic;
>
> (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
>
> (d) be loyal to the Constitution, the Republic and its people;
>
> (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
>
> (f) not assume any power or function except those conferred on them in terms of the Constitution;
>
> (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
>
> (h) co-operate with one another in mutual trust and good faith by—
>
> (i) fostering friendly relations;
>
> (ii) assisting and supporting one another;
>
> (iii) informing one another of, and consulting one another on, matters of common interest;
>
> (iv) co-ordinating their actions and legislation with one another;
>
> (v) adhering to agreed procedures; and
>
> (vi) avoiding legal proceedings against one another."

[16] Section 156(3) of the Constitution provides:

> "Subject to section 151(4), a bylaw that conflicts with national or provincial legislation is invalid. If there is a conflict between a bylaw and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the bylaw must be regarded as valid for as long as that legislation is inoperative."

the Act is invalid. Telkom argued that the conflict stems from the requirement in the bylaw which demands that a licensee under the Act must first obtain municipal approval before exercising the right to erect telecommunications infrastructure within the City.

[33] For section 156(3) to be activated, there must be real conflict between the challenged bylaw and national legislation. And for a conflict to arise, the two pieces of legislation must be incapable of operating alongside each other. In other words, they must be mutually exclusive. If they are reasonably capable of co-existing, conflict as envisaged in section 156(3) would not have arisen.

[34] Relying on *Maccsand,* here the Supreme Court of Appeal held that the bylaw is not in conflict with section 22(1) of the Act. The Court reasoned that Telkom was required to comply with the bylaw by section 22(2) of the Act which obliges a licensee to follow applicable law in exercising any of the rights in section 22(1). The Supreme Court of Appeal held that the bylaw constituted the applicable law contemplated in section 22(2).

[35] Telkom sought to distinguish *Maccsand* from the present matter on the basis that *Maccsand* dealt with an alleged conflict between a provincial piece of legislation and a national one and that a different provision in the Constitution applied.[17] But this, as the City pointed out, misses the point. The import of *Maccsand* was whether a conflict envisaged in the Constitution had arisen and we concluded that none had occurred. In *Maccsand* we said:

> "But more importantly the two sections do not apply because 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. This is what the MPRDA proclaims."[18]

[17] Section 146 of the Constitution is applicable to resolution of conflict between provincial and national legislation.

[18] *Maccsand* above n 7 at para 51.

[36] The principle that emerges from *Maccsand* is that the conflict resolving provisions of the Constitution are triggered only where there is real conflict. If two pieces of legislation which deal with different subject-matters are reasonably capable of operating alongside each other, there is no conflict and the conflict resolution provisions of the Constitution are not applicable. This is the principle which the Supreme Court of Appeal distilled from *Maccsand* and applied here.

[37] Indeed, the impugned bylaw regulates the control and use of land, whereas the Act governs telecommunications matters. The fact that telecommunications infrastructure is established on land creates an overlap between the functional areas of municipal planning and telecommunications which are located in different spheres of government. In accordance with our jurisprudence, the fact that Telkom is licensed to offer telecommunications services does not, without more, entitle it to exercise the rights in section 22(1) of the Act to the total disregard of municipal planning and zoning powers. The Act itself stipulates that the exercise of those rights is subject to compliance with applicable law which includes the impugned bylaw.

Reliance on Link Africa

[38] To buttress the contention that the bylaw was in conflict with section 22(1), Telkom argued that by requiring licensees to obtain the City's approval before building infrastructure, the bylaw "thwarts" the objectives of the Act. Consequently, the bylaw ought not to be followed. For this proposition, reliance was placed solely on the following statement taken from *Link Africa*:

> "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."[19]

[19] *Link Africa* above n 8 at para 189.

[39] The same issue was raised in the Supreme Court of Appeal. This is how that submission was rejected:

> "The portion of the majority judgment on which Telkom relied was paras 185 to 189 dealing with the powers and duties of municipalities. As the issues of the meaning of section 22(1) and the question of its constitutionality had already been disposed of, the precise status of these paragraphs is unclear. They do not form part of the *ratio* of the decisions on either of the two issues decided in the judgment. As such they appear to constitute an *obiter dictum*, but one to which respect must be paid as emanating from a majority judgment of our highest court. In para 185 the majority said that as far as municipalities are concerned the 'applicable law' referred to in section 22(2) referred to laws made by the municipalities in the exercise of their own constitutional competence. It accepted that telecommunications is not an area of municipal legislative competence, but then turned to deal with an 'illuminating argument' raised by the Msunduzi Municipality that municipalities had rights and powers to regulate the manner in which licensees exercised the powers conferred by national legislation. For that reason Msunduzi argued that the licensee had to engage with the municipality before entering upon public land. Practical considerations of order and safety had to be taken into account. It contended that a licensee could not simply enter a municipality and without warning dig up a busy intersection, or lay cables on a pedestrian walk, without consulting the local authority. . . So, at both the beginning and the end of this paragraph, the majority emphasised the need for licensees to comply with by-laws of which the obviously relevant would be building regulations and planning by-laws and their zoning provisions. Such by-laws conventionally require municipal consent for many forms of construction. Could they really have meant that the need for all such consents was dispensed with in consequence of the enactment of section 22(1)? Surely not. That would have been entirely inconsistent with their accepting the validity of the point raised by Msunduzi."[20]

[40] We do not find it necessary in this matter to express a view on whether paragraphs 185-9 in *Link Africa* were *obiter*. This is because when properly read in context, these paragraphs do not make statements which are inconsistent with principles of our law. What is stated there particularly in relation to licensees not bound by a

[20] Above n 4 at paras 42-3 and 47.

bylaw that was adopted purely to thwart the objectives of section 22 of the Act, accords with our law.

[41] We agree with the Supreme Court of Appeal that when the exception in the second sentence of paragraph 189 is read in the context of the entire paragraph and also paragraphs 185-8, it means a municipality has no power to make a bylaw whose purpose is nothing else but to thwart the objectives of the Act. This plainly stems from well-established principles. The first is that public power may not be exercised to achieve a purpose other than the one for which it was conferred. Here the power to regulate municipal planning may not be used for a different purpose.

[42] The second principle is that under our constitutional architecture, spheres of government may exercise only those powers which fall within their competence. The local sphere may not, under the guise of exercising its own power, seek to thwart the objective of the functional area of the national sphere. It is accepted by all parties here that the telecommunications services regulated by the Act are the competence of the national sphere.

The policy

[43] Having reviewed the entire policy, the Supreme Court Appeal concluded that the policy requires adherence to matters which fall within the municipal competence such as the usual impact of the relevant infrastructure on the City and its environs; landscaping; and the protection of the heritage and the environment. At the hearing in this Court, Telkom accepted that by means of bylaws the City could prescribe the materials to be used in building masts and their height. Properly read, the policy seeks to achieve those objectives and no more.

[44] Accordingly, we are not persuaded that the Supreme Court of Appeal was wrong to dismiss the appeal. The judgment of that Court is unassailable and as a result, the granting of leave here would serve no purpose. This means that leave must be refused

as it is not in the interests of justice to grant it. The effect of this refusal is that the order issued by the High Court remains extant.

[45] There is one further matter that needs to be mentioned. This relates to time periods taken by the City, and probably other municipalities, to decide applications for approval to build cellular phone masts and other related infrastructure. The average period is between six months and a year. This is not conducive to the licensees' needs and conditions imposed upon them by the Regulator. However, this is a process issue which is not relevant to the interpretation of the Constitution. It may be resolved by the relevant authorities prescribing shorter time periods within which municipalities must determine telecommunications related applications for approval.

[46] In the result, the following order is made:

1. Leave to appeal is refused.
2. Telkom SA SOC Limited is ordered to pay costs including costs of two counsel.

For the Applicant	M Chaskalson SC and K Hofmeyr instructed by Lawtons INC
For the First Respondent	G Budlender SC and R Paschke SC instructed by Webber Wentzel