

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**CASE NO. CCT 287/19
SCA Case No. 1038/2018
High Court No. 10354/2018**

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 N.O in her capacity as the

Executrix of the late Estate late Birch Kalu

Second Respondent

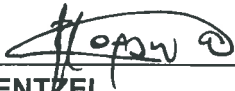
(Second Respondent in the Court a quo)

FILING SHEET

PRESENTED FOR SERVICE AND FILING:

1. The first Respondent's Practice Note.

Dated at Johannesburg on 31 January 2012.



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THE REGISTRAR

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And to:

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 287/19

SCA Case No. 1038/2018

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 PRACTICE NOTE

(a) Names of the parties and case number

1. As above.

(b) Nature of proceedings

2. Application for leave to appeal against a judgment of the Supreme Court of Appeal dated 25 January 2019 (the SCA judgment) and, if leave is granted, an appeal against the SCA judgment.

(c) Issues

3. The first issue is whether Telkom acted unlawfully by erecting a telecommunications mast without building plan approval or an exemption from the City under the National Building Regulations and Building Standards Act 103 of 1977 (Building Act).
4. The second issue concerns the City's constitutional legislative competence in respect of municipal planning: may the City use its municipal planning power, which includes the control of zoning of all land in its area for all purposes, to regulate the use of land for telecommunications masts?
5. Third, if it may do so, is there a conflict between City of Cape Town Municipal Planning By-Law, 2015 (the By-Law) (which requires land use approval for telecommunication masts) and the right of licence holders in terms of s 22(1) of the Electronic Communications Act 36 of 2005 to enter upon land without the consent of the landowner? If there is a conflict, does it invalidate the By-law?
6. Lastly, if it is found that s 22(1) exempts an ECA licence holder from obtaining zoning authorisation to erect a telecommunications mast from a municipality, was

the exemption impliedly repealed by Parliament's subsequent enactment of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA)?

(d) Relevant portions of the record

7. Appeal record:

- 7.1 Telkom's Notice of Motion dated 13 June 2017 vol 1 pp 1-.4;
- 7.2 Telkom's Founding Affidavit (Shamaladevi Singh) vol 1 pp 5-38;
- 7.3 City's Notice of Counter-Application vol 2 pp 135-137;
- 7.4 City's Answering Affidavit and Founding Affidavit in Counter-Application (Fiona Jane Ogle) vol 2 138-171;
- 7.5 FO1: Telecommunication Mast Infrastructure Policy dated April 2015 vol 2 pp 172-218;
- 7.6 FO6: Letter from City of Cape Town to Warren Petterson Planning dated 24 February 2016 vol 2 pp 239-240;
- 7.7 FO7: Letter from Warren Petterson Planning to City of Cape Town dated 23 March 2017 vol 2 p 241;
- 7.8 Telkom's Replying Affidavit and Answering Affidavit in the Counter Application (Shamaladevi Dingh) vol 3 pp 313-347;
- 7.9 City's Replying Affidavit in its Counter- Application (Fiona Jane Ogle) vol 3 pp 359-374;
- 7.10 The SCA judgment vol 6 pp 461-489;

7.11 Letter from Telkom to the NDPP dated 12 July 2019 vol 5 p 428-436 paras 6.6, 8.2 and 8.3;

7.12 Letter from Telkom to the SCA dated 13 September 2019 vol 6 p 438-436 para 2;

8. Application for leave to appeal:

8.1 Telkom's Application for leave to appeal pp 537-539;

8.2 Telkom's Founding Affidavit in its application for leave to appeal pp 545-572;

8.3 City's Answering Affidavit in the application for leave to appeal pp 612-628.

(e) Estimated duration of argument

9. One day.

(f) Summary of the City's argument

10. The Building Act required Telkom to obtain the City's approval or an exemption before it erected the mast at issue. Its failure to do so was unlawful. The City seeks a declaratory order to confirm that the erection of the mast without Building Act approval is unlawful.
11. The City has legislative competence, through the By-Law, to control the use of all land, including for the use of telecommunication masts.
12. There is no conflict between the By-Law and s 22(1) of the ECA. Each deal with a different function. A person seeking to engage in an activity must have all

necessary authorisations from each sphere of government where functions overlap. If authorisation is refused by one, that is not a veto of another's authorisation. The s 22(2) requirement that licensees exercise their s 22(1) rights with due regard to 'applicable law' includes the By-Law.

13. If contrary to the above, s 22(1) of the ECA exempts licensees from obtaining municipal planning authorisation from municipalities, Parliament impliedly repealed that exemption when it enacted the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), which provides that land may be used only for purposes permitted by a municipality's land use scheme, and that a land use scheme includes the regulation of the use and development of land for all purposes, including a telecommunications mast.

(g) The City's list of authorities on which particular reliance will be placed:

14. *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 (6) SA 440 (CC).
15. *Dark Fibre Africa v City of Cape Town* 2019 (3) SA 425 (SCA).
16. *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC).
17. *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).
18. *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC).

Geoff Budlender SC
Ron Paschke SC
Mitchell De Beer
Chambers, Cape Town
31 January 2020