



IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. 303/2022

In the matter between:

DR BEYERS NAUDE LOCAL MUNICIPALITY

Applicant

and

HERO TELECOMS (PTY) LTD

First Respondent

MINISTER OF TRANSPORT

Second Respondent

SOUTH AFRICAN ROAD AGENCY LIMITED

Third Respondent

MINISTER OF ARTS AND CULTURE

Fourth Respondent

**MEC: EASTERN CAPE DEPARTMENT OF SPORT,
RECREATION, ARTS AND CULTURE**

Fifth Respondent

JUDGMENT

Bloem J

- [1] This is an application for an order that a rule *nisi* be issued calling upon the respondents and other interested parties to show cause at a later date why it should not be declared that the first respondent's trenching, excavation and/or construction related to the installation of fibre and/or telecommunications cabling within the jurisdictional area of Graaff-Reinet be declared unlawful and in contravention of various pieces of legislation. The applicant also seeks an order that the first respondent be interdicted from undertaking any trenching, excavation and/or construction.

- [2] The applicant is a local municipality, its area of jurisdiction including the towns of Graaff-Reinet and Aberdeen (the municipality). The first respondent is Hero Telecoms (Pty) Ltd (Herotel). Although there are four other respondents, the dispute is between the applicant and Herotel. Nothing further needs be said about the other respondents who have not opposed the application.
- [3] The municipality is responsible for the care and maintenance of land and public spaces within its area of jurisdiction. Herotel is an electronic communications network service licensee as well as an electronic communications service licensee. Those licences, which were granted and issued by the Independent Communications Authority of South Africa, grant Herotel the right to provide electronic communications network services and electronic communications services.
- [4] During 2020 the municipality invited interested parties to make representations for the installation of fibre-optic cabling in the towns within its area of jurisdiction. Herotel and other entities responded to the invitation. By letter dated 29 September 2020 Conic Consulting Engineers and Project Managers (Pty) Ltd (Conic), on behalf of Herotel, submitted an application for the approval of a wayleave¹ to the municipality. Conic requested the municipality to provide Herotel with details of the information that it required for the issuing of a wayleave as well as the layout drawings of the existing services. By letter dated 17 November 2020 Conic provided the municipality with Herotel's layout drawings. In an email dated 1 February 2020 Conic made *inter alia* the proposal that Herotel be granted a

¹ In terms of the municipality's By-law relating to Roads and Streets, which were published in Provincial Gazette Extraordinary No 3084 dated 4 December 2013 (Local Authority Notice No 273), "wayleave" means a formal approval to carry out work in the road reserve.

wayleave for the area of Graaff-Reinet with *"a condition that we submit all third party wayleave before construction started"*. It also suggested that the municipality call a meeting with all the involved parties to enable the municipality to inform them what questions it had *"around the processes and fees"*.

- [5] On 2 February 2021 the municipality informed Conic that its portfolio committee would be sitting on 9 February 2021 when *"it will be making recommendations to council"* regarding the applications for wayleave. It appears that the municipality's council did not make any recommendation in that regard.
- [6] In an email of 15 February 2021 Conic pointed out to the municipality that it had made an application for the approval of a wayleave during 2020, that on 2 February 2021 the municipality undertook to revert to it after the council meeting on 9 February 2021, that the municipality failed to do so and that Herotel would enter municipal land and install a fibre network according to the Electronic Communications Act² because *"we have notified local municipality of our intention to install fibre and no feedback regarding services that might be affected has been submitted to us or our client"*.
- [7] On 6 September 2021 a management task team submitted a memorandum to the municipality's municipal manager wherein it recommended that approval be granted to Herotel for a wayleave for the area of Graaff-Reinet and to another service provider for the area of Aberdeen. By letter dated 20 September 2021 the municipal manager assured Herotel that the municipality was seriously considering its application for a wayleave to install fibre in Graaff-Reinet and Aberdeen.

² Electronic Communications Act, 2005 (Act 36 of 2005).

- [8] By letter dated 21 September 2021 Herotel's attorney informed the municipality of Herotel's undertaking to comply with all the reasonable requirements set by the municipality *"for the issuance of a wayleave to it, including all standard and reasonable by-laws promulgated by municipalities in respect of wayleaves"* and requested to be provided with a wayleave on or before 27 September 2021, failing which Herotel shall commence with the installation of fibre optic network in the Graaff-Reinet and Aberdeen areas. It reiterated its undertaking to, in commencing with the installation, comply with all reasonable requirements set by the municipality. In that letter the attorney also brought to the attention of the municipality that Herotel had been contacted by one Mr van der Westhuizen, who had offered to facilitate an agreement to acquire a wayleave from the municipality in return for payment of a fee of R300 000.00. Mr van der Westhuizen allegedly informed Herotel that he was specifically contacted by one of the municipality's officials for that purpose. In response to that, the municipality informed Herotel's attorney that many other entities had applied for wayleaves and that Herotel should not rush the municipality into making a decision in that regard. He stated that any installation without the municipality's consent would be illegal. The municipality also informed Herotel's attorney that a letter, informing Herotel about the outcome of the wayleave applications, *"will be sent this week, unfortunately I am unsure of the specific day"*. The municipality did not revert to Herotel's attorney.
- [9] By email dated 5 October 2021 Herotel's attorney informed the municipality that, as a result of its deliberate inactivity in respect of the wayleaves, Herotel drew the reasonable inference that certain of its officials, together with Mr van der Westhuizen, were intent on ensuring that no wayleave be issued to Herotel. He also gave notice of Herotel's availability to attend a meeting with the municipality

on 7, 8 or 11 October 2021 and that it could commence construction of the network on 18 October 2021.

- [10] In his letter dated 4 October 2021 the municipality informed Herotel that no service provider acted on behalf of the municipality, that the municipality has no knowledge of Mr van der Westhuizen, that the municipality strongly condemned bribery and that Herotel should lay criminal charges against any person who made himself guilty of bribery. The municipal manager also informed Herotel that the municipality had in the interim decided to place all wayleave applications on hold. In his response dated 17 February 2022 the attorney informed the municipality that the unilateral imposition of a moratorium was impeding Herotel's rights under the Electronic Communications Act. In that letter Herotel gave the municipality thirty days' notice of its intention to commence its operations as described in the wayleave application. The municipality engaged an attorney who informed his opponent that the municipality would seek a court order interdicting any attempt by Herotel to commence with operations. By email dated 12 January 2022 Herotel's attorney informed his opponent that Herotel did not intend to debate the matter any further by way of correspondence, and, if necessary, respond in the appropriate forum.
- [11] By email dated 21 January 2022 the municipality's attorney informed his opponent that Herotel had started digging trenches on municipal property, well knowing that it was not entitled to do so and called upon it to refrain from such conduct, failing which legal action would be instituted. It is not in dispute that Herotel commenced with the construction of an electronic communications network in Graaff-Reinet.
- [12] Further correspondence between the parties and their attorneys involved seeking an undertaking that Herotel would not persist with its conduct and Herotel's refusal

to give such undertaking. It is against the above factual background that it must be determined whether or not the municipality is entitled to the interim relief sought.

[13] Section 22 of the Electronic Communications Act deals with entry upon and construction of lines across land and waterways. That section reads as follows:

- “(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 or 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.”

[14] Mr Potgieter, who appeared on behalf of Herotel with Mr van Tonder, submitted that the municipality arrogated to itself a right which it does not have. That right, so the submission went, is the right to consent or not to consent “to install communication services even if it results in digging up the [municipality’s] streets”. Counsel submitted that the rights granted by section 22(1) are dispositive of the application and the municipality’s contentions that it has a *prima facie* right. Mr Mullins, counsel for the municipality who appeared with Ms Morgan, submitted that, although Herotel has the rights granted by section 22(1), it cannot undermine the municipality’s relevant by-law which, if ignored, will render Herotel’s operations unlawful.

[15] The legal implications of section 22 were discussed in *Dark Fibre Africa (Pty) Ltd v City of Cape Town*³ in which Lewis JA interpreted the majority judgment in *Tshwane City v Link Africa and others*.⁴ In *Dark Fibre Africa* the court considered whether a licensee had unfettered power to construct electronic communications networks, despite the express provision of section 22(2) of the Electronic Communications Act, which requires a licensee to have due regard to *inter alia* applicable law.

[16] The municipality relies on the provisions of section 18 of its By-law relating to Roads and Streets⁵ (the by-law). That section deals with excavation in streets. It reads as follows:

"No person shall make or cause to be made an excavation or dig or cause to be dug a pit, trench or hole in a street –

- (a) except with the written permission of the municipality; and*
- (b) otherwise than in accordance with the requirements prescribed by the municipality attached as schedule 2."*

[17] In terms of section 1 of the by-law:

17.1. "street" has the meaning assigned thereto by section 2 of the Municipal Ordinance, 1974 (Ordinance 20 of 1974), or section 2 of the Divisional Council's Ordinance, 1976 (Ordinance 18 of 1976), or as amended thereto, and, except where inconsistent with the context, includes a sidewalk;

17.2. "road reserve" means the full width of a public road and includes the verge

³ *Dark Fibre Africa (Pty) Ltd v City of Cape Town* 2019 (3) SA 425 (SCA).

⁴ *Tshwane City v Link Africa and others* 2015 (6) SA 440 (CC).

⁵ See footnote 1 above.

and the roadway; and

17.3. "sidewalk" means that portion of street between the outer boundary of the roadway and the boundary lines of the adjacent property or buildings which are intended for the use of pedestrians.

- [18] The definition of "street" in section 2 of Ordinance 20 of 1974 and section 2 of Ordinance 18 of 1976 is exactly the same. In terms of those sections "street" means any street, road, highway, thoroughfare, lane, footpath, sidewalk, alley, passage, bridge or any other place of a like nature or any portion of the width or length thereof and includes all appurtenances of whatsoever nature thereto.
- [19] The provisions of section 18(a) of the by-law are clear. The ordinary grammatical meaning attached to that subsection is that a person requires written consent of the municipality to dig a trench in a street, including a sidewalk, within the area of the municipality's jurisdiction.
- [20] Schedule 2 of the by-law sets out the Code of Practise for Work in a Road Reserve. In terms of section 1 of the Code of Conduct, the basic procedure which is required for work in a road reserve is *inter alia* that approval must first be obtained for the proposed work from the relevant municipal department or authorised agent. In terms of section 3 thereof no work may be done on the road reserve before a wayleave in respect thereof has been issued by the municipality. Section 3(6) thereof provides that only work described in the wayleave may be done and only at the locations given in the wayleave.
- [21] It was submitted on behalf of the municipality that any excavation by Herotel on any street, including a sidewalk, in Graaff-Reinet would be in breach of the provisions of the by-law.

- [22] Section 22(1) creates a public servitude over the property of another. The servitude limits the rights of ownership in, for example an immovable property, in that it affords someone other than the owner the power to use and enjoy the immovable property. The servitude allows the holder of the right to gain access to the property to enable such holder to exercise the servitude. Section 22(1) does not determine how the holder of the right may exercise that right. It is in that regard that section 22(2) becomes relevant. It obliges the licensee to have due regard to applicable law in taking any action set out in section 22(1). What the licensee cannot do is to barge in, brazenly disregarding municipal by-laws. The rights granted by section 22(1) must be exercised over the municipality's property in a respectful manner with due caution (*civiliter modo*).
- [23] A licensee cannot exercise the rights granted by section 22(1) and pretend that the municipality does not have by-laws, which must be complied with. Section 22(2) enjoins a licensee to have due regard to applicable law, such as common law and municipal by-laws. The provisions of by-laws must be complied with before the rights granted by section 22(1) may be exercised.⁶
- [24] It is clear from the above factual background that Herotel and the municipality cannot agree on how Herotel should exercise its rights granted by section 22(1). Herotel contends that it does not require consent from the municipality to exercise those rights.
- [25] Where a municipality is the cause of a licensee not being able to exercise its rights granted by section 22(1), for example, by not considering how the licensee should exercise those rights (which seems to be the position in this case), a

⁶ *Link Africa* n 4 at par 185.

licensee cannot, without further ado, exercise those rights and in the process disregard the municipality's by-law.⁷

[26] Disputes as to how the licensee should exercise the rights granted by section 22(1) should be adjudicated by the court. Since the parties are in dispute as to how Herotel should exercise those rights, it appears that, in the absence of resolution,⁸ Herotel may have acted unlawfully when it excavated municipal land and constructed an electronic communications network without complying with the provisions of the by-law. The municipality has a right to protect the land and public spaces under its care against unlawful damage.

[27] I am satisfied that the municipality has established that it has a *prima facie* right to ensure that the by-law be complied with. That right should be protected by an interim interdict. Herotel made an application for a wayleave "to deploy our network ... both underground and overhead wayleave". It cannot exercise the rights granted by section 22(1) before the municipality has made a decision in respect thereof, lest its application for a wayleave becomes meaningless. I am furthermore of the view that the applicant has also established that it will suffer irreparable harm unless the interdict be granted. If the interim relief is refused and the ultimate relief sought in the application is granted, the effect thereof would be that Herotel would be allowed, in the interim, to continue with what seems to be unlawful conduct. On the other hand, Herotel is unlikely to suffer damages if interdicted until the final determination of this case. Lastly, I am satisfied that the municipality does not have a satisfactory alternative remedy.

⁷ *Link Africa* n 4 at par 142.

⁸ *Link Africa* n 4 at paras 152 to 155.

[28] Insofar as urgency is concerned, which raised in Herotel's main answering affidavit as an issue, but not pursued by Mr Potgieter at the hearing, it is found that, based on the facts set out above, the matter was clearly urgent.

[29] It would, in the circumstances of this case, be unwise to make a costs order at this stage. The costs occasioned by the hearing of the application for interim relief should be reserved, to be determined at a later stage.

[30] In the result, it is ordered that:

30.1. The applicant's non-compliance with the rules of this Court relating to service and time be and is hereby condoned and that the application is dealt with as a matter of urgency.

30.2. A rule *nisi* do hereby issue calling upon the respondents and any other interested party to show cause at 09h30 on Tuesday, 1 March 2022 why the following order should not be granted:


30.2.1. The first respondent's trenching, excavation and construction of an electronic communications network in the jurisdictional area of Graaff-Reinet from about 19 January 2022 were and remain unlawful and in contravention of:

30.2.1.1. section 22(2) of the Electronic Communications Act, 36 of 2005;

30.2.1.2. section 18 of the Code of Practise contained in Schedule 2 of the applicant's By-law relating to Roads and Streets (Local Authority Notice No 273 of 2013) (the Roads and Streets By-law); and

- 30.2.1.3. sections 124 and 128 of the applicant's By-law relating to Water Supply and Sanitation Services (Local Authority Notice No 249 of 2006) (the Water and Sanitation By-Law).
- 30.2.2. The first respondent be found guilty of an offence in terms of section 31(1) of the Roads and Street By-law.
- 30.2.3. The first respondent be fined in an amount of R10 000.00 or such other sentence as the court may deem fit after having been found guilty.
- 30.2.4. The first respondent and any other person acting under its direction or authority terminate their offending conduct set out in paragraph 2.1 above and desist from undertaking any trenching, excavation and construction of an electronic communications network within the jurisdictional area of Graaff-Reinet.
- 30.2.5. The first respondent pay, at its own cost, the reinstatement and restoration to the original condition all roads, verges and/or pavements in the jurisdictional area of Graaff-Reinet which it damaged from about 19 January 2022.
- 30.2.6. The first respondent pay the costs of the application on an attorney and own client scale.
- 30.3. Paragraph 2.4 shall operate as an interim interdict with immediate effect pending the outcome of the application.

30.4. A copy of the full set of the application papers and this order shall be served on all the service providers who applied for wayleave permits for the installation of a fibre optic network in Graaff-Reinet.



G H BLOEM
Judge of the High Court

For the applicant:

Mr N J Mullins SC and Ms M P Morgan,
instructed by Wikus van Rensburg
Attorneys, Port Elizabeth and Neville,
Borman and Botha, Grahamstown

For the first respondent:

Mr M v R Potgieter SC and Mr L V R
van Tonder, instructed by Smit
Sewgoolam Inc, Johannesburg and
Nolte Smit Inc, Grahamstown.

Date of hearing:

8 February 2022.

Date of delivery of judgment:

22 February 2022.