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The right to deploy networks and the obligation to obey applicable law

Telkom SA Soc Ltd v Kalu NO and Another (ZAWCHC 53 (10 May 2018)

This matter involved the interplay between

- the rights of a licensee under the Electronic Communications Act 36 of 2005 ("the ECA") to enter upon land without consent for the purpose of deploying electronic communications facilities; and
- the rights and competencies of municipalities to discharge their mandates relating to land use and municipal planning.

In short: Telkom entered into an agreement with a private landowner in November 2015 for the lease of a portion of a residential property so that it could erect and maintain a base station. Telkom then erected a mast in contravention of a zoning bylaw and without notice to the City. An application for appropriate rezoning was completed in April 2016, after the mast was erected. Consideration of this application was interrupted by the initiation of court proceedings.

Telkom and the landowner ("the Applicants") sought a declaratory order that the provisions of the City of Cape Town's Municipal Planning By-laws 2015 ("By-law"), Zoning Scheme Regulations and Telecommunications Mast Infrastructure Policy ("Mast Policy"), were in conflict with the provisions of Section 22 of the ECA and were accordingly invalid.

The two issues the court addressed were:

- Whether the By-law and the Mast Policy are in conflict with national legislation and therefore invalid as provided for in Section 156(3) of the Constitution.
- Whether the By-law and Mast Policy overstep the boundaries of municipal planning and encroach on an area of national planning.

The arguments relating to the relationship between national legislation and local government legislation interpreted through the prism of the Constitution are complex and beyond the scope of this short note. Suffice to say that:

- It has been firmly established by the Constitutional Court that municipalities' constitutional legislative power regarding "municipal planning" includes the control of zoning, even in respect of a use of land, such as telecommunications. It is overtly clear that a municipality must regulate land use, including matters which affect national interests.
- The City therefore has the exclusive legislative competence to regulate zoning of all land in its area for all purposes, regardless of whether the purpose affects a national interest. The By-law and Mast Policy are valid.
- The Applicants had failed to establish that there was a conflict between section 22(1) and the By-law and the court found there was no conflict when taking into account the different powers given to

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national and local government in the Constitution. The ECA regulates electronic communications, while the By-law regulates zoning and use of land.

The application was dismissed with costs and the erection of the mast and use of the property for the location of the mast was declared unlawful.

Note: The judgement builds on the DFA v City of Cape Town matter, confirming that the requirement to have "due regard to applicable law" includes the obligation to comply with applicable bylaws.

What is interesting is that the Mast Policy – which seeks "*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*" – explicitly requires that the consent of the City be obtained. Telkom argued that this was in direct conflict with and effectively negated its rights under section 22, in terms of which consent was not required. This takes things a step further than the DFA matter.

The court's answer was unequivocal (our emphasis):

> *[48] The Applicants submitted that Section 22 has been authoritatively interpreted so as to trump the fundamental right of ownership. I do not agree with this contention. It is my view that the Applicants are misinterpreting the* ***Link Africa*** *decision.* ***Section 22 cannot operate in a vacuum****. I agree with the Respondent's contention that* ***it has to co-exist in a web of other laws including municipal by-laws****. I am therefore of the view that the Respondent's zoning requirements do not conflict with Section 22(1) because* ***before a licensee may exercise its right in terms of Section 22(1) of the ECA, the licensee must comply with all applicable law, including laws enacted by the municipality****. As Section 22(2) clearly provides that "due regard must be had to applicable law and the environmental policy of the Republic", it follows that apart from the municipality's consent, which is required in terms of the By-law, the licensee is still required to obtain all other permits, licenses and authorisations required by law which do not constitute a 'municipality's consent', such as rezoning or departure, building plan approval or exemption (which the First Applicant concedes is required), environmental authorisations, heritage authorisation, and civil aviation permits, amongst others. It is for these reasons that I am not in agreement with the Applicants' contention that the By-law and the Mast Policy exceed the boundaries between spheres of planning law.* ***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, license or authorisation required by any law from any authority. If this were so, the public would be without the protection of a range of constitutionally compliant laws which serve the public interest****.*