IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.:22032/2016

In the matter between:

TELKOM SA SOC LTD **Applicant**

and

RESIDENTIAL ESTATE DENNEGEUR (PTY) LTD **First Respondent**

VODACOM (PTY) LTD **Second Respondent**

JUDGMENT DELIVERED: WEDNESDAY, 26 JULY 2017

SALDANHA, J

[1] This is an application for *a mandament van spolie* against both, first and second respondents. The applicant claims that the respondents unlawfully deprived it of its undisturbed possession of ducts, manholes, manhole covers and copper cables that make up the electronic communication facilities as well as a communications network located on the estate of the first respondent.

[2] The relief sought by the applicant is set out in the Notice of Motion as follows:

"1 Dispensing with the rules pertaining to forms, time periods and process and permitting this application to be heard as one of urgency in terms of Rule 6(12);

2. Directing that the First Respondent restore to the Applicant its ante omnia undisturbed possession of its underground ducts, sleeves, manholes and manhole covers as well as copper cables (the infrastructure) within the Residential Dennegeur Estate off Bizweni Avenue, Dennegeur, Cape Town ("the Estate");

3. Directing that the Second Respondent forthwith remove all and any cabling or equipment from the infrastructure and restore to the Applicant its ante omnia undisturbed possession of the infrastructure;

4. Directing the First Respondent to pay the costs of this application, save in the event of opposition to this application by the Second Respondent, in which event, ordering the Respondents jointly and severally to pay the costs of this application; and

5. Further and/or alternative relief."

[3] Telkom and the second respondent Vodacom are both holders of electronic communications network licenses as contemplated under the provisions of the Electronic Communications Act, 36 of 2005 (the ECA). The

license confers on a licensee various statutory powers under section 22[1] and 24[2] of the ECA and allows the applicant to enter onto land and to construct and maintain electronic communications facilities and an electronic communications network.

[4] The first respondent, the Home Owners Association (HOA) is responsible for the management of the estate. It granted access and co-operated with the second respondent to install optic fibre facilities within the existing telecommunications infrastructure situated at the estate (Dennegeur) to which the applicant claimed undisturbed possession of. The second respondent now provides telecommunication services to about 32 home owners at Dennegeur. The application is brought by the first applicant to prevent the respondent's

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[1] *"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."

[2] **"24 Pipes under streets**
(1) A electronic communications network service licensee may, after providing thirty (30) days prior written notice to the local authority or person owning or responsible for the care and maintenance of any street, road or footpath-
(a) construct and maintain in the manner specified in that notice any pipes, tunnels or tubes required for electronic communications network facilities under any such street, road or footpath;
(b) alter or remove any pipes, tunnels or tubes required for electronic communications network facilities under any such street, road or footpath and may for such purposes break or open up any street, road or footpath; and
(c) alter the position of any pipe, not being a sewer drain or main, for the supply of water, gas or electricity.
(2) The local authority or person to whom any such pipe belongs or by whom it is used is entitled, at all times while any work in connection with the alteration in the position of that pipe is in progress, to supervise that work.
(3) The licensee must pay all reasonable expenses incurred by any such local authority or person in connection with any alteration or removal under this section or any supervision of work relating to such alteration."

continued depravation of what it claims is its lawful possession of the electronic communication facilities and communications network on the estate.

Brief factual background

[5] Telkom is an electronic communications network service as well as an electronic communications licensee as defined in terms of the ECA[3] and provides network services to a number of residential estates in the Western Cape one of which is Dennegeur.

[6] Prior to the promulgation of the ECA in 2005, Telkom's right to enter onto land for the purposes of providing public switched telecommunication services was governed by section 70 of the now repealed Telecommunications Act 103 of 1996.[4] Such rights were afforded to Telkom as a Public Switched Telecommunications Service (PSTS) licensee responsible for the construction of the Public Switched Telecommunications Network (PSTN). The right to enter

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[3] '**electronic communications network service**' means a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise-
(a) for that person's own use for the provision of an electronic communications service or broadcasting service;
(b) to another person for that other person's use in the provision of an electronic communications service or broadcasting service; or
(c) for resale to an electronic communications service licensee, broadcasting service licensee or any other service contemplated by this Act,
and '**network services**' is construed accordingly;
'**electronic communications network service licensee**' means a person to whom an electronic communications network service license has been granted in terms of section 5 (2) or 5 (4);

[4] *"Entry upon and construction of lines across any lands*
70. (1) A fixed line operator may, for the purposes of provision of its telecommunications services, enter upon any land, including any street, road, footpath or land reserved for public purposes, and any railway, and construct and maintain a telecommunications facility upon, under, over, along or across any land, street, road, footpath or waterway or any railway, and alter or remove the same, 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 the environmental policy of the Republic.
Underground pipes for telecommunication service purposes"

onto land under the Telecommunications Act was previously granted only to Telkom and one other fixed line licensee and not to mobile service providers such as Vodacom, MTN and Cell C.

[7] Telkom claimed that in terms of these legislative provisions, during the latter part of 1999 and 2000 it supplied material to the developer and contractor of the Dennegeur Estate and oversaw the construction of the underground ducts, sleeves, manholes and manhole covers which constituted the electronic communications infrastructure at the Estate. Telkom claimed that it provided the developers with the specifications and drawings as well as the requirements that had to be met for the construction of the infrastructure which, inter alia, included the installation. Telkom claimed further that the installation would be done at no cost to it, and would have been for its sole use.

[8] Telkom installed its copper cables through the infrastructure during 2000 and in so doing claimed that it created the electronic communications facilities and an electronic communications network as currently defined in the ECA.[5] It

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[5] **'electronic communications facility'** includes but is not limited to any-
(a) wire, including wiring in multi-tenant buildings;
(b) cable (including undersea and land-based fibre optic cables);
(c) antenna;
(d) mast;
(e) satellite transponder;
(f) circuit;
(g) cable landing station;
(h) international gateway;
(i) earth station;
(j) radio apparatus;
(k) exchange buildings;
(l) data centres; and
(m) carrier neutral hotels,
or other thing, which can be used for, or in connection with, electronic communications, including, where applicable-

claimed that over the years it provided services to several homes in Dennegeur and its access to the electronic communications facilities were locked by means of a T-key. In 2016, the Telecommunications Act was replaced with the ECA. Section 22 of the ECA[6] replaced section 70 of the Telecommunications Act which gave rights to both fixed and mobile service providers (such as the second respondent) to enter onto the land for the purposes of constructing and maintaining electronic communications networks and electronic communications facilities.

[9] In August 2015, the second respondent addressed correspondence to Telkom in which it requested permission to share Telkom's facilities as

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(i) collocation space;
(ii) monitoring equipment;
(iii) space on or within poles, ducts, cable trays, manholes, hand holds and conduits; and
(iv) associated support systems, sub-systems and services, ancillary to such electronic communications facilities or otherwise necessary for controlling connectivity of the various electronic communications facilities for proper functionality, control, integration and utilization of such electronic communications facilities;
[Definition of 'electronic communications facility' substituted by s. 1 *(g)* of Act 1 of 2014 (wef 21 May 2014).]
'electronic communications network' means any system of electronic communications facilities (excluding subscriber equipment), including without limitation-
(a) satellite systems;
(b) fixed systems (circuit- and packet-switched);
(c) mobile systems;
(d) fibre optic cables (undersea and land-based);
(e) electricity cable systems (to the extent used for electronic communications services); and
(f) other transmission systems, used for conveyance of electronic communications;

[6] " ***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."

contemplated under section 43.[7] Telkom and Vodacom however, differed as to whether Telkom had an obligation to share the electronic communications facilities. It is to be noted, that Dennegeur was one of several estates and areas in which Telkom provided such facilities.

[10] The dispute between the applicant and the second respondent was referred to ICASA by the second respondent on the 27th January 2016, and had at the date of the hearing of the application not been finalized.

[11] For the purpose of demonstrating a brief timeline of events; the Home Owners Association claimed that its negotiations with Telkom with regard to the provision of optic fibre cable facilities had broken down in November 2015.[8] The HOA claimed that its negotiations with Vodacom was successful and that the HOA and Vodacom agreed that the latter would install the optic fibre network within the existing telecommunications infra-structure at Dennegeur. It is not clear from the affidavits filed by both respondents nor that of the applicant when exactly Vodacom commenced its installation of its optic fibre network at

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[7] **43 Obligation to lease electronic communications facilities**

(1) Subject to section 44 (5) and (6), an electronic communications network service licensee must, on request, lease electronic communications facilities to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.

(2) Where the reasonableness of any request to lease electronic communications facilities is disputed, the party requesting to lease such electronic communications facilities may notify the Authority in accordance with the regulations prescribed in terms of section 44.

(3) The Authority must, within 14 days of receiving the request, or such longer period as is reasonably necessary in the circumstances, determine the reasonableness of the request...."

[8] The deponents to the first respondents answering affidavit Mr Andre Loedolff claimed that it was in response to an email from a Mr Hagan who represented Telkom in the negotiations an email dated 6 November 2015 informed him due to manifold difficulties the HOA would not be availing itself of Telkom's optic fibre installation and that he instead entered into negotiations with Vodacom regarding its capacity to perform the installation.

Dennegeur. It appeared though that on the 18th February 2016, a Telkom cable was damaged in the course of Vodacom's installation process which had affected the connectivity of five Dennegeur home owners who were Telkom customers. The damage was apparently repaired on the 24th of February 2016.

[12] On the 8th March 2016, Telkom filed its response to the dispute with ICASA. Vodacom thereafter filed its reply on the 18th April 2016. In March 2016, Telkom claimed that a Mr Hagan one of its employee while attending at the Dennegeur Estate for the purposes of investigating Telkom's manholes and ducts, observed that Vodacom (with the permission of the HOA) was in the process of installing micro-ducts into Telkom's 110mm ducts that formed part of the Telkom's network in the facilities on the estate. That was done without the requisite consent of Telkom and before the finalization of the dispute that Vodacom had referred to ICASA.

[13] Telkom claimed that on the 7th June 2016, it wrote to ICASA and advised it that it was of the view that the dispute should be referred to the Compliance and Complaints Committee for an oral hearing. ICASA had apparently requested further information which was apparently provided on the 7th June 2016. Telkom claimed that on the 1st August 2016, it filed an independent expert technical report and on the 12th September 2016, an independent expert economic report with ICASA. Telkom claimed it awaited further guidance from ICASA with regard to the dispute. On the 19th August 2016, ICASA requested that a site inspection be conducted at the estate which was subsequently held on the 19th November

2016. Vodacom claimed that its installation process had already been completed by May 2016.

The issues for determination

[14] The parities were in agreement that the following issues had to be determined by the court;

(i) A point *in limine* raised by the respondents, to the effect that Telkom had failed to join all of the affected residents who had entered into agreements with Vodacom,

(ii) Whether Telkom had *"peaceful and undisturbed"* possession of the electronic communications facilities, also referred to as the infrastructure.[9]

(iii) Whether Telkom had been unlawfully deprived of such possession, and

(iv) Whether Telkom had asserted its rights (such as they are) within a reasonable period.

The application of the relevant legal principles

[15] Inasmuch as these are motion proceedings, where disputes of fact arises in the affidavits, a final order can only be granted if the facts averred in the applicants affidavits are admitted by the respondent together with the facts alleged by the latter and which justify the grant of the order *(Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984 3 SA 623 A at 634).*

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[9] While the applicant referred to *"facilities"* in its Notice of Motion it was clear that it was a reference to *"infrastructure"* and *"network"* as defined in the Act.

[16] Counsel for the respondent correctly pointed out that the test in relation to the rejection of the respondent's version is a stringent one, not easily satisfied, *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A), 430G-H.* It appeared though, that the factual disputes in the matter were not entirely relevant to the determination of the relief and that much of the factual basis of both the applicant and the respondents' contentions were common cause. An example of such dispute, relates to the first respondent's claim that it was not the applicant that supplied the materials for the construction of the infrastructure on the property.

[17] In as early as 1906, in the oft quoted decision of *Nino Bonino v De Lange*[10] on *the mandement van spolie, spoliation was described as;*
"... is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right. He does not make violence or even fraud an essential element, provided that the act is done against the consent of the person despoiled, illicitly."

[18] This time honoured description was cited with approval by Cameron JA in *Tswelopele Non-Profit Organization and Others v City of Tshwane Metropolitan Municipality and Others 2007 (6) SA 511 SCA at para 21.*

[19] The essence of the remedy against spoliation is that the possession enjoyed must be clearly established. See *Yeko v Qana 1973 (4) SA 735 - A) at*

[10] 1906 TS 120 at 122

739 E-F. The underlying principle of the remedy was emphasized that no one is allowed to take the law into their own hands and resort to *"self-help"*. All that the spoliator had to prove was possession of a kind that warranted protection accorded by the remedy and that there was an unlawful deprivation of such possession. The applicant had to establish the nature of its possession and as pointed out by Addleson J in *Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977 (1) SA 230 (E) at 232H-233H* it is not necessary that the possession be continuous by an applicant, if the nature of the operations which it conducts on the premises does not require his continuous presence. Addleson J referred to *Lee and Honore, The South African Law of Property, Family Relations and Succession at p8, "The remedies given by this section"* (including a spoliation order) *"are available to any person who has control of a thing and exercises such control in his own interest or as agent for another."*

[20] Further, Van Blerk JA in *Yeko v Qana 1973 (4) SA 735 (A) at 739E-F* stated;

"For, as Voet, 41.2.16, says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the spoliatus had proved, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted."

[21] Counsel for the applicant pointed out that the applicable legal principles demonstrate that the remedy was available to a wide range of possessors and factual situations, and that the defences available to a respondent in spoliation proceedings were limited to:

(i) Whether the applicant was in possession (which need not be exclusive possession); and

(ii) Whether the respondent was unlawfully deprived of that possession.

[22] The legal principles applicable to the remedy are shaped by its purpose: The remedy is essentially aimed at parties who resort to self-help instead of invoking any substantive legal right to which they may claim through appropriate legal processes.

[23] The applicant contended that inasmuch as it had enjoyed exclusive use and enjoyment of the facilities on the property which belonged to the estate, it had established its physical possession of the facilities and moreover, and uncontestedly did so for its own personal benefit. The respondent on the other hand contended that insofar as the applicant sought permission from it to access the estate and therefore the facilities, it had possession of the facilities rather than Telkom. The first respondent neither claimed that it had itself used, or accessed the manhole and duct facilities on the property for any reason at all. The manhole had also been closed with a T-lock, which although was readily available on the market as explained by the applicant was indicative of its claim of access into the manholes and duct facilities. The applicant also explained that its obtaining

permission from the first respondent to enter the premises of the estate was done no more than to facilitate its access, without hindrance and mindful that it was a security gated complex requiring access to the estate. Such permission to access the estate did not detract from its actual possession of the communication facilities on the premises. Neither was any evidence to the contrary by either of the respondents that prior to Vodacom's intrusion any other entity ever accessed, serviced, installed cabling within or exercised any form of occupation of the ducts, manholes and manhole covers other than Telkom. On this basis Telkom thus asserted its actual and exclusive possession of the facilities.

[24] In addition to Telkom's claim of actual possession of the facilities it claimed that it had established and more persuasively in my view its *quasi* possession of the facilities. Hefer JA in the matter of *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989 (1) SA 508 (A) at 514D-515E,* authoritatively re-affirmed the principle that the exercise of an incorporeal right can be the subject of spoliation through the concept of *quasi possessio*. There the court held that in order to establish *quasi possessio* an applicant had to show *"actual use"* (daadwerlike gebruik) of the right in question. Where in proceedings such as these the applicant seeks to establish *quasi possessio*, Malan AJA in the matter of *First Rand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others 2007 (1) All SA 436 (SCA) at para 12* held that:

> *"... in such legal proceedings it is not necessary to prove the existence of the professed right inasmuch the purpose of the proceedings is the restoration of the status quo ante and not the determination of the existence of the right."*

In paragraph 13 the following is said;

"13 The mandement van spolie does not have a 'catch-all function' to protect the quasi possessio of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandement is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of quasi possessio of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterized to establish whether its quasi possessio is deserving of protection by the mandement. Kleyn seeks to limit the rights concerned to 'gebruiksregte' such as rights of way, a right of access through a gate or the right to affix a name plate to a wall regardless of whether the alleged right is real or personal. That explains why possession of 'mere' personal rights (or their exercise) is not protected by the mandement. The right held in quasi possessio must be a 'gebruiksreg' or an incident of the possession or control of the property."

[24] The applicant contended that the incorporeal right on which it relied was that of a public servitude established by virtue of the provisions of section 22 of the ECA and which had authoritatively been established as such in the majority judgment of Cameron J in the matter of *Tshwane City v Link Africa and Others 2015 (6) SA 440 (CC) at paras 136-138.* I will revert to the findings in that matter which was also relied upon by counsel for the respondent in submitting that the applicant's possession could not have been exclusionary but rather could and should only be in the *"public interest"* with reference to the provisions of the ECA.

Hefer JA in *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989 (1) SA 508 (A)* with reference to the possession of an incorporeal right stated:

"...As I read the passage in Nienaber's case (Nienaber v Stuckey 1946 AD 1049 at 1053) quoted above it is the servitutal right which is protected against dispossession by spoliation and a person claiming such an order must therefore show that he is the holder of such a right and not merely that he claims such a right. An incorporeal such as a servitude cannot of course be possessed in the ordinary sense of the word and the possession is represented by the actual exercise of the right with the result that a refusal to allow a person to exercise the right will amount to a dispossession of such right."

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[26] In the matter of *Tshwane City v Link Africa and Others* the constitutional validity of the provisions of sections 22 and 24 of the ECA were challenged. In upholding the constitutionality of the provisions, the majority through Cameron J dealt extensively with the nature of the inroad into the ownership of a landowner, and characterized the provisions of section 22 as constituting a public servitude by virtue of statute through licensing as defined in the Act over *inter alia* the defined communication facilities which, as in this matter the applicant claimed *quasi* possession over. The court re-stated the position that both public and private law recognized that a law may grant to one person a right in and over the property of another which entitled the former to *"use and enjoy that persons property or to prevent the latter from exercising certain entitlements flowing from the usual rights of ownership."* The court added that where *"the law imposes this obligation on land owners it requires fair procedures and equitable compensation*

in appropriate circumstances." It held further that sections 22 (and 24) of the Act permits the licensee such as the applicant in this matter to exercise such powers without prior consent. However, inasmuch as the right of the applicant is characterized as servitudinal the common law requirements of such exercise must be applied to it and referred to the decision in *Holman & Another v Estate Latre 1970 (3) SA 638 A at 645D "exercise of a servitude is subject to the important condition that incidental rights must be 'exercised civiliter'.* Inasmuch as the Constitutional Court embraced the principle that rights over the property must be exercised *civiliter moda* which in plain language means as to be exercised *"respectfully and with due caution."* The applicant contended for that very reason it was incumbent on it when exercising its right of access to the communication facilities on the first respondent's property to seek permission to access the estate. Such exercise was in my view not a derogation of its quasi possession over the communication facilities and the network.

[27] The applicant was also required to establish that its possession of the facilities was spoliated by the conduct of the respondents. It is perhaps more convenient to deal with this claim with reference to the defense's raised by the respondents.

[28] The respondents claimed that Telkom was no more than entitled to lay claim to possession of its own copper cables which it had installed in the facilities but not the facilities itself. As has already been demonstrated with reference to the right established by way of servitude in terms of section 22, Telkom's use and

enjoyment of the facilities was not limited to its own cables in the manholes and ducts.

[29] Inasmuch as the respondents rely on the provisions of section 22 which bar any exclusionary use of facilities, counsel for the applicants correctly submitted that access, or sharing of such facilities by Vodacom was subject to the provisions of section 43 of the ECA which Vodacom had itself invoked.

[30] The second challenge to Telkom's claim of having been disturbed of its possession was the claim by Vodacom that such dispossession would only occur if as a result, Telkom was unable to provide services to its own customers at Dennegeur. Counsel for the applicant submitted that Telkom's use and enjoyment of the facilities constituted the necessary possession and that the disturbance thereof was not constituted by mere damage to its copper cables.

[31] The applicant submitted further, in response to the respondents claim that Vodacom could easily co-occupy the facilities with Telkom, that it was not necessary that the whole of the property be spoliated and again referred to the dicta of Addleston J where the following was stated *in Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977 at 233 para A;*

"The possession on which he relies need not be of the whole of the property and he need not have lost the whole of that property at the hands of the invader before he is entitled to claim a spoliation order. A disturbance of possession, without deprivation of the whole of it, is sufficient."

[32] Counsel for the applicant correctly compared the situation to an unauthorized interloper into a house that was partly occupied by a possessor of property.

[33] I am satisfied that the applicant had established its possession of the communication facilities on the property of the first respondent, and that the conduct of both the first and second respondent constituted an unlawful deprivation of such possession.

[34] The respondents also pointed out that in the applicant's response in the section 43 complaint by Vodacom it stated:

"9. Telkom does not own any of the ducts that have been deployed within this estate [that is Dennegeur]. Telkom therefore cannot deal with Vodacom's request for access to ducts which may have been installed and are owned by third party service providers or the homeowners of this estate.(para 51,annexure "SS4" hereto).

10. Telkom further stated that "there is no legal, or factual basis upon which it can be directed to grant Vodacom access to underground infrastructure within [certain] residential estates (emphasis added), including Dennegeur (para 62, annexure "SS5" hereto).

[35] The respondents claimed that inasmuch as Telkom disavowed its possession as a legal basis in response to the complaint by the respondents, on its own version it could not have been dispossessed of the infra-structure.

Counsel for the applicant correctly in my view pointed out, that inasmuch as Telkom had disavowed a claim of ownership, it had not pertinently stated that it was not in possession of the premises. In any event, that matter was still before ICASA and has not been resolved one way or the other.

[36] Counsel for the respondent in his heads of argument also sought to rely on Telkom's response in the ICASA application as the basis on which the respondents proceeded with the installation of Vodacom's optic fibre cables. It was pointed out by counsel for the applicant that the installation of the optic fibre cables by Vodacom had commenced prior to Telkom's response in the ICASA complaint. That as much was also evident from the fact that applicant's copper cables had been damaged as early as mid-February 2016, which was at least a month prior to its response.

The non-joinder of customers of Vodacom

[37] The deponent to the answering affidavit on behalf of the first respondent claimed that inasmuch as he was a customer of Vodacom, that he and the other remaining 30 odd residents enjoyed a substantial interest in the subject matter of the litigation, were necessary parties to it, and should have been joined by the applicant to the proceedings. The respondents pointed out that the impact of an order by this court of unlawful spoliation against the respondents would impact

significantly on those customers of Vodacom who would lose their connectivity to the internet and would suffer financially as a result therefrom.[11]

[38] The applicant resisted the claim of non-joinder principally on two grounds. The first respondent as the Homeowners Association was a party to the proceedings and represented the interests of all of the occupants at Dennegeur including the customers of Vodacom.

[39] In this regard counsel for the applicant relied on the decision of *Burger v Rand Water Board 2007 (1) SA 30 SCA paras 8, 9 and 10;*

"[8] In the present context the succinct question is thus whether the individual members of the Club can be said to have a 'direct and substantial interest' in the outcome of the proceeding....

[40] The respondents contended that the *Burger* case (above) relied on by the applicant was distinguishable on the facts inasmuch as there was no suggestion that the HOA represented the 33 customers at the estate for the purposes of this litigation, or that it had the authority to do so in terms of the HOA's constitution which was not before the court.

[41] In the answering affidavit Andre Loedolff claimed that as a result of the successful negotiations between the HOA and Vodacom, an agreement had

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[11] The respondents claimed that some of the customers used the internet connectivity for business purposes.

been reached between the two parties that Vodacom would install an optic fibre network within the existing telecommunications infra-structure at Dennegeur. In my view the HOA was the necessary party to the proceedings insofar as it had entered into an agreement with Vodacom which effectively led to the unlawful spoliation of the applicant's possession of the telecommunication facilities at the estate. That agreement (between the respondents) led to the individual homeowners entering into separate service agreements with Vodacom.

[42] In the second string to its bow in resisting the claim of non-joinder, the applicant contended that *"the unnamed 30 odd"* customers of Vodacom enjoyed no more than a financial interest in the outcome of these proceedings insofar as their relationship with Vodacom was contractual. Vodacom had not indicated on the papers whether in the event of its resistance in this application being unsuccessful, it could continue to provide internet services to its customers by any alternate means.

[43] The parties relied on the test as set out by Mlambo JA in the matter of *Gordon v Department of Health Kwazulu-Natal 2008 (6) SA 522 (SCA) at para 9:*

"[9] ... The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the Amalgamated Engineering Union case (supra) it was found that 'the question of joinder should . . . not depend on

the nature of the subject-matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party, or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."

[44] The applicant contends that the respondents have not set out the basis in which the individual homeowners would be prejudiced in the event of an order against the respondents, inasmuch as they had failed to demonstrate what actual prejudice the customers would suffer, and that it had not indicated that there is no other alternative means of providing internet access to any of its customers. Moreover, as the applicant correctly submitted it was for the respondents before the court to resist the claim of unlawful spoliation by their conduct as opposed to that of the customers of Vodacom. In my view the claim of non-joinder was without merit and stands to be dismissed.

The delay in bringing the application.

[45] Vodacom contended that it went ahead and installed the fibre optic cables based on Telkom's apparent acquiescence inasmuch as Hagan had seen as early as March that Vodacom was installing the cables in the infrastructure and Telkom did nothing to stop it until the launching of the application some nine months later. The applicant pointed out that the history of the matter demonstrated to the contrary. It was not clear from the papers and neither during argument did it appear as to when Vodacom commenced with the installation of its cables. It was however, clear that by February Vodacom had already started laying the cables. In January 2016, it lodged the complaint with ICASA in respect of Telkom's refusal to share the facilities with it. Clearly, in my view as contended for by the applicant despite having lodged the complaint with ICASA (albeit even if it only believed that Telkom was the owner of the infrastructure which in any event would have been irrelevant to the determination of the complaint,) Vodacom proceeded with the installation. The complaint had as at the date of the launching of the application not been resolved by ICASA and neither had it been withdrawn by Vodacom if it genuinely believed that it was entitled to do so and without relying further on the provisions of section 43 of the Act.

[46] The applicant also relied on the fact that the proceedings had been launched within a year which has generally been accepted as reasonable within which to launch such proceedings. The respondents contend and correctly so that rule of a year is no more than a guide and that the ultimate decision depends

on the circumstances of each case. In this matter Telkom has demonstrated that with the invocation of the section 43 complaint and the proceedings thereafter, it was entitled to accept that the respondents would not have resorted to the unlawful spoliation of the facilities. I am satisfied that in the circumstances of this matter it was not unreasonable for the applicant to have launched the proceedings when it did.

[47] Lastly, with regard to the remedy of the *mandement van spoile* relied on by the applicant, respondents contended with reference to prayers 2 and 3 in the Notice of Motion that the applicants remedy was more appropriately that of interdictory proceedings. Counsel for the applicant contended and correctly in my view that the applicant was entitled to rely on spoliation proceedings where as it did in establishing the requirements of such relief. In any event it was at liberty to choose the appropriate remedy based on the facts and circumstances of the matter. In my view the relief sought by the applicant is entirely appropriate and it had moreover established the requirements of the remedy against both of the respondents.

In conclusion the following order is made and which is subject to the outcome of the section 43 proceedings before ICASA:

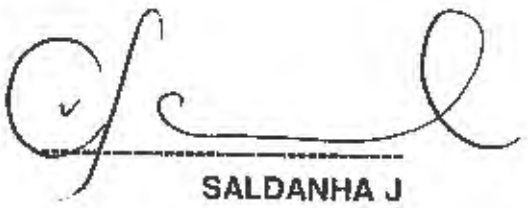
It is ordered that:

[1] The first respondent is directed to restore to the applicant its *ante omnia* undisturbed possession of its underground ducts, sleeves, manholes, manhole

covers and copper cables (the infrastructure) within the Residential Dennegeur Estate off Bizweni Avenue, Dennegeur, Cape Town (the Estate).

[2] The second respondent is directed to forthwith remove all and any cabling or equipment from the infrastructure and to restore to the applicant its *ante omnia* undisturbed possession of the infrastructure.

[3] The first and second respondents are ordered to pay the cost of the applicant, jointly and severally, which costs are to include the costs of two counsel.



SALDANHA J