

# IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between :

**CASE NO. 184/2014**

CITY OF TSHWANE  
METROPOLITAN MUNICIPALITY

APPLICANT

and

LINK AFRICA (PTY) LTD

FIRST RESPONDENT  
AND OTHERS

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## MSUNDUZI MUNICIPALITY'S WRITTEN ARGUMENT

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## **INTERVENTION**

1. The Msunduzi Municipality (Msunduzi) has sought leave to intervene as a respondent in the present application pursuant to the direction of this Court dated 9<sup>th</sup> February 2015. Our argument relates only to the matters of law which arise in the application.
  
2. Msunduzi has made an application to intervene in terms of Rule 8. This application is based on :-
  - 2.1. Msunduzi's position as a municipality being government in the local government sphere.
  
  - 2.2. Msunduzi had a dispute with an electronic communications licensee which terminated with a judgment in the Supreme Court of Appeal. An application for leave to appeal to the Constitutional Court was refused.
  
  - 2.3. Msunduzi asserts a direct and substantial interest in that any judgment of the Constitutional Court will

regulate how Msunduzi deals with the licensees who seek to exercise rights under Section 22 of the Act referred to below.

- 2.4. Msunduzi desires an opportunity to make representations as an intervening party in an effort to shape the decision which will be made by the Constitutional Court.
  - 2.5. Msunduzi's submission that it is the interests of justice that it be granted the leave it seeks on the basis of the interest set out above, the considerable importance of the issues to Msunduzi and the legal issues of public law raised.
3. These issues are set out in Msunduzi's application for leave to intervene.
  4. Intervention is regulated by Rule 8. The overriding consideration is whether it is in the interests of justice for a party to intervene, but this includes the requirement that a

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party must have a “direct and substantial interest in the subject matter” of the litigation.<sup>1</sup>

5. This interest is the impact that the judgment in this matter will have on the Municipality’s power to govern effectively.<sup>2</sup>
6. It is therefore submitted that Msunduzi’s intervention application should be granted.

## **THE ISSUE OF INTERPRETATION**

7. The central issue is the proper interpretation of section 22 of the *Electronic Communications Act, 36 of 2005* (“ECA”). That section extends certain rights to a licensee in relation to land belonging to other parties, including public land. The exercise of such rights, however, is subject to compliance with certain legal protections (section 22 (2)).
8. There are two judgments of the Supreme Court of Appeal on the issue. The first is that of **Mobile Telephone Networks**

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<sup>1</sup> International Trade Administration Commission v SCAW SA 2012 (4) SA 618 (CC) at paras 11 and 12.

<sup>2</sup> SATAWU v Garvas 2013 (1) SA 83 (CC) at para 29.

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**(Pty) Ltd v SMI Trading CC**<sup>3</sup> (“the MTN decision”) and the second is the SCA’s judgment in an application instituted by **Msunduzi against Dark Fibre Africa (RF) (Pty) Ltd**<sup>4</sup> (“the DFA judgment”).

9. In the *MTN* case the SCA principally held that:

9.1. Section 22 (1) of the ECA authorises a licensee to enter upon the land of another person (for the purposes provided for in the sub-sections thereto) and specifically dispenses with the need to obtain the owner’s consent.<sup>5</sup>

9.2. The provisions of section 22 (2) require the licensee to have due regard to any applicable law in the course of executing its (previously validly taken) decision to exercise its section 22 (1) right (and not in taking the decision to exercise that right).

9.3. The licensee is required to take a valid decision to invoke its statutory rights and such decision must be taken

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<sup>3</sup>2012 (6) SA 638 (SCA).

<sup>4</sup>*Msunduzi Municipality v Dark Fibre Africa (RF) (Pty) Ltd* (2011/14) [2014] ZASCA 165 (1 October 2014).

<sup>5</sup>Para [15].

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lawfully, reasonably and procedurally fairly. Without such a decision the licensee would not have exercised its powers under section 22 and would not be entitled to enter upon the land.<sup>6</sup>

9.4. The power conferred on a licensee is a public power as contemplated in *Promotion of Administrative Justice Act, 3 of 2000* (PAJA) and is susceptible to judicial review.<sup>7</sup>

10. Municipalities and organs of state have rights and obligations which stem, *inter alia*, from sections 151, 152 and 156 of the Constitution and the common law. A municipality is the custodian of public land and is obliged to administer such land in the interests of its residents.

11. From this perspective Msunduzi asserted before the SCA in the DFA case that the SCA's interpretation was overbroad inasmuch as it did not take into account the rights and obligations of organs of state in respect of land under their control (public land, such as municipal land).

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<sup>6</sup>Para [24].

<sup>7</sup>Paras [26] to [33].

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12. The SCA dismissed Msunduzi's appeal to a large extent on the facts of the case. Its findings on the law were principally as follows:

12.1. Its decision in the *MTN* case was not overboard. A licensee is required to have regard to applicable law and comply with such law.<sup>8</sup> Msunduzi had not established that DFA had failed to comply with the applicable law.<sup>9</sup>

12.2. The ECA dispensed with a licensee having to obtain the landowner's consent. On this basis a challenge to the licensee's conduct (conducting construction on municipal land without the Municipality's consent or input) on the basis of legality could not succeed since such an argument would amount to imposing a consent requirement.<sup>10</sup>

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<sup>8</sup>Para [11].

<sup>9</sup>Para [14].

<sup>10</sup>Paras [15] and [16].

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12.3. DFA had no obligation to interact with Msunduzi to secure its consent.<sup>11</sup>

12.4. Msunduzi could not rely on its by-laws because the effect of the by-law concerned would be limit the action authorised under section 22 of the ECA.<sup>12</sup>

13. The DFA decision fortifies the *MTN* decision. We submit that the interpretation of section 22 in both decisions is (with respect) incorrect. The licensees (Link and DFA) support the SCA's reasoning.

14. The dispute as to the interpretation of the section raises clear constitutional matters. The rights extended to a licensee have the potential to compromise the constitutional and other rights of persons. Safeguards need to be placed upon a licensee's decision to invoke its rights as well as the manner which it exercises those rights. This raises clear constitutional issues. These matters are addressed further in the submissions which follow.

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<sup>11</sup>Para [20].

<sup>12</sup>Para [21].

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## ADMINISTRATIVE ACTION

15. Section 22 contemplates two actions. The first is the licensee *taking the decision* to exercise its rights. The second is the licensee actually *exercising its rights* (such as by performing construction on the land of another).
16. A licensee's taking of a decision to invoke the rights under section 22 amounts to administrative action as contemplated in the PAJA. When the licensee seeks to exercise those rights in respect of public land, its decision constitutes administrative action which affects the rights of the public. The licensee must accordingly comply with section 4 of PAJA (which provides for a public process).
17. The decision to invoke the section 22 rights must also be lawful, reasonable and procedurally fair. If it is not, the licensee acquires no right to access municipal land at all. The SCA in fact expressly held so in the *MTN* case.<sup>13</sup> A valid decision is therefore a jurisdictional prerequisite for the

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<sup>13</sup>Para [24].

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entering upon the land (i.e., for the exercise or enforcement of the right).

18. Section 22, and a licensee's decision to invoke its rights under that section, must therefore be interpreted subject to the safeguards in PAJA (which stem from section 33 of the Constitution). A licensee cannot assert that it is not required to follow any public process at all when it takes a decision to invoke its section 22 rights in respect of public land. The question is rather the extent to which it is required to invoke a public process, having regard to what is lawful, reasonable and procedurally fair as well as the requirements of section 4 of PAJA.
19. There is therefore no question of a licensee having an absolute right. Its rights are subject to a lawful decision which is in turn subject to the administrative justice protections in PAJA. Absent this, there can be no "enforcement action".

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## PUBLIC AND PRIVATE LAND

20. In the case of public land, organs of state exercise an administrative role in respect of that land. They have obligations *vis-a-vis* their residents and the failure to comply with those obligations could give rise to civil (municipal) liability<sup>14</sup>. Hence although section 22 does make reference to public land, where the licensee seeks to invoke its rights in respect of public land, different and additional considerations must necessarily arise and these will inform the interpretation to be placed on the section.

21. Section 151 of the Constitution affords a municipality autonomy in governing its affairs. Section 151 (4) expressly provides that national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. The section necessarily contemplates the passing of national legislation which affects the rights and obligations of a local authority.

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<sup>14</sup>See for example *M<sup>c</sup>Intosh v Premier, KwaZulu-Natal & Others* 2008 (6) SA 1 (SCA) at para 14; *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) at paras 6 and 7; *Pretoria City Council v De Jager* 1997 (2) SA 46 (AD) at 55E – 56H.

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The ECA is national legislation and it cannot be interpreted as affording a licensee an absolute right.

22. To the extent that the SCA held in the *MTN* case and in the *DFA* case that no distinction falls to be drawn between public and private land (on the basis that section 22 includes public land), that finding (with respect) cannot be correct. A constitutional interpretation requires a licensee to have regard to the public order and public benefit role of an organ of state with respect to that property. This necessarily requires the licensee, when taking its decision to invoke its section 22 rights, to comply with any processes imposed by a local authority (such as to agree to reasonable conditions) or, at the very least, to meaningfully engage with the local authority.
23. The SCA's interpretation of section 22 must accordingly be qualified when the licensee intends to exercise its rights in respect of public land. A qualified interpretation to this effect enjoys the benefit of common sense: a licensee must necessarily interact with the local authority when it seeks to enter upon public land (such as roads and public spaces) so

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as to ensure that any construction is conducted in an orderly and safe fashion. Arrangements would have to be made in relation to matters such as the closure of roads, public liability, insurance and the quality of remedial work. These matters form part of the licensee's obligation to act lawfully, reasonably and procedurally fairly and arise at the stage when a licensee takes a decision to invoke its rights (and not in the context of it actually exercising those rights).

24. The effect of holding that a licensee has no obligation to engage with a local authority would be rank inequity. The licensee could marginalise a local authority, unilaterally access public land and perform construction thereupon without any regard to the local authorities rights and obligations; the licensee could do so without proper regard to safety or orderly workmanship and otherwise without any regard to matters of public interest (such as the effect of the construction on service delivery). This is not a sensible construction of the section and such construction is in fact inconsistent with section 151 of the Constitution.

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## THE “APPLICABLE LAW”

25. It was (correctly) held in the *MTN* case that unless a valid decision is taken by a licensee to exercise its section 22 rights, it acquires no legal entitlement to access the land of another person.<sup>15</sup> If the licensee *does* take a valid decision, the provisions of section 22 (2) then find application. Those provisions oblige a licensee, when *executing* its decision, to have due regard to applicable law and the environmental policy of the Republic. In the *MTN* case the SCA, in this context, had regard to section 25 of the Constitution.<sup>16</sup>

26. We accept that the right to the non-arbitrary deprivation of property in section 25 of the Constitution constitutes applicable law to which a licensee must have regard in the course of exercising its section 22 rights (such as in the course of performing construction on private land). However in instances where the right is sought to be invoked in respect of public land, regard is also required to be had to the provisions of the Constitution which impose obligations on

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<sup>15</sup>Para [24].

<sup>16</sup>Para [18].

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municipalities with respect to their residents and those which specify the rights and powers of a municipality<sup>17</sup>.

27. It is quite clear that when a licensee executes its decision to invoke its section 22 rights (such as by commencing construction), that cannot be or cannot yield a result which is contrary to law. Hence where a licensee has validly taken a decision to enter upon public land for the purposes contemplated in any of sections 22 (1) (a) to (c), that licensee must necessarily have regard to the effect that its conduct will have on the powers and functions of a municipality and on members of the public. It is not entitled to exercise its rights in a manner which usurps the powers of a municipality or undermines its ability to achieve its objects. This would be unconstitutional.

28. Under Part B of Schedule 5 of the Constitution, read with section 156 thereof, a municipality has a right to administer certain local government matters and these include municipal roads, traffic and parking and public spaces. A licensee is

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<sup>17</sup>City of Cape Town v Robertson 2005 (2) SA 323 (CC) at para 60.

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accordingly obliged to have due regard to these matters which, at the very least, require it to engage with the local authority for the purposes of co-ordinating any construction. It is not entitled to commence and conduct the construction unilaterally and on its own terms.

29. The Constitution also affords legislative authority to municipalities. This permits a municipality to make and administer by-laws for the effective administration of the matters which it has the right to administer (section 156 (2)). The applicable law to which licensees must have due regard will therefore include municipal by-laws.

30. Further, a licensee is also not entitled to exercise its rights without having regard to the consequences on the resident-public. At a local authority level, the interests of the public are safeguarded by local legislation (municipal by-laws). Hence a validly promulgated by-law constitutes “applicable law” which a licensee is obliged to have regard to in the course of exercising its rights.

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31. In the *DFA* case the SCA clarified its reasoning in the *MTN* case by holding that a licensee is both obliged to have regard to applicable law and also to obey such law. We submit that the “applicable law” includes local legislation such as municipal by-laws.
32. By way of example only, Msunduzi’s *Motor Vehicle and Road Traffic Regulation By-Laws* provide, *inter alia*, that no person shall dig or cause to be dug any excavation, pit, trench or hole for any purpose whatsoever in or close to any city street, road or thoroughfare without the consent in writing of the City Engineer or other duly authorised officer.<sup>18</sup> This constitutes “applicable law” which a licensee is obliged to have regard to and also obey.
33. Even if a by-law imposes a consent requirement, the by-law cannot simply be ignored since it has a constitutional basis (section 151 (2) of the Constitution) and the ECA must be interpreted consistently with such a by-law. This would require a licensee, at the very least, to engage with the municipality

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<sup>18</sup>By-law 32.

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- for the purpose of agreeing on the manner which the performance of the work should be regulated (i.e. the enforcement of the right under section 22 (2) of the ECA), taking into account the public interest.
34. In addition, every person (land owner) has the right to the equal benefit and protection of the law. It also has the right not to be deprived of its property arbitrarily. These rights conjunctively encompass, in the context of municipal property, that where a municipality does not consent to construction on its land, the licensee cannot commence construction without an order of court authorising it to do so.
35. We submit that, in addition to the administrative safeguards to which a decision under section 22 is subject, the section must be interpreted to require, where there is an absence of consent and a dispute as to the licensee's entitlement to enter the land, that the licensee approach the Court for an order authorising it to exercise its rights. Such interpretation does not mean that the licensee requires the landowner's consent but rather than the sanction of the Court is required where

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there is a dispute. It is designed to prevent a resort to self-help and require judicial authority for a deprivation of a person's right to property, where the land owner disputes the entitlement of the licensee to enter upon its land. This is a necessary constitutional safeguard to preserve the landowner's equality rights and prevent an arbitrary deprivation of the property.

36. In the *DFA* case the SCA held that a legality challenge could not be raised against a licensee. We respectfully submit that this is incorrect as a matter of legal principle. The taking of valid decision is a jurisdiction prerequisite for the legality of a licensee entering the land of another person. If that decision is not valid, it would not meet the prescripts of the rule of law and the principle of legality.<sup>19</sup> There can therefore be no objection in principle to a landowner challenging the exercise or enforcement of a licensee's rights under the principle of legality.

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<sup>19</sup>DA v Ethekwini Municipality 2012 (2) SA 151 (SCA) at para [21];  
Eye of Africa Developments v Shear 2012 (2) SA 186 (SCA) at para [26];  
MEC For Health, Eastern Cape v Kirland Investments (Pty) Ltd 2014 (3) SA 481 (CC) at para [51]  
(minority judgment).

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## **CONCLUSION**

37. We accordingly submit that the SCA's interpretation of section 22 of the ECA in the *MTN* and the *DFA* cases is incorrect and should be substituted with or clarified on the basis of the above submissions.

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13 APRIL 2015**

<b>LIST OF AUTHORITIES</b>	
International Trade Administration Commission v SCAW SA	2012 (4) SA 618 (CC)
SATAWU v Garvas	2013 (1) SA 83 (CC)
Mobile Telephone Networks (PTY) Ltd v SMI Trading CC	2012 (6) SA 638 (SCA)
Msunduzi against Dark Fibre Africa (RF) (PTY) Ltd	(20119/14) [2015] ZASCA 165 (1 <sup>st</sup> Oct 2014)
M <sup>c</sup> intosh v Premier, Kwazulu-Natal & Ors	2008 (6) SA 1 (SCA)
Cape Metropolitan Council v Graham	2001 (1) SA 1197 (SCA)
Pretoria City Council v De Jager	1997 (2) SA 46 (AD)
City Of Cape Town v Robertson	2005 (2) SA 323 (CC)
DA v eThekweni Municipality	2012 (2) SA 151 (SCA)
Eye of Africa Developments v Shear	2012 (2) SA 186 (SCA)
MEC for Health, Eastern Cape, v Kirkland Investments (PTY) Ltd	2014 (3) SA 481 (CC)