

Rights of licensees to deploy networks: what does it mean to have “due regard to applicable law” when deploying a network?

The judgement of the High Court in the Western Cape in the matter of [Dark Fibre Africa \(Pty\) Ltd v City of Cape Town \(7748/2017\) \[2017\] ZAWCHC 151 \(14 December 2017\)](#) has added to the judicial precedent on the interpretation of section 22 of the Electronic Communications Act 36 of 2005, with particular reference to the requirement that a licensee exercising its rights must have “due regard for applicable law”.

‘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.

In brief: DFA notified the City of its intention to construct a fibre optic route and that it disputed the City’s right to impose conditions which include a refundable and a non-refundable deposit as well as the right to apply a tariff in future. The City issued a wayleave; DFA crossed out the offensive conditions and the parties eventually met in court.

The four conditions were:

- payment of a refundable or non-refundable deposit prior to the issuing of any wayleave/permit;
- payment of a trench reinstatement deposit;
- a reservation by which the City reserves a right to impose a tariff charge in respect of the use of City land for the installation of telecommunications infrastructure; and
- a condition which provides that, should these services (or part thereof) have to be relocated for whatever reason as determined by the City then these service owners will immediately do so at no cost to the City.

DFA argued that these conditions did not constitute applicable law to which DFA has to have regard as envisaged by s22(2) of the ECA and that they had no bearing on the manner in which DFA would execute its works.

The High Court disagreed, noting the following:

- where there is national legislation (the ECA) plus the potential application of legislation passed by a local authority (the City), then a court must approach this interaction by reconciling the provisions on the basis that 'each is concerned with a different subject matter'. The court must interpret each of the provisions so that they can both apply in a seamless manner, subject to the local authority legislation not thwarting the national legislation (in this case, not requiring the consent of the landowner).
- DFA had not made out a case that its rights under section 22 had been thwarted: what is required is that, in the exercise of these rights, it must abide by municipal bylaws.
- The City had provided a clear justification for the conditions imposed, through which it was trying to influence the behaviour of licensees in exercising their section 22 rights. A desirable outcome was to reduce the potential financial burden imposed on ratepayers through deployment of electronic communications networks.
- The City had demonstrated that its bylaws served a legitimate purpose relating to its mandate as a local government entity and that they were of general application. The City of Tshwane in their dispute with Link Africa had not satisfactorily proved this element.

DFA's application was accordingly dismissed with costs.

In our view:

- ***The ruling confirms that section 22 must be very carefully used where a municipal authority is involved.***
- ***Further, where there is a dispute between a licensee and a landowner regarding the lawfulness of the licensee's exercise of its section 22 rights – it is required of the licensee to approach a court for declaratory relief before it proceeds to enter onto the land and deploy facilities.***

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