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 Heads of argument.

Dated at Johannesburg on 31 January 2012.

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CITY'S HEADS OF ARGUMENT

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ABBREVIATIONS

Abbreviation	Definition
Building Act	National Building Regulations and Building Standards Act 103 of 1977
By-Law	City of Cape Town Municipal Planning By-Law, 2015
City	City of Cape Town, the first respondent
Development Management Scheme	Development Management Scheme, Schedule 3 to the By-Law
ECA	Electronic Communications Act 36 of 2005
licensee	person to whom an electronic communications network service licence is issued in terms of the ECA
LUPO	Land Use Planning Ordinance 15 of 1985 (Cape)
Mast	electronic communications base station or freestanding base telecommunications station, as defined in the Development Management Scheme
Mast Policy	City of Cape Town Telecommunication Mast Infrastructure Policy, April 2015, FO1 vol 3 pp 172-218
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
Systems Act	Local Government: Municipal Systems Act 32 of 2000
Telkom	Telkom SA SOC Ltd, the first appellant

INTRODUCTION

1. Telkom is a licensee under the Electronic Communications Act 36 of 2005 (the ECA). It has erected cell phones masts in Cape Town in non-compliance with two laws which the City administers.

2. First, it erected the masts without building plan approval or an exemption under the National Building Regulations and Building Standards Act 103 of 1977 (the Building Act).

3. Second, the masts are on land which is not zoned for the erection and use of the masts. They therefore also contravene the City's Municipal Planning By-Law (the By-Law). Telkom contends that the By-Law 'regulates telecommunications' (a national competence), and that therefore the requirement of zoning of land for the use of masts falls outside the City's legislative competence. This is fundamentally misconceived. Municipalities' constitutional legislative power in respect of 'municipal planning' includes the control of zoning and land use. Telkom attempts to convert the national government's power to regulate telecommunications into a power also to determine land use in that regard. If Telkom's approach is correct, then a municipality may not require zoning permission for any activity which is regulated by the national government. Telkom's approach flies in the face of the jurisprudence of this Court.

4. Telkom also asks the Court to declare that the By-Law's zoning requirements conflict with s 22(1) of the ECA (which gives licensees the right, without the

landowner's consent, to access land and to install electronic communication facilities such as masts), and that the By-Law is unconstitutional and invalid to that extent. The City's zoning requirements do not conflict with s 22. Section 22(2) requires that in exercising its s 22(1) power, a licensee must comply with all applicable law. This is the well-established *Maccsand* principle.[1] A licensee would be obliged to comply with all applicable law even if s 22(2) did not exist.

5. Accordingly, the HC and the SCA correctly dismissed Telkom's application.

FACTS

6. Telkom erected the disputed mast on the Kalu property. It is a residential property in Heathfield, Cape Town,[2] zoned under the By-Law as Single Residential 1: Conventional Housing.[3] The By-Law prohibits the erection of a freestanding base telecommunication station[4] (a mast) on land with that zoning.[5]

7. On 22 January 2016, Telkom applied in terms of s 42(a) of the By-Law to rezone a portion of the Kalu property.[6] Less than two weeks after the City began processing Telkom's rezoning application, Telkom erected a mast on the Kalu property – to the outrage of local residents. Telkom did not wait for the City's

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[1] *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) (*Maccsand* CC).
[2] City AA vol 2 p 149 para 29; Telkom RA vol 4 p 338 para 19.
[3] Telkom FA vol 1 p 17 para 41; FA8 vol 2 p 96; City AA vol 2 p 149 para 30; Telkom RA vol 4 p 338 para 19.1.
[4] Item 1 of the Development Management Scheme defines a freestanding base telecommunication station as 'a freestanding support structure on land or anchored to land and used to accommodate telecommunications infrastructure for the transmitting or receiving of electronic communication signals, and may include an access road to such facility.'
[5] Item 21 of the Development Management Scheme read with s 35(2) of the By-Law.
[6] City AA vol 2 p 150 para 31; FA8 vol 2 p 96-116 section 4.6.

approval of its rezoning application. It also did not obtain the building plan approval required by the Building Act.[7]

8. This was 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'.[8] Telkom admits other incidents where it failed to get planning authorisation or building plan approval before erecting masts.[9]

9. The City Manager commenced enforcement proceedings against Telkom by applying for an administrative penalty in terms of the By-Law.[10] Telkom only then brought this application.[11]

10. The City has yet to consider Telkom's rezoning application. Telkom may seek and obtain authorisation even though it is in contravention of the By-Law.[12]

THE BOGEY RAISED BY TELKOM

11. Telkom impermissibly seeks to introduce new evidence in this appeal via its application for leave to appeal.[13] The import of the evidence is that a mast's location is important for the efficacy of a network. It also claims (without

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[7] City AA vol 2 p 151 para 36; Telkom RA vol 4 p 338 para 19.
[8] City AA vol 2 p 155 para 48; Telkom RA vol 4 pp 338-339 (unanswered).
[9] City AA vol 2 pp 155-159 paras 49-54; Telkom RA vol 4 pp 339-340 paras 20-24.
[10] City AA vol 2 pp 153-154 paras 42-4; FA10 vol 2 pp 120-128; Telkom RA vol 4 p 338 para 19.
[11] City AA vol 2 p 154 para 45; Telkom RA vol 4 p 338 para 19.
[12] By-law ss 130(1) and (2); City AA vol 2 pp 154-155 paras 46-47; Telkom RA vol 4 p 339 para 19.
[13] Appeal record Telkom application for leave to appeal pp 549-553 paras 15-24; Appeal record City AA p 617 para 14; Telkom's heads para 29. Telkom has not complied with Rule 31 (Appeal record City AA p 621 para 22).

evidence) that the need for municipal planning approval impedes the 'rapid roll-out' of infrastructure contemplated by the ECA.[14]

12. With this new evidence Telkom attempts to raise a bogey: it claims that because the SCA's judgment confirms the power of municipalities to regulate the use of land for electronic communications infrastructure, and because land use planning applications supposedly have lengthy delays, the judgment 'may interfere with the roll out of 5G networks and set back the development of the country in the process'.[15] On this basis, Telkom asks the Court to limit local governments' constitutional municipal planning powers. The City disputes this impermissible evidence. Telkom's claim is contradicted by the evidence which is in the record, even if regard is had to the inadmissible evidence.

The City regards location as relevant and important

13. Telkom criticises the SCA's observation that there is ordinarily some flexibility to the positioning of cell phone towers as 'patently incorrect' and as having 'no basis on the papers'. In fact, the record shows that Telkom could have erected the mast at issue at a network-viable position 50m from the Kalu property on land which does not need to be rezoned.[16]

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[14] Telkom's heads paras 52, 59.1, 60, 63.
[15] Telkom's heads para 33.1
[16] Appeal record City AA p 617 para 15; FO6 vol 3 p 239 para 6; FO7 vol 3 p 242.

14. The City accepts that the location of masts is a relevant and important factor. An explicit object of the Mast Policy[17] is for masts to be situated in the best possible location, having regard both to maximising their coverage and minimising visual impact.[18] The circumstances of the case will dictate whether there is flexibility in where a mast is located.

15. 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'.[19] The Mast Policy also recognises 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'.[20] 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'.[21]

16. 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

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[17] FO1 vol 3 pp 172–218.
[18] FO1 vol 3 p 185.
[19] FO1 vol 3 p 176 para 1.2.2.
[20] FO1 vol 3 p 176 para 1.2.4.
[21] FO1 vol 3 p 185 Objective 2.

with the view of or from the site, with an adverse impact on the environmental or heritage resource, even at such a sensitive site, a mast may be erected where 'this is unavoidable for network and technical reasons'.[22]

17. The Mast Policy is reasonable, balanced and sound. It fully addresses Telkom's concern about the importance of a mast's location. It is undisputed that 'the Mast Policy does not in principle or in fact impede or limit the implementation of s 22 of the ECA and it does not thwart the objectives of the ECA'.[23]

18. There is accordingly no basis for Telkom's professed concern that the City's exercise of its function of municipal planning will unreasonably compromise or frustrate the establishment of telecommunications networks.

19. If the City or another municipality does act in this fashion, the licence holder has review and other remedies. The remedy cannot be to deny municipalities their constitutionally allocated function. Telkom's case amounts to this: because in some cases it may be imperative for a mast to be located at a particular case, and because a particular municipality may in a particular case unreasonably refuse to recognise this, the law requires that all municipalities be deprived of their

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[22] FO1 vol 3 p 192 Objective 7.1.
[23] AA vol 2 p 146 para 23 (unanswered in reply).

municipal planning power in respect of all cell masts. That proposition needs only to be stated, to be rejected.

Location is not the only consideration

20. While Telkom focuses only on the location of masts, the City also considers other matters when deciding whether to grant municipal planning approval. The Mast Policy also beneficially promotes co-location or sharing of masts,[24] 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.[25] Telkom gives no reason why the City should not regulate these matters.

Telkom has enough time to obtain approval

21. Telkom alleges that having to obtain the City's approval 'will materially delay the roll out of telecommunications networks'.[26] In its application for leave to appeal, Telkom repeats its earlier allegation that the delay could be as long as 18 months.[27] The uncontroverted evidence is that the City decides planning

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[24] FO1 vol 3 p 187 Objective 3.
[25] FO1 vol 3 p 188-192 Objectives 4-7.
[26] Appeal record Telkom's application for leave to appeal pp 547-548 para 9.
[27] Appeal record Telkom's application for leave to appeal pp 547-548 para 9; Telkom FA vol 4 p 335 para 16.3.

applications within 5 to 6 months.[28] The maximum time for a final decision is 14 months, if there are objections and appeals.[29]

22. The record shows 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.'[30] It has a two-year roll out plan for its current network in Cape Town.[31] There is no need for Telkom to erect masts impulsively. Telkom's poor management is to blame for any delay. In this matter, it inexplicably waited until just two weeks before erection date of the Kalu mast before submitting its application.[32] Telkom sometimes submits its rezoning application on the same day it erects the mast.[33] Tardy management by a licensee is not a valid reason to limit the constitutional ambit of municipal planning.[34]

THE BUILDING ACT

23. Section 4(1) of the Building Act prohibits the erection of a building – which includes a telecommunications mast[35] – without the prior written approval of the

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[28] City RA vol 5 p 368 para 6.
[29] City RA vol 5 p 370 para 29.3. This evidence must accepted: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.
[30] RA vol 5 p 367 para 22.
[31] Telkom FA vol 1 pp 16-17 para 39.
[32] City AA vol 2 p 151 para 36.
[33] City AA vol 2 p 155 para 39; Telkom RA vol 4 p 339 para 20.
[34] RA vol 5 p 367 para 22.
[35] *Mobile Telephone Networks (Pty) Ltd v Beekmans NO and Others* 2017 (4) SA 623 (SCA).

local authority. This Court has held that under the Constitution, only a municipality may give building plan approval for the erection of a telecommunications mast.[36]

24. Telkom accepts that a licensee must comply with the requirements of the Building Act before erecting a telecommunications mast.[37] It is common cause that Telkom did not obtain an authorisation under the Building Act for the mast.[38] In a counter-application, the City accordingly requested a declaration that the erection of the mast was unlawful for want of building plan approval.[39]

25. Telkom conceded in both the HC and the SCA that it must obtain building plan approval from the municipality before erecting any mast.[40] This was not limited to the Kalu mast. The HC correctly declared the erection of the mast to be unlawful.[41]

26. Contrary to its concession to the HC, when prosecuted for erecting masts contrary to the Building Act, Telkom argues to the NDPP 'in all instances' that a mast is not a building under the Building Act.[42] After the SCA hearing, where its counsel

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[36] *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC) para 25 held that when approving building plans to erect a cell mast, the municipality exercises its constitutional powers pertaining to building regulations and municipal planning, and these are exclusively municipal executive powers (paras 26, 35).
[37] Telkom RA vol 4 p 324 para 7.1.
[38] RA vol 4 p 333 para 13.
[39] City notice of counter-application vol 2 p 135 para 1 read with AA record vol 2 pp 146-148, 170 paras 24-28, 97.
[40] SCA judgment vol 6 pp 463-467 paras 4-10.
[41] HC judgment vol 5 p 410 paras 51-52.
[42] Appeal record vol 5 p 428-436 paras 6.6, 8.2 and 8.3: Letter from Telkom to the NDPP dated 12 July 2019, written after its concession in the High Court.

had made an unqualified concession that masts are buildings, in a letter to the SCA, Telkom sought to backtrack by arguing that the concession related only to the Kalu property.[43]

27. As the City has pointed out, Telkom's approach is duplicitous.[44] At each hearing, by tactically not arguing 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 continue to argue that it is not bound to comply with the Building Act. Consistent with this approach, Telkom's heads of argument avoid saying a word about the Building Act, but ask this Court to set aside the HC's declaration that the erection of the Kalu mast was unlawful.[45]

28. While the SCA judgment records Telkom's concession, it does not state what the law requires. This creates the following difficulties: first, Telkom cannot be relied upon to abide by its concession; second, other licensees are not bound by Telkom's concession; third, an issue of considerable importance to the public, licensees and local government remains open to dispute.

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[43] Appeal record vol 6 p 438-436 para 2: Letter by Telkom to the SCA dated 13 September 2019.
[44] Application for leave to appeal p 622 para 25.
[45] Telkom's heads para 70(b).

29. The City asks this Court to lay the matter to rest and unequivocally to declare that Building Act approval is required for the erection of any telecommunications mast, and that erection without such approval is unlawful.

MUNICIPAL PLANNING LEGAL FRAMEWORK

The By-Law

30. The By-Law applies to all land in Cape Town (s 2(1)). It binds every owner and every user of land, including the state (s 2(2)). No person may use or develop land unless the use or development is permitted in terms of the zoning scheme, which includes the Development Management Scheme.[46] It is an offence to contravene a provision of the Development Management Scheme or to use land in a manner other than permitted by the Development Management Scheme.[47]

31. The By-Law permits a freestanding base telecommunication station on land which has a general industry subzoning, risk industry zoning or utility zoning (items 67, 74, 80), and does not permit it on land zoned Single Residential 1: Conventional Housing (item 21).

32. An applicant who requires land to be rezoned must make an application under s 42(a) of the By-Law. Applications are governed by criteria in s 99, which

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[46] Section 25(1)(a) and 35(2).
[47] Sections 133(1)(a)(ii) and (iii).

include any applicable policy approved by the City to guide decision-making (s 99(2)(c)). In this case, the Mast Policy is applicable.

Mast Policy

33. The Mast Policy recognises the increasing importance of telecommunications to the growth of the economy. The 'overarching premise' of the Mast Policy 'is to facilitate the growth of new and existing telecommunications systems and facilitate the provision of [masts] in an efficient, cost-effective, environmentally appropriate and sustainable way'.[48]

34. The Mast Policy does not purport to regulate telecommunications. Telkom's description of the Policy in its heads as a 'Telecommunications Policy' is disingenuous. The Mast Policy does not concern itself with the granting of licenses, the activity of electronic communications ('the emission, transmission or reception of information'),[49] or the content of electronic communications. The Mast Policy does even not regulate whether land may be used for a mast (that is the function of the By-Law).

35. The Mast Policy provides relevant objectives and guidelines to the decision-maker who, under the By-Law, must consider a rezoning, consent use or other

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[48] City AA vol 2 p 143 para 18.
[49] Section 1 of the ECA.

application to permit the erection and use of a mast. The considerations are: economic, site selection and co-location, visual impact, landscaping, public amenity, impact on areas of environmental and heritage significance, impact on existing services and utilities, and public health and safety.[50] Telkom has not suggested that these considerations are irrelevant or unreasonable.

The Constitutional division of powers among the spheres of government

36. In terms of s 40 of the Constitution, government consists of three spheres: national, provincial and local government. Each sphere is granted autonomy to exercise its powers and perform its functions within the parameters of its defined space.[51] A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. As Moseneke J pointed out in *Robertson*:

> '[t]he Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, "inviolable and possesses the constitutional latitude within which to define and express its unique character" subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation. A municipality

[50] City AA vol 2 p 144 para 20; FO1 vol 3 p 172.
[51] This Court has consistently stressed that the local-government sphere is given autonomy within its sphere, subject to the requirements of co-operative governance, and the limits imposed by the Constitution, or national and provincial legislation: *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 126; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) para 43.

> enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits.'[52]

37. The Constitution provides that each sphere must respect the status, powers and functions of government in the other spheres and may 'not assume any power or function except those conferred on [it] in terms of the Constitution'.[53]

38. The scope of intervention by one sphere in the affairs of another is 'highly circumscribed'. The national and provincial spheres 'are not entitled to usurp the functions of the municipal sphere, except in exceptional circumstances, but then only temporarily and in compliance with strict procedures'.[54]

39. The powers of municipalities derive from two main constitutional sources, namely ss 156(1) and 156(2).

    39.1 Section 156(1) of the Constitution provides that a municipality has executive authority in respect of, and has the right to administer, the local government matters listed in Schedules 4B and 5B to the Constitution. This includes building regulations and municipal planning (Schedule 4B).

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[52] *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) paras 59-60 (footnotes omitted). See also *Fedsure Life Assurance Ltd* (n 51) paras 26 and 38 and *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality and Others* 2007 (4) SA 276 (SCA) paras 37-40.

[53] Section 41 of the Constitution provides:

> '(1) All spheres of government and all organs of state within each sphere must –
> …
> (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'

[54] *Gauteng Development Tribunal* CC (n 51) para 44.

39.2 Section 156(2) confers legislative authority on municipalities by providing that a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

40. These are also matters in respect of which the national Parliament (Schedule 4B) and the provincial legislature (Schedules 4B and 5B) have legislative competence. That legislative power is, however, limited: Schedules 4B and 5B state that national and provincial governments have the power to legislate 'to the extent set out' in s 155(6)(a) and (7)'. Those sections provide as follows:

40.1 section 155(6)(a) provides that the provincial governments must, by legislative or other measures, provide for the monitoring and support of local government; and

40.2 section 155(7) provides that the national government (subject to s 44[55]) and the provincial governments have the legislative and executive authority to 'see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)'. In this way, the powers in s 155(7) are 'hands-off'.[56] As this Court held in the *First Certification* case:

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[55] Section 44(1)(a)(ii) prevents national government from passing legislation with regard to a Schedule 5 matter (which is not relevant in this case).

[56] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) para 21. Hence the power under s 155(7) does not extend to the detail of schedule 4B matters but rather envisage framework within which local government is to exercise these powers.

> 'the function of national legislation is restricted to regulation. It is adequate for present purposes to state that the term "regulate" connotes a broad managing or controlling rather than a direct authorisation function.'[57]

41. Section 151(4) underpins all of this: it provides that the national or provincial government may not 'compromise or impede a municipality's ability or right to exercise its powers or perform its functions'.

42. The fundamental constitutional principle is that municipalities have exclusive executive authority over, and the right to administer and legislate regarding Schedule 4B and 5B matters. The national and provincial governments may not compromise or impede the municipalities' ability or right to exercise their powers or perform their functions.

THE MUNICIPAL PLANNING LEGISLATIVE COMPETENCE

43. Telkom's case on legislative competence is founded upon a false dichotomy between telecommunications and municipal planning – as if they exist in hermetically sealed compartments – and upon a mistaken understanding of the how constitutional powers are divided.

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[57] *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 377.

Correct nesting sequence

44. Telkom argues that since telecommunications is not listed in the Constitution and hence falls within the residual national competence,[58] the local competence of municipal planning must exclude the regulation of any aspect concerning telecommunications. On that premise, Telkom contends that because the By-Law and Mast Policy purport to 'regulate' telecommunications, they fall outside the City's municipal planning legislative competence.[59]

45. Telkom's argument is based on a reasoning which has been rejected by our courts. In *Gauteng Development Tribunal*, the SCA held that inferential reasoning from the proposition that national and provincial functions fall to be excluded from the functional area of municipal planning approaches the matter 'the wrong way round'.[60] In a dictum approved by this Court in *Habitat Council*, Nugent JA explained:

> 'It is to be expected that the powers that are vested in government at national level will be described in the broadest of terms, that the powers that are vested in provincial government will be expressed in narrower terms, and that the powers that are vested in municipalities will be expressed in the narrowest terms of all. To reason inferentially with the broader expression as the starting point is bound to denude the narrower expression of any meaning and by so doing to invert the clear constitutional intention of devolving powers on local government.'[61]

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[58] It is not listed in Schedules 4 or 5 to the Constitution and accordingly falls within the residual exclusive national competence in terms of s 44(1)(a)(ii) of the Constitution.
[59] Telkom's heads paras 17-26.
[60] *Gauteng Development Tribunal* (n 51) para 35.
[61] *Gauteng Development Tribunal* SCA (n 51) para 36. The Constitutional Court endorsed this approach in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) para 13 n 19.

46. The correct approach in determining the ambit of functional areas of the respective spheres is first, to determine the powers vested in municipalities, then to determine the powers vested in provincial government, and lastly to determine those powers vested in national government.

47. Both the national and provincial powers exclude the powers in Schedules 4B and 5B – which have already been 'carved out' for municipalities.

Land use regulation of masts is municipal planning

48. The City enacted the By-Law in terms of its original legislative power under s 156(2) of the Constitution. That provision gives the City the power to make and administer laws for the effective administration of, among other functions, 'municipal planning', a matter that it has the right to administer in terms of Schedule 4B to the Constitution.

49. It is settled law that 'municipal planning' in Schedule 4B to the Constitution includes the zoning of land.[62] The provisions in the Development Management Scheme (the zoning scheme under the By-Law) which regulate whether land may be used for masts are land zoning provisions.[63] Accordingly, the impugned

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[62] *Gauteng Development Tribunal* CC (n 51) para 57 ('"Planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships'); *Habitat Council* (n 61) para 13; *Tronox KZN Sands (Pty) Ltd v Kwazulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC) para 25(d).

[63] The By-Law defines 'zoning' to mean 'a land use category prescribed by the Development Management Scheme regulating the use of and development of land and setting out … (a) the purposes for which land may be used; and (b) the development rules applicable to that land use category'. 'Development rule', in turn, 'means a provision, restriction or condition in the Development Management Scheme that sets out the permissible extent of the land use in terms of a zoning'.

provisions of the By-Law, which regulate whether land may be used for masts, fall within the ambit of 'municipal planning', and hence fall within the constitutional legislative competence of the City.

50. However, Telkom asks this Court to exclude from the constitutional domain of municipal planning, 'national or provincial functions which depend on trans-municipal networks', such as bulk electricity and water supply, telecommunications and national roads and provincial roads.[64] Tehe difficulties with the argument include:

50.1 By contending that national or provincial functions should be excluded from the functional area of municipal planning, Telkom again approaches the matter 'the wrong way round'. Reasoning which denudes local powers by starting with national and provincial powers was rejected in *GDT* and *Habitat Council* since it would 'invert the clear constitutional intention'.[65]

50.2 Telkom identifies no constitutional provision or authority which exempts 'trans-municipal networks' from 'municipal planning'. There is none.

50.3 Telkom places misplaced reliance on *Reflect-All*.[66] Section 9 of the Gauteng Transport Infrastructure Act prohibited development in a road or rail reserve, while recognising that municipal planning laws continue to

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[64] Telkom's heads para 37-38.
[65] Paras 45-46 above.
[66] *Reflect-All 1025 CC and Others v MEG for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC).

apply in the reserve.[67] The Act did not purport to say that development could occur in a reserve without municipal planning permission (the power which Telkom seeks). Rather this Court upheld the provincial coordinate power to stop development in a reserve.[68] *Reflect-All* does not support Telkom's contention that a national network may be constructed without municipal planning permission.

50.4 In any event, when Telkom or MTN, Octotel, DFA or any of the other 400 or so private licensees select where to place a mast, do not make any national governmental planning or networking decisions, or implement such decisions. Obtaining land use permission for a local tower is not a national planning issue. Hence, the exception for which Telkom argues would not even apply to it.

51. Telkom asserts, without evidence, that if municipal planning governs land uses in terms of national functions which depend on trans-municipal networks, then the efficient performance of national functions would be compromised or frustrated completely.[69] This is another bogey which must be slain.

51.1 Municipal planning decisions which have the potential to affect bulk infrastructure and national roads are not taken in a vacuum or arbitrarily.

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[67] *Reflect-All* (n 66) para 23.
[68] *Habitat Council* (n 61) para 19 said that provinces may exercise a coordinate power to stop big developments. That power is to be exercised in addition to the local government's municipal planning function.
[69] Telkom's heads para 38.

There are several constitutional and statutory provisions which regulate and require cooperation and coordination among the spheres of government when they exercise their respective powers.

51.2 The Constitution requires that all spheres of government and all organs of state within each sphere must, among other things, 'co-operate with one another in mutual trust and good faith by … informing one another of, and consulting one another on, matters of common interest' and 'co-ordinating their actions and legislation with one another'.[70] These cooperative governance principles are implemented through various laws which bind municipalities.

51.3 For example, the Systems Act requires municipal planning to be aligned with, and complement, the development plans and strategies of other affected municipalities and other organs of state.[71] Furthermore, a municipality's spatial development plan must be compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation.[72]

51.4 SPLUMA requires all three spheres of government to prepare spatial development frameworks that guide planning and development decisions across all sectors of government, guide municipalities in taking municipal

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[70] Section 41(1)(h)(iii) and (iv) of the Constitution.
[71] Section 24(1) of the Systems Act.
[72] Section 25(1)(e) of the Systems Act.

planning decisions, and contribute to a 'coherent, planned approach to spatial development in the national, provincial and municipal spheres'.[73] Section 12(2)(a) of SPLUMA requires all spheres of government to 'participate in the spatial planning and land use management processes that impact on each other to ensure that the plans and programmes are coordinated, constituent and in harmony with each other.' A municipality may not make a land development decision which is inconsistent with its spatial development framework.[74]

52. It is therefore unsurprising that Telkom is unable to 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, telecommunications or any other trans-municipal network.[75]

***Maccsand* on competence**

53. Maccsand had been granted a right to mine in terms of the MPRDA. Mining (like telecommunications) is an exclusively national competence. Maccsand and the Mining Minister argued that since mining is an exclusive national competence,

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[73] Sections 12(1) of SPLUMA provides that:
'The national and provincial spheres of government and each municipality must prepare spatial development frameworks that –
…
(d) guide planning and development decisions across all sectors of government;
(e) guide a provincial department or municipality in taking any decision or exercising any discretion in terms of this Act or any other law relating to spatial planning and land use management systems;
(f) contribute to a coherent, planned approach to spatial development in the national, provincial and municipal spheres…'
[74] Section 22(1) of SPLUMA.
[75] The invitation to do so was raised in the application for leave to appeal AA p 618 para 17.

LUPO (the By-Law's predecessor) does not apply to land used for mining.[76] They contended that to hold that LUPO applies to mining would permit an unjustified intrusion of the local sphere into the exclusive terrain of the national sphere of government.[77]

54. This Court rejected those contentions. It held the following.

54.1 The control and regulation of the use of all land constitutes municipal planning, a functional area which the Constitution allocates to the local sphere of government.[78]

54.2 The MPRDA and LUPO serve different purposes within the competence of the sphere charged with the responsibility to administer each law. While the MPRDA governs mining, LUPO regulates the use of land. An overlap between the two functions occurs since mining is carried out on land. This overlap does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments.[79] The mere granting of a mining right does not cancel out LUPO's application.[80]

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[76] *Maccsand* CC (n 1) para 24.
[77] *Maccsand* CC (n 1) para 41.
[78] *Maccsand* CC (n 1) para 42.
[79] *Maccsand* CC (n 1) paras 43, 47.
[80] *Maccsand* CC (n 1) para 44.

54.3 Because LUPO regulates the use of land and not mining, there is no merit in the assertion that it enables local authorities to usurp the functions of national government. All that LUPO requires is that land must be used for the purpose for which it has been zoned.[81]

54.4 Since the powers of the national and local spheres 'are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence.'[82]

Conclusion regarding municipal competence to regulate the use of land for masts

55. Telkom's argument – that regulation of land use for purposes of telecommunication masts is excluded from the local competence of municipal planning because it concerns telecommunications – is bad in law. On Telkom's approach, there can be no land use regulation of *any* matter falling within the national competence. For example, municipal zoning schemes could not prohibit the operation of a saw mill or a noxious industry or even a mine in a residential area, since those are matters of national competence.[83] As both the SCA and this

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[81] *Maccsand* CC (n 1) para 46.
[82] *Maccsand* CC (n 1) para 47.
[83] While 'industrial promotion' is a schedule 4A functional area, matters such as industry more generally, factories, saw mills, forestry and mining are not listed in schedules 4 or 5 and are therefore exclusive national competencies (s 44(1)(a)(ii)).

Court have explained, Telkom's approach would 'denude [municipal planning] of any meaning'.[84]

56. The City has the legislative competence to regulate zoning of all land in its area for all purposes, including the use of land for masts. It is constitutionally permissible for there to be overlap between the powers of the national and local spheres since they 'are not contained in hermetically sealed compartments'.

57. Accordingly, the City has the constitutional power and right (and in fact duty) to regulate the zoning of land to determine whether it may be used for masts.

THERE IS NO CONFLICT

58. Telkom's alternative argument is that the By-Law and Mast Policy are invalid because they conflict with s 22(1) of the ECA. The SCA and this Court have rejected Telkom's approach in the directly comparable matter of *Maccsand*. Telkom's claim that there is a conflict is based on a misinterpretation of s 22(1) and of an *obiter* comment in *Link Africa*.[85] Section 22(1) does not conflict with the By-Law or Mast Policy.

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[84] Para 45 above.
[85] *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 (6) SA 440 (CC).

Section 22(1) of the ECA

59. Section 22(1) gives a licensee the right to enter land, without the consent of the landowner, and to construct and maintain electronic communications network facilities (which include masts). Section 22 states:

> '**22. Entry upon and construction of lines across land and waterways**
> (1) An electronic communications network service licensee may—
> (a) enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic;
> (b) construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic; and
> (c) alter or remove its electronic communications network or electronic communications facilities, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.
> (2) In taking any action in terms of subsection (1), due regard must be had to applicable law and the environmental policy of the Republic.'

60. Telkom claims that by regulating zoning of land for use of a mast, the By-Law and the Mast Policy conflict with licensees' right under s 22 of the ECA to enter upon land to construct masts without the need for municipal consent.[86]

***Maccsand* principle**

61. *Maccsand* is directly on point. There this Court considered the very issue raised by Telkom: whether a planning law requirement to obtain municipal land use approval conflicts with rights of a licensee granted under national legislation.

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[86] Telkom's heads paras 49, 55-56, 61.

62. Similarly to s 22(1) of the ECA in respect of holders of ECA licences, s 5(3) of the MPRDA permits the holder of a mining right to enter upon and use land without the consent of the landowner for the purpose of exercising the rights conferred by that statutory licence. In both instances, the licence is granted subject to applicable law: s 22(2) of the ECA and s 23(6) of the MPRDA.

63. In both statutes, those far-reaching powers are conferred in the public interest. The ECA right is 'good for economic growth, education and public service delivery', has the potential to 'improve the quality of life of all people in South Africa' and furthers the public's right to receive and impart information and ideas.[87] The MPRDA seeks to facilitate the exploitation of mineral resources in order to promote economic growth, to promote employment, to advance the social and economic welfare of all South Africans, to eradicate discrimination and to promote equitable access to mineral resources.[88]

64. In response to an argument by Maccsand and the Minister that the LUPO zoning requirement conflicted with the right of access in s 5(3) of the MPRDA, this Court held in *Maccsand* 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. This is what s 23(6) of the MPRDA proclaims.'[89]

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[87] *Link Africa* (n 47) paras 36, 180, 120, 121. Telkom's heads paras 52-53.
[88] See the objects of the MPRDA in s 2. See also *Maccsand* CC (n 1) paras 3-4.
[89] *Maccsand* CC (n 1) para 51. Emphasis added.

65. The Court held that the fact that mining cannot take place until the land in question is appropriately zoned is permissible in our constitutional order. 'It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed.' If consent is refused, it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power, which does not extend to the power of the other functionary. This is so in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through cooperation between the respective organs of state, failing which, the refusal may be challenged on review.[90] The Court thus confirmed the SCA's finding that 'a successful applicant for a mining right or a mining permit will also have to comply with LUPO.'[91]

66. *Maccsand* is therefore authority for the conclusion, consistent with the language and context of s 22 of the ECA, that a licensee's s 22(1) right of access to land without the consent of the landowner does not conflict with the By-Law's zoning provisions regarding masts.

67. Telkom attempts to distinguish *Maccsand* on two bases.

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[90] *Maccsand* CC (n 1) para 48.
[91] *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* 2011 (6) SA 633 (SCA) para 34.

67.1 First, Telkom contends that the ECA aims to facilitate the 'rapid' roll-out of telecommunication networks, while Maccsand did not require rapid action. We submit that the point is bad. Maccsand had to mine rapidly because its permit under s 27(1)(a) of the MPRDA was for only two years.[92] By contrast, under ECA there is no time-bar, and in any event the City's approval process under the By-Law will not cause delays because, with proper management, Telkom's two-year roll out plan gives it time to apply for and obtain the City's approval.[93] Further, the rapidity of the rollout contemplated in s 22(1) is subject to the requirement in s 22(2) that the licences must first obtain other authorisations. And the use of the word 'rapid' in a statute cannot change the structure of our Constitution.

67.2 Secondly, Telkom seeks to distinguish *Maccsand* on the ground that the Constitution treats conflict between national and provincial laws differently from conflict between national and municipal laws.[94] That distinction is irrelevant. It misses the point of the *Maccsand* principle, which is that the Constitution's conflict resolution provisions do not arise since there is no conflict. *Maccsand* was not decided on the basis of the constitutional provisions for dealing with conflicts.

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[92] *Maccsand* CC (n 1) para 7, n 12, para 20.
[93] Refer to para 22 above.
[94] Telkom's heads para 65.

68. The *Maccsand* principle establishes that a person may not engage in an activity without all authorisations required; and that an activity authorised by one sphere of government may also require authorisation by another sphere of government.

69. In *Link Africa*, while not citing *Maccsand*, this Court reaffirmed this principle:

> 'As far as municipalities are concerned, "applicable law" in section 22(2) refers to laws that they may make within their constitutional legislative competence in terms of Chapter 7 of the Constitution. If laws fall within that competence, they must be complied with before section 22(1) may be exercised.'[95]
> …
> 'licensees, though empowered by national legislation, must abide by municipal by-laws'[96] (Emphasis added.)

70. In *Dark Fibre*, the SCA held that s 22(1) of the ECA grants a licensee general authority to enter land and construct a network of fibre-optic cables or to perform any of the licensed functions. That authority stands alongside any other authority that must be given under a by-law. 'Different, and separate, independent, consents required for different activities (environmental, zoning, municipal or other) must be obtained by a licensee or its operations will not be lawful. The right of a licensee under the ECA does not "trump" other rights. It exists alongside other rights created by applicable law, and none overrides the other.'[97]

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[95] *Link Africa* para 185.
[96] *Link Africa* para 189.
[97] *Dark Fibre Africa v City of Cape Town* 2019 (3) SA 425 (SCA) para 37.

Telkom's misinterpretation of s 22(1) of the ECA

71. Telkom's interpretation of s 22(1) of the ECA ignores fundamental principles. When interpreting a provision, '[t]he "inevitable point of departure is the language of the provision itself", read in context.'[98] This Court has emphasised that '[a] fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.' There are three riders to this general principle, namely:

> '(a) that statutory provisions should always be interpreted purposively;
> (b) the relevant statutory provision must be properly contextualised; and
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'[99]

Language

72. The language of s 22(1) shows that it concerns a licensee's right of access to land and its right to undertake certain activities. It gives a licensee the right to access land without the landowner's consent. There is no indication in the language of s 22(1) that it exempts a licensee from obtaining zoning approval required by law. Telkom does not explain how the language of s 22(1) supports its interpretation.

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[98] Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 quoting Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98.
[99] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

Purpose

73. There is nothing in the ECA which indicate that its purpose is to regulate zoning or land use. Just as the MPRDA and LUPO serve '*different* purposes within the competence of the sphere charged with the responsibility to administer each law',[100] so do the ECA and the By-Law. The ECA regulates electronic communications. The By-Law regulates zoning and the use of land.

Context

74. The provisions in the ECA immediately preceding and following s 22(1) provide the context. The preceding provision is s 21, which expressly recognises the duty of a licensee to obtain necessary permits, authorisations and approvals before it may construct an electronic communication network facility. That section directs the Independent Communications Authority of South Africa to prescribe regulations in accordance with ministerial policy for the rapid deployment of electronic communications facilities. Importantly, s 21(2)(a) states:

> 'The regulations must provide procedures and processes for … obtaining any necessary permit, authorisation, approval or other governmental authority including the criteria necessary to qualify for such permit, authorisation, approval or other governmental authority'[101] (Emphasis added.)

75. Telkom's interpretation of s 22(1) would render s 21(2)(a) nugatory.

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[100] *Maccsand* CC (n 1) para 43.
[101] The contemplated regulations have not been prescribed.

76. Furthermore, the rights conferred by s 22(1) are qualified by, and subject to, the requirement in subsection (2) that 'due regard must be had to applicable law'. This means that a licensee has a duty to comply with applicable law.[102]

77. In *Maccsand*, Maccsand and the Minister contended that LUPO does not apply to land in respect of which mining rights have been granted and is therefore not a 'relevant law' to which a mining right is subject under s 23(6) of the MPRDA. This Court held that there is no justification for not regarding LUPO as a 'relevant law' to which a mining right is subject under s 23(6) of the MPRDA Act.[103]

78. *Link Africa* affirms that a licensee must comply with by-laws which fall within a municipality's legislative competence, before s 22(1) rights may be exercised:

> 'As far as municipalities are concerned, "applicable law" in section 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 section 22(1) may be exercised. …'[104]

Consistency with the Constitution

79. Telkom's argument that s 22(1) of the ECA invalidates the By-Law's requirement for rezoning in relation to masts 'raises the spectre of the [ECA] being in conflict with the Constitution's division of powers'.[105] This is because a national statute may not prevent municipalities adopting constitutionally-competent by-laws.

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[102] *Link Africa* (n 85) paras 31, 84 (minority); and 126, 153, 189 (majority).
[103] *Maccsand* CC (n 1) para 45.
[104] *Link Africa* (n 85) para 185.
[105] *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* 2011 (6) SA 633 (SCA) para 29.

80. The conflict which Telkom says exists would in fact invalidate the ECA, not the By-Law. This is so because if, contrary to our submissions, it is found that s 22(1) of the ECA conflicts with the By-Law, then s 156(3) of the Constitution would apply:[106]

> 'Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid.'

81. Section 151(4) states:

> 'The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.'

82. Section 151(4) reinforces s 41(1)(f) of the Constitution which provides that:

> 'All spheres of government and all organs of state within each sphere must … not assume any power or function except those conferred on them in terms of the Constitution.'

83. The City submits that s 156(3) contemplates the following approach:

83.1 first, when considering an apparent conflict between a by-law and national or provincial legislation, a court must prefer any reasonable interpretation of the by-law and legislation which avoids a conflict, over any alternative interpretation that results in a conflict;[107]

83.2 second, if a by-law conflicts with national legislation or provincial legislation and the national legislation or provincial legislation does not

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[106] Telkom's submissions fail to refer to the qualification in the first sentence: Telkom's heads paras 46, 65.3.
[107] See para 86 below.

compromise or impede a municipality's ability or right to exercise its powers or perform its functions contrary to s 151(4), the by-law is invalid;

83.3 third, if national legislation or provincial legislation conflicts with a by-law and the national legislation or provincial legislation compromises or impedes a municipality's ability or right to exercise its powers or perform its functions contrary to s 151(4), the relevant provision of the national legislation or provincial legislation is invalid.

84. The City has the right to require in a by-law that land may not be used for masts unless it is appropriately zoned. If s 22(1) of the ECA were to entitle licensees to ignore such a requirement, then the ECA would 'compromise or impede a municipality's ability or right to exercise its powers or perform its functions', contrary to s 151(4).

85. This Court has struck down a series of statutes which compromise or impede municipalities' ability and right to exercise their powers or perform their functions in relation to municipal planning.

85.1 In *Gauteng Development Tribunal*, the Court held that:

> 'the national and provincial spheres cannot, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs. The mandate of these two spheres is ordinarily limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities.'[108]

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[108] *Gauteng Development Tribunal* CC (n 51) para 59. See also para 44.

85.2 In *Habitat Council,*[109] the Court held that '*all*' municipal planning decisions that encompass zoning, no matter how big, lie within the competence of municipalities. The Court held that s 44 of LUPO, which allowed the provincial government to overturn on appeal a municipality's land-use decision, was clearly invalid as it permitted the provincial government to usurp local government's exclusive power to manage 'municipal planning' and therefore intruded upon municipal autonomy.[110] The reason for this strict allocation of functions is that municipalities are best suited to make planning decisions as they are localised decisions which should be based on information that is readily available to them.[111]

85.3 The Province contended that there are circumstances in which it may permissibly veto a municipality's land-use decision the exercise of its provincial oversight function. It argued that certain decisions might have extra-municipal impact or impact on provincial competencies such as, 'provincial planning'. Cameron J rejected that reasoning:

> 'This bogey must be slain. All municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within the competence of municipalities. This follows from this court's analysis of municipal planning in *Gauteng Development Tribunal*. Provincial and national government undoubtedly also have power over decisions so big, but their powers do not lie in vetoing zoning and subdivision decisions, or subjecting them to appeal.

[109] *Habitat Council* (n 61).
[110] *Habitat Council* (n 61) para 13.
[111] *Habitat Council* (n 61) para 14.

> Instead, the provinces have co-ordinate powers to withhold or grant approvals of their own.'[112]

85.4 The Court held that the constitutional scheme does not envisage a province employing appellate power over municipalities' exercise of their planning functions. This is so even where the zoning, subdivision or land-use permission has province-wide implications.[113]

85.5 Telkom incorrectly claims that the judgment in *Habitat Council* held that parochial municipal interests may prevail over national and provincial interests, 'except where national and provincial planning decisions were at stake'.[114] *Habitat Council* does not say that in such matters, municipal planning law no longer applies. As quoted in para 85.3 above, it held that national and provincial governments have no power to veto municipal zoning decisions. Rather they may exercise coordinate powers to withhold or grant approvals of their own. And in any event, as we have noted, decisions about the location of telecommunications networks are not 'national and provincial planning decisions'.

85.6 In *Habitat Council*, this Court held that:

> 'The provincial appellate capability impermissibly usurps the power of local authorities to manage "municipal planning", intrudes on the autonomous sphere of authority the Constitution accords to municipalities, and fails to recognise the distinctiveness of the municipal sphere. This is because, as Jafta J said in *Gauteng Development Tribunal*, the planning competence that the Constitution

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[112] *Habitat Council* (n 61) para 19. Emphasis added.
[113] *Habitat Council* (n 61) para 22.
[114] Telkom's heads para 65.5 citing *Habitat Council* para 23. Telkom misquotes para 23.

> ascribes to municipalities "includes the zoning of land and the establishment of townships".'[115]

85.7 In *Tronox KZN Sands*, the Court affirmed the power of local authorities to manage 'municipal planning' and held that this power is autonomous and 'under no circumstances can it be intruded upon'.[116]

86. A court must prefer a reasonable interpretation of s 22 which avoids a conflict with the By-Law. And when courts interpret legislation, they must 'read the provisions of the legislation, so far as is possible, in conformity with the Constitution',[117] and must avoid conflicts with the Constitution where reasonably possible.[118]

87. The SCA endorsed the following conclusion of the HC in this matter:

> 'Section 22 cannot operate in a vacuum ... [I]t has to co-exist in a web of other laws including municipal by-laws. The [City's] zoning requirements do not conflict with Section 22(1) because before a licensee may exercise its rights in terms of [s 22] the licensee must comply with all applicable law, including laws enacted by the municipality … I am not persuaded that it is the intention of the legislature to grant a licensee unqualified rights to conduct activities on land without obtaining any permit, licence or other authorization required by any law from any authority.'[119]

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[115] *Habitat Council* (n 61) para 13.
[116] *Tronox* (n 62) para 28.
[117] *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) para 20 quoting *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 22-23.
[118] *Link Africa* (n 85) para 117.
[119] HC judgment vol 5 p 408 para 48, quoted with approval by Lewis JA in *Dark Fibre* (n 97) para 36.

Link Africa

88. The foundation of Telkom's argument on the meaning of s 22(1) of the ECA is a misinterpretation of an *obiter* statement in para 189 of *Link Africa.*

89. To appreciate what the Court meant in para 189, it is necessary first to examine the issues in that case. *Link Africa* concerned the refusal by the City of Tshwane, exercising what it regarded as its right 'as landowner', to give consent to Link Africa to install a fibre-optic cabling network on municipal land in Tshwane's sewers. Tshwane sought a declarator that s 22 of the ECA 'requires consent of the landowner before action authorised by the section could be undertaken'.[120] In the alternative, Tshwane attacked the constitutionality of ss 22 and 24 of the ECA.[121] The Court accordingly identified the issues as follows:

> 'The first issue is the interpretation of section 22 of the Act. More specifically, whether the section requires consent of landowners before a licence-holder may perform any of the acts listed in it. If, when properly construed, the section does not require consent, the other issue is whether sections 22 and 24 are inconsistent with section 25(1) of the Constitution and for that reason are invalid.'[122]

90. On the first issue (whether the landowner's consent is required), the minority[123] and majority[124] judgments agreed that s 22(1) allows a licensee to enter onto land and construct electronic communications facilities 'without the landowner's

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[120] *Link Africa* (n 85) para 17.
[121] *Link Africa* (n 85) para 19.
[122] *Link Africa* (n 85) para 32. Emphasis added. Although the issues were identified in the minority judgment, the majority does not differ on the identification of the issues – para 100.
[123] *Link Africa* (n 85) paras 43-46.
[124] *Link Africa* (n 85) para 131.

consent', whether it is a private or public landowner.[125] That is the purpose of the subsection which the Court identified, and to which the majority referred later in para 189 when it said it may not be thwarted.

91. The majority found (unlike the minority) that s 22(1) confers a public servitude in favour of licensees. The majority further found that 22(1) is constitutionally valid. Tshwane's constitutional challenge was based on an alleged arbitrary deprivation of property, contrary to s 25(1) of the Constitution. The majority held that what saved s 22(1) from unconstitutionality, was the protections in the law of servitude that require a licensee to 'exercise a right to enter another's property respectfully and with due caution' ('*civiliter*'), and which require the licensee to give notice to and consult with the landowner about the manner in which the rights are to be exercised, and to pay compensation to the landowner for the use of the land.[126]

92. Having determined the issues before it, from para 185 the majority made some statements about the statutory powers of municipalities when licensees lay cables in streets. There was issue in *Link Africa* of conflict between a by-law and s 22(1). Tshwane did not claim accessing its sewers breached any of its by-laws.[127]

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[125] *Link Africa* (n 85) paras 140, 149, 151.
[126] *Link Africa* (n 85) paras 144-154, 174, 181-184.
[127] *Link Africa* (n 85) para 186.

93. The majority noted that municipalities may make by-laws within their legislative competence, and that s 22(2) of the ECA requires licensees to comply with them.[128] In para 189, the majority stated:

> 'licensees, though empowered by national legislation, must abide by municipal by-laws. The only limit is that by-laws may not thwart the purpose of the statute by requiring the municipality's consent.'

94. Context is all-important. A reading of the whole judgment shows that what was in issue was the statutory purpose of s 22(1), namely to allow a licensee access to land without 'the landowner's consent'.[129] 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'. That is the only purpose of the statue considered and established in *Link Africa*. 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.[130]

95. A by-law which prohibited a licensee from accessing municipal land without the municipality's consent as landowner would thwart the purpose of s 22(1).

96. There is a fundamental difference between a municipality giving consent as landowner, and the municipality deciding an application in its capacity as local

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[128] *Link Africa* (n 85) para 185.
[129] It is clear from the following paragraphs of *Link Africa* that the case concerned whether s 22 requires the consent of the landowner before a licence-holder may perform any of the acts listed in it (it does not), and whether the right of non-consensual access to land contravened the property right of the landowner in the Constitution: paras 17, 32, 43-46, 58, 62, 64, 83, 85 (minority); 102, 104, 108-110, 112, 125, 131, 133, 139-142, 144, 146, 149, 166 (majority).
[130] Para 189 refers to the concern raised in the previous paragraph about licensee coming into a municipality and without warning digging up a busy intersection, or laying cables along a busy pedestrian walk.

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

97. That distinction is illustrated in this case because the Kalu property is not the City's land. The City therefore acts only as government in applying the By-Law.

98. Telkom ignores this distinction. It misconstrues the reference to 'municipality's consent' in para 189 as a ruling by this Court that municipalities may not exercise their constitutional power to regulate the zoning of land for use of masts, thereby contradicting the Court's earlier affirmation of those powers.

99. *Link Africa* did not consider whether s 22 exempts a licensee from compliance with a by-law, or whether it removes a municipality's power to regulate the zoning of land for use of masts. *Link Africa* made no such finding.

100. Telkom seeks to ascribe a meaning to para 189 of *Link Africa* that has the following impermissible, anomalous and/or absurd consequences, which the majority clearly did not intend. On Telkom's interpretation, the majority:

(a) overruled *Maccsand* without the necessary finding that its earlier, binding decision (which it has thrice endorsed[131]) was clearly wrong, and without even referring to it;

(b) decided issues which were not before it, and invalidated laws which were not at issue, contrary to the established principle of judicial economy;[132]

(c) decided the validity of by-laws without considering the legislative competence of municipalities or the nuanced enquiry required by ss 156(3) read with 151(4) of the Constitution, to which it had referred in the immediately preceding paras 185 and 188;

(d) brought about a fractured application of applicable laws contemplated in s 22(2), since those laws would still to apply to licensees who access land with the landowner's agreement,[133] but would cease to apply to licensees who access land in terms of s 22(1) without the landowner's consent;

(e) created an anomaly by allowing licensees to avoid the requirement of a '<u>municipality's consent</u>' when such consent is required in terms of a by-law, while still requiring licensees to obtain all the other permits, licenses and authorisations required by law which do not constitute a

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[131] *Habitat Council* (n 61) para 19 n 24; *Minister of Defence and Military Veterans v Thomas* 2016 (1) SA 103 (CC) para 16 n 14; *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC) para 106.
[132] *Habitat Council* (n 61) para 24.
[133] *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA) para 24.

'municipality's consent', such as: rezoning or departure;[134] or municipal building plan approval or exemption (which the SCA and this Court held is required);[135] environmental authorisation;[136] heritage authorisation;[137] civil aviation permit;[138] etc. and

(f) alternatively to (e), contrary to ss 21 and 22(2) of the ECA, gave licensees an unqualified right to conduct activities on land without obtaining any authorisation of any other authority. This would remove the protection of environmental, heritage, civil aviation, municipal planning, building regulation and other constitutionally-compliant and mandated laws which serve the public interest, without this Court having considered the implications of this finding.

101. The majority in *Link Africa* did not intend any of these results. It meant only that a by-law may not thwart the s 22(1) access right by requiring the municipality's consent <u>as landowner</u> for access to municipal land.

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[134] The By-Law distinguishes between applications such as for rezoning contemplated in s 42(a) of the By-Law, and 'consents' which are required under either s 42(h).
[135] Required by the Building Act: *Mobile Telephone Networks (Pty) Ltd v Beekmans NO and Others* 2017 (4) SA 623 (SCA). <u>Only</u> a municipality may approve building plans for a telecommunications mast: *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC).
[136] Listing Notice 3 of 2014 (GNR 985 of 4 December 2014) published under ss 24(2), 24(5), 24D and 44, read with section 47A(1)(b) of the National Environmental Management Act 107 of 1998 requires environmental authorisation for certain telecommunication masts or towers.
[137] Various provisions of the National Heritage Resources Act 25 of 1999 regulate development, and may require a permit from the responsible heritage resources authority authorising the construction of an electronic communications facility.
[138] Regulation 139.01.30 of the Civil Aviation Regulations, 2011 – GN R425 of 2012 prohibits the erection of a structure or other object above prescribed heights and within prescribed proximity to an aerodrome or heliport without the prior approval of the Director of Civil Aviation.

102. The SCA judgment did not satisfactorily deal with para 189. 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. We submit that he suggestion that para 189 contemplated any form of regulatory consent is not correct. 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).[139]

103. Even if Telkom's interpretation were correct, para 189 of *Link Africa* could not prevail over the binding *Maccsand* principle. Since the ambit of municipalities' legislative power was not an issue in *Link Africa*, the comment in para 189 would be *obiter* in that regard.[140]

104. In *Beekmans*,[141] the SCA held that a telecommunications mast requires municipal consent in terms of the Building Act. In *Johannesburg Metropolitan Municipality*,[142] this Court held that only a municipality may grant such consent for a mast. Both cases were decided after *Link Africa.* In neither case was it suggested that the requirement of municipal consent for the erection of a cell phone mast is inconsistent with the ECA or thwarts its purpose.

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[139] SCA judgment vol 6 p 485 para 49
[140] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 30.
[141] *Beekmans NO* (n 135).
[142] *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* (n 135).

105. In *Dark Fibre*, the SCA held that the *Maccsand* principle governs s 22(1).[143] After analysing *Link Africa's* interpretation of s 22(1), the SCA held:

> 'Although Dark Fibre is the holder of a licence, it may not exercise its rights without the authorization of the City to work on its property and comply with its requirements. This is not a 'second consent', or licence, under that Act. It is authorization to make use of its streets in the manner prescribed by its by-laws. It does not override the consent under the ECA. It is consent to dig on its roads, which is governed by by-laws applicable to everyone in the City's jurisdiction. That is precisely what the majority in *Link Africa* held in para 189 …'[144]

106. The SCA concluded on the issue of the legal implications of s 22(1) of the ECA:

> 'a licence granted [under the ECA] to a licensee constitutes general authority to enter land and construct a network of fibre-optic cables or to perform any of the functions that it is licensed to do. It stands alongside any other authority that must be given, by an owner, or under a bylaw, to do the work in a way that is determined by a municipality or other landowner. Different, and separate, independent, consents required for different activities (environmental, zoning, municipal or other) must be obtained by a licensee or its operations will not be lawful. The right of a licensee under the ECA does not "trump" other rights. It exists alongside other rights created by applicable law, and none overrides the other.'[145]

107. We submit that what para 189 means is that a by-law may not (for example) provide that the ECA right of the licensee to access another person's land is subject to the consent of the landowner. However, a municipality may, as in *Maccsand*, legislate that an activity may not commence without the municipality's authorisation in accordance with a law in respect of a matter which it has the constitutional right to administer, such as 'municipal planning', 'building regulations' and 'municipal roads'. *Link Africa* makes it clear that

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[143] *Dark Fibre* (n 97) paras 32-34.
[144] *Dark Fibre* (n 97) paras 35.
[145] *Dark Fibre* (n 97) paras 37.

'licensees … must abide by [such] municipal by-laws' (para 189) and 'they must be complied with before section 22(1) may be exercised' (para 185).

108. *Link Africa* thus supports the conclusion, consistent with *Maccsand*, that the By-Law does not conflict with s 22 of the ECA. The By-Law and s 22 of the ECA are both valid, and both must be complied with.

IMPLIED REPEAL

109. If, contrary to our submissions, s 22(1) of the ECA exempts a licensee from a requirement in a zoning scheme to obtain zoning approval for the use of land for a mast, then we submit that that Parliament has impliedly repealed the exemption.[146] The subsequently enacted Spatial Planning and Land Use Management Act 16 of 2013 a[147] has the following provisions which are irreconcilable with Telkom's interpretation of s 22(1) of the ECA.

109.1 A municipality must 'adopt and approve a single land use scheme for its entire area' (s 24(1)). A land use scheme must 'determine the use and development of land' (s 25(1)). 'Land use' is defined to mean 'the purpose for which land is or may be used lawfully in terms of a land use scheme'.

109.2 The erection and use of a mast falls within the ambit of 'land development', which means 'the erection of buildings or structures on

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[146] *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 67.
[147] SPLUMA came into force on 1 July 2015.

land, or the change of use of land, including township establishment, the subdivision or consolidation of land or **any** deviation from the land use or uses permitted in terms of an applicable land use scheme'.

109.3 A land use scheme 'has the force of law, and all land owners and users of land, including a municipality, a state-owned enterprise and organs of state within the municipal area are bound by the provisions of such a land use scheme' (s 26(1)(a)).

109.4 'Land may be used only for the purposes permitted … by a land use scheme' (s 26(2)(a)). It is an offence to use land contrary to a permitted land use (s 58 (1)(b)).

109.5 'Except as provided in [SPLUMA], all land development applications must be submitted to a municipality as the authority of first instance' (s 33(1)).

CONCLUSION

110. The City submits that it is in the interests of justice for the Court to grant leave to appeal, despite the lack of merit in the appeal. The issues are of considerable public importance which require authoritative resolution.[148]

111. The City asks the Court to:

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[148] Appeal record City AA pp 614, 623, 627 paras 5, 27, 41-42.

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

111.2 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 Building Act was unlawful; and

111.3 declare that the development and use of the property for purposes of a freestanding base telecommunications station in contravention of the By-Law was and is unlawful.

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

AUTHORITIES

1. *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC).
2. *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC).
3. *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality and Others* 2007 (4) SA 276 (SCA).
4. *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC).
5. **City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 (6) SA 440 (CC).
6. *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC).
7. **Dark Fibre Africa v City of Cape Town* 2019 (3) SA 425 (SCA).
8. *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).
9. *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC).
10. *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC).
11. *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC).
12. **Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC).
13. *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC).
14. *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* 2011 (6) SA 633 (SCA).
15. **Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).
16. *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC).
17. *Minister of Defence and Military Veterans v Thomas* 2016 (1) SA 103 (CC).
18. **Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC).
19. *Mobile Telephone Networks (Pty) Ltd v Beekmans NO and Others* 2017 (4) SA 623 (SCA).

20. *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA).

21. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

22. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

23. *Tronox KZN Sands (Pty) Ltd v Kwazulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC).