CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 184/14

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Applicant
and	
LINK AFRICA (PTY) LIMITED	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
MINISTER OF COMMUNICATIONS	Third Respondent
and	
DARK FIBRE AFRICA (RF) (PTY) LIMITED	First Intervener
MSUNDUZI MUNICIPALITY	Second intervener
TELKOM SA SOC LIMITED	Third Intervener
NEOTEL (PTY) LIMITED	Fourth Intervener
MOBILE TELEPHONE NETWORKS (PTY) LIMITED	Fifth Intervener
SMI TRADING CC	Sixth Intervener

Neutral citation: *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* [2015] ZACC 29

Coram: Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ

Judgments: Jafta J and Tshiqi AJ (minority): [1] to [99]
Cameron J and Froneman J (majority): [100] to [191]

Heard on: 12 May 2015

Decided on: 23 September 2015

Summary: Electronic Communications Act 36 of 2005 — constitutionality of sections 22 and 24 — provisions valid

Statutory interpretation — "due regard to applicable law" — common law of servitudes — *civiliter modo*

Section 25 of the Constitution — private property owner — deprivation — not arbitrary

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Gauteng Division of the High Court, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The City of Tshwane Metropolitan Municipality is ordered to pay the costs of Link Africa (Pty) Limited.

JUDGMENT

JAFTA J and TSHIQI AJ (Moseneke DCJ and Nkabinde J concurring):

Introduction

[1] South Africa, like many developing countries, lags behind developed countries in the field of electronic communications. This shortcoming impacts negatively on the economy of this country. In order to address this problem, Parliament has passed a number of Acts,[1] including the Electronic Communications Act (Act).[2] The present dispute is rooted in the Act which mandates the Independent Communications Authority of South Africa (ICASA) – an organ of state established in terms of the ICASA Act – to issue three types of licences to qualifying applicants.[3]

[2] These licences entitle the holder to construct on the land of another person an electronic communications network[4] or an electronic communications facility.[5]

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[1] These include for example the Independent Broadcasting Authority Act 153 of 1993 and the Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act).

[2] 36 of 2005 (as amended by the Electronic Communications Amendment Act 37 of 2007 and the Electronic Communications Amendment Act 1 of 2014).

[3] Section 5(2) of the Act states:

> "The Authority may upon application and due consideration in the prescribed manner, grant individual licences for the following:
>
> (a) subject to subsection (6), electronic communications network services;
>
> (b) broadcasting services; and
>
> (c) electronic communication services."

[4] The Act defines an electronic communications network as:

> "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 transmissions systems, used for conveyance of electronic communications."

[5] Under the Act an electronic communications facility "includes but is not limited to any—

> (a) wire;
>
> (b) cable (including undersea and land-based fibre optic cables);
>
> (c) antenna;
>
> (d) mast;
>
> (e) satellite transponder;

Section 22 of the Act lists a number of rights to which the licence-holder, like Link Africa (Pty) Limited (Link Africa), is entitled.[6] It was the desire on the part of Link Africa to exercise those rights on the property of the City of Tshwane Metropolitan Municipality (City) which triggered these proceedings. The bone of contention was whether Link Africa needed to obtain consent from the City before it could exercise those rights. Litigation was resorted to when agreement on the issue eluded the parties.

Parties

[3] The applicant is the City, defined as such in section 1 of the Municipal Systems Act.[7] The first respondent is Link Africa, a private company duly registered in accordance with the company laws of the Republic of South Africa. The second respondent is the Minister of Justice and Constitutional Development and the third respondent is the Minister of Communications (Minister). Both are parties to these proceedings because of the constitutional issues that arise. However, only the Minister filed written arguments opposing the relief sought by the applicants and was represented at the hearing in this Court.

(f) circuit;

(g) cable landing station;

(h) international gateway;

(i) earth station; and

(j) radio apparatus or other thing,

which can be used for, or in connection with, electronic communications, including where applicable—

(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 utilisation of such electronic communications facilities."

[6] Section 22 is quoted in [42] below.

[7] Local Government: Municipal Systems Act 32 of 2000.

[4] Link Africa carries on the business of constructing infrastructure in the field of electronic communications, for commercial benefit. Once constructed, the infrastructure is let or sold to business entities which provide internet and other communications services to the public and business. Link Africa installs its fibre infrastructure in the underground infrastructure of municipalities, like the water and sewage systems. Its network involves clipping the fibre-optic cables to the top part or floor of the sewer pipe. Link Africa's network is cheap because it does not involve digging up trenches for purposes of installing cables underneath the ground.

[5] Its cables are used for the purposes of transmitting electronic data, voice and video communications at a greater speed and communication capacity. These cables are as thin as human hair and are arranged in bundles so as to give them the ability to transmit signals over long distances.

Factual background

[6] Link Africa chose the municipal area of the City as one of the places where it wished to install its fibre-optic cabling network. It then approached the City in June 2011, and in October 2011 submitted a formal proposal to the City's Chief Information Officer. In terms of the proposal, the City was required to grant Link Africa the right to make use of existing municipal infrastructure, especially existing service ducts and sewage and storm water infrastructure. In exchange for this right of use, Link Africa would either:

a) provide the City with the use of two fibre pairs on all routes deployed, and endeavour to route the fibre-optic cables as closely as possible to the City points of interest to facilitate easy connections; or

b) pay the City an annual rental on a per meter basis for the City's infrastructure used for the deployment.

[7] At about the same time it also engaged with the City's Executive Director for Water and Sanitation Division. It undertook to provide the Water and Sanitation

Division (Division) with a firm proposal for the deployment of an initial site. It identified the Waterkloof Glen area. Wayleave notices were submitted and approved.[8]

[8] The Chief Information Officer gave the Division the go-ahead to allow Link Africa to use municipal infrastructure for "the purpose of creating infrastructure that will be used to agree on appropriate installations and maintenance procedures between the parties". On this basis ongoing engagement proceeded between the parties. Mr Ngobeni, the Municipal Manager for the City, is emphatic in his affidavit that this was not an agreement, but should rather be viewed against the fact that at that stage the City was engaged in the formulation and development of its own broadband strategy and not ready to approve Link Africa's proposal.

[9] Following a list of queries and responses, the Division granted Link Africa permission to "proceed with physical surveys of the proposed initial sites". A series of meetings took place and in March 2012 the Division's Acting Executive Director, Mr Pansegrouw, recommended the approval of Link Africa's request. After that, in November, the City's Strategic Executive Director for Services Infrastructure, Mr Makibinyane also recommended approval and at the same time, in his capacity as Acting Deputy City Manager, granted final approval.

[10] Link Africa published a press release confirming the installation of the network. When the City Manager was alerted to the approval, he did not endorse it. He immediately convened a meeting with Link Africa. Following this meeting, the City Manager wrote a letter requesting Link Africa to halt the installation of the fibre-optic cables on the City's infrastructure, pending an investigation into the

[8] In its papers Link Africa explained the wayleave process as follows:

> "The wayleave process is the process in terms of which any person who wishes to make use of space on a municipal road or install any infrastructure on or under a road such as an electricity network operator, a water services provider, a telecommunications network operator, or an outdoor advertising service provider which erects billboards in the road reserve, notifies the relevant municipality of its intention to do so and agrees with the municipality on the manner in which it will access the road reserve. This includes, for example, agreeing on traffic restrictions and road markings to be put in place."

approval by the City. Link Africa acceded to this request and temporarily stopped the installation.

[11] Meanwhile, the Supreme Court of Appeal delivered its judgment in *MTN*.[9] Of significance to Link Africa, this judgment asserted that consent of the landowner was not required if a licence-holder acts in terms of the Act. The Supreme Court of Appeal also held that the Promotion of Administrative Justice Act[10] (PAJA) applies to an action taken in terms of section 22 of the Act.[11]

[12] Emboldened by the judgment, Link Africa gave the City notice purportedly in terms of PAJA and invited the City to make representations to it in relation to its proposed decision. For compliance with procedural fairness, PAJA requires notice to be given by a decision-maker before taking a decision that adversely affects the rights or legitimate expectations of another person.

[13] The City Manager responded to Link Africa's notice by outlining the new direction the City wanted to take in relation to the roll out of broadband connectivity. And stated further that the City was in a tender process for the broadband project and would have expected Link Africa to tender and participate in the process if it was serious about partnering with the City in the furtherance of its vision to build a "Smart City". In the same letter, the City informed Link Africa that its request to install an electronic communications network on its underground infrastructure was refused. The City did not make any representations in terms of PAJA as was anticipated by Link Africa.

[9] *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* [2012] ZASCA 138; 2012 (6) SA 638 (SCA) (*MTN*).

[10] 3 of 2000.

[11] Above n 9 at paras 21 and 29.

[14] On a subsequent date, Link Africa provided the City with full reasons for its decision to proceed with the installation.[12] It also informed the City of its right to review the decision.[13]

[15] The City did not respond to this letter nor did any of its representatives attend the "kick-off meeting" that was convened by Link Africa. Link Africa's attorneys addressed a letter to the City stating, amongst others, that as the City had at no stage sought to review and set aside Link Africa's decision to proceed with the installation of its fibre-optic cables, Link Africa would proceed with the installation. Indeed it did.

[16] On 6 December 2013 Link Africa had already completed phase one of the installation of its fibre-optic cables in the City's underground infrastructure. Subsequent to that it was agreed between them that Link Africa would suspend phase two of the installation of its fibre-optic cables, if the City launched interdict proceedings by 27 January 2014.

In the High Court

[17] On 28 January 2014, the City brought an application in the Gauteng Division of the High Court, Pretoria (High Court). The relief sought was divided into four parts. In the first part, it sought a declarator that section 22 of the Act requires consent of the landowner before action authorised by the section could be undertaken.

[18] In the second part, the City asked for an interdict restraining Link Africa from taking the actions listed in section 22, on the City's infrastructure without consent or agreement from the City. Furthermore, a *mandamus*[14] directing Link Africa to remove the cables already installed was also requested. Part three contained an

[12] This was done in terms of section 5 of PAJA.

[13] Section 6 of PAJA.

[14] *Mandamus* generally means an order a court issues directing a party to do or refrain from doing something. See *Sibiya and Others v Director of Public Prosecutions* [2006] ZACC 22; 2005 (5) SA 315 (CC); 2006 (2) BCLR 293 (CC) at paras 5-9.

alternative review claim. The City sought to impugn Link Africa's decision on the basis that it breached the principle of legality.

[19] The fourth part was devoted to a constitutional attack against sections 22 and 24 of the Act. The constitutional challenge too was advanced as an alternative to the remedy sought in part one. This constitutional attack was grounded in sections 217(1) and 25(1) of the Constitution. With regard to section 217, it was asserted that by authorising licence-holders to install an electronic communications network or facility on municipal infrastructure, section 22 of the Act forces municipalities to accept services from licence-holders in contravention of section 217(1) of the Constitution. Regarding section 25(1), it was contended that section 22 permits arbitrary deprivation of property.

[20] In view of the constitutional challenge, the Minister of Justice and Constitutional Development and the Minister of Communications were joined as respondents. But only Link Africa filed papers and opposed the application, contending that the core proposition by the City, that its consent is necessary, is fundamentally flawed and inconsistent with the Supreme Court of Appeal decision in *MTN*. The City had not sought to challenge nor review that decision and was bound by it. On the constitutional challenge, Link Africa contended that *MTN* makes it clear that the sections are consistent with the Constitution. It further argued that the requirements for an interdict had not been established.

[21] The High Court (per Avvakoumides AJ) dismissed the application with costs. It found that section 22 cannot be construed as requiring consent of the landowner before the licence-holder may undertake any of the actions the section authorises. In this regard, the High Court considered itself bound by the judgment of the Supreme Court of Appeal in *MTN*. Consequently, the interdict was also not granted.

[22] Regarding the review claim, the High Court upheld the argument advanced by Link Africa to the effect that there was an unreasonable delay on the part of the City

in instituting the review. The Court noted that the City had furnished no explanation for the delay, except to argue that the period of 180 days had not yet lapsed. The High Court in declining to entertain the review, took into account the fact that the delay had prejudiced Link Africa.

[23] The High Court dismissed the constitutional attack based on section 25(1) of the Constitution on two grounds. First, the Court considered it doubtful that the City was the bearer of section 25 rights, for it to rely on the provisions of that section. Second, following *MTN*, the Court held that section 22 does not authorise arbitrary deprivation of property and that on the present facts what Link Africa seeks to do does not constitute deprivation. Instead, the fibre-optic cables installed by Link Africa, held the High Court, would benefit business and the residents of the City. The High Court did not rule on the challenge based on section 217 of the Constitution. Leave to appeal was subsequently refused by the High Court and later by the Supreme Court of Appeal; hence the present application for leave to this Court.

In this Court

Applications for intervention

[24] Dark Fibre Africa (RF) (Pty) Limited (Dark Fibre Africa), Mobile Telephone Networks (Pty) Limited (Mobile Telephone), Neotel (Pty) Limited (Neotel), and Telkom SOC Limited (Telkom) are electronic communications network services licence-holders in terms of the Act. They derive rights from the Act. By virtue of their status, they have an interest in the interpretation and application of sections 22 and 24 of the Act. Any determination will have a material effect on their core functions and ability to meet their obligations. They seek leave to intervene in these proceedings.

[25] Msunduzi Municipality (Msunduzi) too seeks to be allowed to intervene as a party in these proceedings. A dispute arose between it and Dark Fibre Africa which wanted to construct electronic communications facilities on Msunduzi's infrastructure

without municipal authorisation. This dispute culminated in an application instituted in the KwaZulu-Natal Division of the High Court, Pietermaritzburg which proceeded on appeal to the Supreme Court of Appeal.[15] Having lost the appeal, Msunduzi sought leave to appeal to this Court. The application was dismissed primarily because the matter involved the interpretation of section 22, without any constitutional attack. This Court concluded then that there were no prospects of it construing the section differently. Following the filing of the present matter, Msunduzi and Dark Fibre Africa were afforded the opportunity to apply for intervention.[16]

[26] SMI Trading, a private landowner with interest in the construction and application of the relevant provisions, also seeks permission to intervene. It is the owner of a farm called Langgewacht No 235 in the Province of KwaZulu-Natal.

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[15] *Msunduzi Municipality v Dark Fibre Africa* [2014] ZASCA 165 (*Msunduzi*).

[16] Directions of this Court of 9 February 2015 stated:

> "The Chief Justice has issued the following directions:
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> 1. The application is set down for hearing on Tuesday, 12 May 2015 at 10h00.
>
> 2. The opposing parties must, on or before Monday, 2 March 2015, file an agreed statement of facts based on the factual findings of the High Court that are pertinent to the issues. If no agreement can be reached:
>
> a. The applicant must, on or before 9 March 2015, file a statement setting out the factual findings of the High Court that the applicant disputes, together with only those portions of the record that are relevant to the impugned findings.
>
> b. The respondents must, on or before 13 March 2015, and if they so wish, file a statement setting out the factual findings of the High Court that the respondents dispute, together with only those portions of the record that are relevant to the impugned findings.
>
> 3. The applicants must, on or before 20 March 2015, file a newly paginated record that comprises the statement of facts agreed upon, or the parties' respective statements of facts and the portions of the record considered relevant by them, as well as a copy of the judgment in the High Court and Supreme Court of Appeal.
>
> 4. Written argument, including argument on the merits of the appeal, must be lodged by—
>
> a. the applicant, on or before 27 March 2015; and
>
> b. the respondents, on or before 2 April 2015.
>
> 5. Be advised that these directions will also be provided to the parties in the matter CCT 195/14 *Msunduzi Municipality v Dark Fibre RF (Pty) Ltd* on the basis that these matters raise related issues.
>
> 6. Further directions may be issued."

Mobile Telephone has constructed an electronic communications facility covering approximately 110 square metres on the farm. The facility is described in the papers as a base station. However, the construction of this facility was done in terms of a lease agreement. When the lease expired, the parties failed to reach agreement in terms of which Mobile Telephone could have continued to maintain the facility.

[27] Mobile Telephone purported to act in terms of section 22 of the Act and PAJA when it issued notice in November 2012, informing SMI Trading that it would maintain the facility in the exercise of its rights under section 22. Mobile Telephone adopted this stance notwithstanding an existing eviction order against it, pertaining to the same property. This was also despite its unsuccessful appeal in the Supreme Court of Appeal. Mobile Telephone's conduct triggered yet another application by SMI Trading in the Gauteng Local Division of the High Court, Johannesburg. That matter is pending before that Court.

[28] In response to the intervention applications, the Court thought it prudent that the applications be argued together with the merits. To that end, it issued directions allowing all the applicants leave to file written submissions. At the hearing, all of them were granted an opportunity to present oral argument.

[29] The overriding consideration in these kinds of applications is whether a party has a direct and substantial interest in the issues raised. The interest must be in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.[17] Once this is shown, then it is in

[17] Rule 8 of the Rules of this Court provides:

> "(1) Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party.
>
> (2) The Court or the Chief Justice may upon such an application make such order, including any order as to costs, and give such directions as to further procedure in the proceedings as may be necessary."

See also *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) at paras 17-8.

the interests of justice that such party join the proceedings.[18] All the interveners mentioned here satisfy the test and consequently must all be permitted to intervene.

Jurisdiction

[30] The powers and rights which sections 22 and 24 of the Act afford to public and private licensees impact on the rights of public and private landowners. Depending on the interpretation given, the sections may be held to amount to arbitrary deprivation of property as envisaged in section 25 of the Constitution. This Court thus has jurisdiction. In any event, this Court has been asked, as an alternative, to declare the provisions of sections 22 and 24 of the Act constitutionally invalid.

Application for leave to appeal

[31] In both *MTN* and *Msunduzi* the Supreme Court of Appeal was asked to interpret section 22 of the Act and its constitutional validity was not raised.[19] In interpreting the term "with due regard to applicable law" the Supreme Court of Appeal in *MTN* stated that it imposed a duty on the licensee to consider and submit to the applicable law. But in *Msunduzi*, the Supreme Court of Appeal said that it means that the licensee must comply with applicable law. It is necessary for this Court to give guidance on the preferred meaning. The matter is truly of public importance as the application of the relevant provisions has the potential to affect every property owner in this country. Accordingly, it is in the interests of justice to grant leave.

Issues

[32] Preliminary matters having been put to rest, it is now convenient to consider the issues arising. The first issue is the interpretation of section 22 of the Act. More specifically, whether the section requires consent of landowners before a licence-holder may perform any of the acts listed in it. If, when properly construed,

[18] Id. See also *Gory v Kolver NO and Others* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at para 13.

[19] *MTN* above n 9 at paras 15 and 18 and *Msunduzi* above n 15.

the section does not require consent, the other issue is whether sections 22 and 24 are inconsistent with section 25(1) of the Constitution and for that reason are invalid.

Statutory interpretation

[33] Although the text of a statutory provision continues to be the starting point in the process of interpretation, the meaning assigned to the provision must have appropriate regard to context, even if the language is clear.[20] In this regard, context includes other relevant provisions of the statute which may reveal the purpose of the interpreted section.[21] The aim being that the meaning assigned to the section must give effect to the purpose which the law-makers sought to achieve. But the process of determining that purpose and giving effect to it should also "promote the spirit, purport and objects of the Bill of Rights".[22]

[34] The objects of the Bill of Rights are to be found in the rights guaranteed by it and the values underlying those rights.[23] This means in the process of interpreting section 22 of the Act, we must pay regard to rights in the Bill of Rights which may be affected by the meaning assigned to the section and settle for a construction that advances those rights. Where more than one right is affected, it is inappropriate to choose a meaning that promotes one right while at the same time it is at odds with other rights. In those circumstances, the promotion of the objects of the Bill of Rights cannot be confined to the impact on one right.

[20] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 90.

[21] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

[22] *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 43.

[23] Id at para 47.

[35] This Court in *Phumelela Gaming and Leisure*[24] affirmed that where a number of rights are implicated in a provision under interpretation, all relevant rights must be considered. In that case Langa CJ said:

> "The Bill of Rights protects the right to property, and also promotes and protects other freedoms, notably in this case, the right to freedom of trade. The consequence of the right to freedom of trade is competition.
>
> . . .
>
> In the consideration of all the above factors, the promotion of the spirit, purport and objects of the Bill of Rights cannot be confined to the impact on section 25 of the Constitution alone, as Phumelela seems to suggest. The process of weighing up must include consideration of other provisions of the Bill of Rights which might be relevant to the issue, for example, as has already been mentioned, the right to freedom of trade."[25]

[36] Therefore, in construing the relevant provisions, we must pay attention not only to the rights contained in the freedom of expression clause but also to property rights protected by section 25 of the Constitution. The freedom of expression clause guarantees, among other rights, the right to receive and impart information or ideas. The electronic communications infrastructure that forms the subject-matter of this case may advance this right. But the construction of that infrastructure on private land and in terms of section 22 of the Act may also violate the rights guaranteed by section 25(1). In promoting the objects of the Bill of Rights, section 39(2) of the Constitution enjoins us to consider all rights which may be implicated by the interpretation we assign to the relevant sections.

Relevant context

[37] Both sections 22 and 24 are located in Chapter 4 of the Act which consists of sections 20 to 29. The two sections must be read in the context of the entire Chapter.

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[24] *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

[25] Id at paras 33 and 35.

Section 20 limits the scope of the Chapter to licensees only.[26] A closer reading of section 21 reveals that the purpose of the Chapter is to achieve a rapid rollout of electronic communications networks and communications facilities.[27] The Minister is required to develop a framework that sets out processes and procedures for, among other matters, obtaining permits necessary for the rollout and resolution of disputes that may arise between a licensee and landowner speedily.

[38] Section 23 obliges a local authority to provide a conduit pipe or other facility for the installation of an underground electronic communications facility from a point of connection on the street boundary, to a building. This obligation arises where the local authority concerned has agreed with a licensee that electricity supply and electronic communications services must be provided by means of an underground cable.[28] The cost for the underground pipe or facility is paid for by the landowner to the local authority and as part of the fee for the installation of the electricity supply line.[29] But the requirement for a prior agreement applies only where the infrastructure for electricity supply to a piece of land is still to be installed.

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[26] Section 20(1) provides: "This chapter applies only to electronic communications service licensees."

[27] Section 21 reads:

> "Rapid deployment of electronic communications facilities
>
> (1) The Minister must, in consultation with the Minister of Cooperative Governance and Traditional Affairs, the Minister of Rural Development and Land Reform, the Minister of Water and Environmental Affairs, the Authority and other relevant institutions, develop a policy and policy directions for the rapid deployment and provisioning of electronic communications facilities, following which the Authority must prescribe regulations.
>
> (2) The regulations must provide procedures and processes for—
>
> (a) obtaining any necessary permit, authorisation, approval or other governmental authority including the criteria necessary to qualify for such permit, authorisation, approval or other governmental authority; and
>
> (b) resolving disputes that may arise between an electronic communications network service licensee and any landowner, in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.
>
> (3) The policy and policy directions contemplated in subsection (1) must be made within twelve (12) months of the coming into operation of the Electronic Communications Amendment Act, 2014."

[28] See section 23(1) of the Act.

[29] Section 23 provides:

[39] Section 25 authorises a licensee to move an electronic communications facility owing to "any alteration of alignment or level or any other work on the part of any public authority or person". The cost of removal is borne by the local authority or the person in question. If the facility passes over a private property and interferes with the construction of a building, the licensee must alter the positioning of the facility so as to remove all obstacles to the construction. The landowner must give the licensee a notice of not less than 28 days, requesting the alteration. A deviation or alteration for any other reason depends on whether the licensee considers the alteration necessary or expedient. If the licensee agrees to make the alteration, the cost is borne by the landowner.[30] The licensee bears the cost only if in its opinion an alteration is justified. Disputes that arise between the licensee and landowner on whether an alteration is necessary must be referred to the Complaints and Compliance Committee of ICASA.

[40] Section 26 authorises a licensee to erect a fence on any land where an electronic communications facility has been constructed. This may be done without any notice to the landowner. However, if the fence so erected renders entry to the land impossible, the licensee must build gates and furnish the landowner with

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"(1) If any local authority and an electronic communications network service licensee agree that the provision of the electricity supply and electronic communications network service to a particular area must be provided by means of an underground cable, that local authority may on any premises within the said area, when installing such cable for an underground electricity supply line on the said premises, provide a conduit pipe or other facility for the installation of an underground electronic communications facility from a point of connection on the street boundary to a building on those premises, in accordance with the requirements of the electronic communications network services licensee.

(2) The cost of the provision of the said conduit pipe or other facility—

(a) is payable to the local authority in question; and

(b) is, for the purpose of any law, considered to be fees payable by the owner of the premises in question to the local authority in respect of the electricity supply line."

[30] Section 25(6) reads:

"If the electronic communications network service licensee agrees to make the deviation or alteration as provided for in subsection (3), the cost of such deviation or alteration must be borne by the person at whose request the deviation or alteration is effected."

duplicate keys. But if the landowner herself wishes to build a fence, she is obliged to give the licensee written notice of no less than six weeks.[31]

[41] Lastly, section 27 authorises the licensee to cut down trees and remove vegetation without notice to the landowner if a tree or vegetation interferes with its electronic communications facility.[32] Where the licensee is of the opinion that a tree or vegetation growing on land will in future obstruct or interfere with its facility, it may give notice to the landowner to cut the tree or remove the vegetation. Failing which the licensee may do the work itself.

Meaning of section 22

[42] For purposes of undertaking any of the actions mandated by sections 24 to 27, the licensee must gain entry into the land, regardless of whether it is state-owned or private land. The requisite entry is authorised by section 22. It reads:

> "(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 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 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.

[31] Section 26(2) provides:

> "Any person intending to erect any such fence must give the electronic communications network service licensee notice in writing of not less than six weeks of his or her intention to erect such fence."

[32] Section 27(3) reads:

> "Where the electronic communications networks or electronic communications facility is actually interfered with or endangered by any such tree or vegetation, the licensee may remove such tree or vegetation without any such notice."

> (2) In taking any action in terms of subsection (1), due regard must be had to applicable law and environmental policy of the Republic."

[43] A plain reading of the section shows that section 22 confers certain entitlements or rights on a licensee. What entitles one to those rights is the status of a licensee. Once a person is granted an electronic communications network service licence, she enjoys the rights listed in section 22. The first of those rights is the right to enter any land in the Republic. Of course, the purpose of the entry must be the exercise of the other rights in section 22 or rights contained in other parts of Chapter 4.

[44] The second right listed in section 22 is the right to construct and maintain an electronic communications facility. Once the facility is constructed the section confers a further right to alter or remove it from the land. The section does not subject the exercise of those rights to the landowner's consent. Nor does it require the licensee to give the landowner any notice. All that is needed for the exercise of those rights is the licence. Once the licence is granted, the licensee may enter any land, on any day, at any hour, for the purposes of exercising its rights under the Act.

[45] On its face the language of section 22(1) does not reasonably bear a meaning that requires the landowner's consent before the licensee may perform any of the authorised functions. Although section 22(2) requires that those functions be carried out in compliance with other applicable laws, there is no other law that requires consent other than the common law. The common law rule that one may enter property with consent or permission of the property owner is in conflict with section 22(1). Therefore, reference to applicable law in section 22(2) does not include the common law rule. To subject the operation of section 22(1) to the common law rule would emasculate it and seriously undermine the goal of achieving a rapid rollout of electronic communications facilities.

[46] Moreover, in the case of a conflict between a statute and the common law, the statute takes precedence. But section 94 of the Act goes further and stipulates that in the case of conflict between the Act and any other law relevant to the regulation of electronic communications or broadcastings, the provisions of the Act will prevail. Therefore, it cannot be proper to regard the common law as introducing consent as a requirement to the application of section 22(1). The interpretation of section 22 advanced by the City must be rejected. The landowner's consent is not required before a licensee may enter any land on which it has chosen to build an electronic communications facility.

[47] While the construction that section 22 permits entry into any property without consent may advance the constitutional rights to receive and impart information, it does not promote the landowner's property rights. Consequently, the section may not pass constitutional muster.

Meaning of section 24

[48] Section 24 of the Act provides:

> "(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."

[49] This section authorises a licensee, if it so chooses, to build and maintain an electronic communications facility under any public street, road or footpath. The facility must be housed in a pipe, tunnel or tube laid below the surface of the street. The licensee is entitled to alter or remove the pipes once laid and in doing so may even "break or open up any street, road or footpath". In addition, a licensee may alter the position of any pipe for the supply of water, gas and electricity, excluding "a sewer drain or main". The local authority within whose area the street falls must be given written notice of 30 days before the tunnels are built or pipes are laid.

[50] It is plain that the section authorises licensees to interfere with the infrastructure of a local authority in terms of which water and electricity are supplied. This is done by altering the position of pipes, albeit under the supervision of the local authority concerned. In respect of section 24, the City and Msunduzi did not ask that it be given an interpretation similar to the one they advanced with regard to section 22. They did not argue that section 24 be construed as requiring consent of a local authority before the licensee could undertake the activities permitted by the section.

[51] The rejection of the City's construction of section 22 leads to a consideration of the constitutional attack. Msunduzi did not advance any argument on the constitutional validity of sections 22 and 24.

Invalidity of section 22

[52] Section 22 was impugned on the ground that it was inconsistent with section 25(1) of the Constitution. The City contended that section 22 permits arbitrary deprivation of property.

[53] Link Africa and other licensees, as well as the Minister countered this argument by submitting that as part of the state, the City did not enjoy any of the rights guaranteed by section 25(1) of the Constitution. They argued that this section protects private property rights. Consequently the City as a non-bearer of those rights, so it was contended, could not invoke section 25(1) in impugning section 22 of the Act.

[54] The City sought to meet the argument by contending that it is a property owner and enjoys all the rights flowing from ownership. However, this misses the point. The argument advanced by Link Africa and others is not disputing the City's capacity to own property. The nub of that argument is that the City is not a bearer of the property rights guaranteed by section 25(1). As a result the City, acting in its own interests alone, cannot claim that the impugned section violates its section 25(1) rights. To that extent there is merit in the submission by the Minister and the licensees.

[55] The Bill of Rights does not confer rights on any arm of the government. On the contrary, obligations are imposed on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights".[33] In fact the Constitution emphatically declares that the Bill of Rights binds the state in all its forms and every organ of state.[34]

[56] However, the fact that the City cannot claim that its rights under section 25(1) of the Constitution were violated does not mean that the challenge based on that section should fail. SMI Trading, the City's co-litigant here, is a private property owner which enjoys the protection guaranteed by section 25(1). SMI Trading too averred that section 22 of the Act is inconsistent with section 25(1).

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[33] Section 7(2) of the Constitution provides:

> "The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

[34] Section 8(1) of the Constitution reads:

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[57] The real issue is whether section 22 is consistent with section 25(1) of the Constitution. We follow a two-stage enquiry in determining this issue.[35] First, we need to consider whether there is a limitation of the rights in section 25(1). If there is, we must determine whether the limitation is justified. Put differently, we must decide whether section 22 permits deprivation of property and whether that deprivation is justified.

Meaning of section 25(1) of the Constitution

[58] Happily for us section 25(1) has been interpreted by this Court in a number of cases.[36] In *Mkontwana* this Court held that section 25(1) guarantees protection against deprivation which constitutes a substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society.[37] Here, it cannot be gainsaid that section 22 of the Act allows deprivation that amounts to a substantial interference with the use and enjoyment of property that goes beyond the normal restrictions. The section authorises a licensee to build an electronic communications facility on any land without permission of the landowner. An electronic communications facility is defined in wide terms in the Act, ranging from wires, to masts, cable landing stations and earth stations. The size of these masts and stations is not limited. That is probably why in *MTN*, Mobile Telephone built a base station covering approximately 110 square metres.

[59] The interference is not limited to the size of the land lost by the landowner. The erection of fences, the cutting down of trees and removal of vegetation are some

[35] *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 9.

[36] See among others *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB*); *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (*Mkontwana*); *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) (*Reflect-All*); and *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC).

[37] *Mkontwana* id at para 32.

of the factors that indicate that the deprivation is extensive. As is the imposition of obligations on the landowner to give written notice to the licensee before exercising her rights on her own property. This includes rights like erecting a building. In addition to these duties, the landowner is required to bear the costs incurred by the licensee in effecting a deviation or alteration of the positioning of the electronic facility that was imposed on her property. All these factors illustrate the extent of the limitation of the rights protected in section 25(1) of the Constitution.

Is section 22 arbitrary?

[60] What remains for consideration is whether the deprivation brought about by section 22 is arbitrary. In *Reflect-All*, Nkabinde J reaffirmed the test for arbitrariness in these words:

> "Deprivation in itself is not sufficient for interference to fall foul of section 25(1) of the Constitution. It must also be arbitrary. Ackermann J in [*FNB* above n 36] concluded that a deprivation will be arbitrary if 'the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair'. It thus follows that for the applicants to ground a successful challenge to sections 10(1) and 10(3), they will have to show that the impugned provisions are either procedurally unfair, or that insufficient reason is proffered for the deprivation in question, in other words it is substantively arbitrary."[38] (Footnote omitted.)

[61] Since the nature of the deprivation we are concerned with here is extensive and affects ownership of land, for it to escape arbitrariness, it is not sufficient to merely establish a rational connection between what section 22 authorises and the goal of achieving rapid rollout of electronic communications networks or facilities. Compelling reasons must be advanced for the deprivation on the scale that section 22 and the related provisions allow. In *Reflect-All*, this Court said:

[38] *Reflect-All* above n 36 at para 39.

> "I agree with the reasoning of the High Court to the extent that the facts of this case require more than the presence of a rational connection between the law in question and the ends sought to be achieved. In terms of the considerations identified in [*FNB* above n 36], the present case deals with land upon which section 10(3) imposes extensive restrictions. Compelling reasons will therefore have to be advanced to save the provision from unconstitutionality."[39]

[62] The Minister upon whom the responsibility to administer the Act falls, has not placed any information before this Court throwing light on the reasons for the extensive limitation of the property rights.[40] Nor are we told why the impugned provision was drafted in a manner that unduly invades the landowner's rights. The scheme of the relevant Chapter as shown earlier, illustrates a manifest bias towards the protection of the licensee's interests at the expense of the landowner's rights. Take for example section 26 which authorises the licensee to erect a fence without notice to the landowner. The same provision requires the landowner to give the licensee written notice of six weeks, advising the licensee of the intention to put a fence on her own property. Additional to this is the authority given to the licensee to cut down trees and remove vegetation without notice to the landowner if the trees or vegetation interfere with the electronic communications facility.

[63] The impugned provisions fail to strike a fair balance between the general public interests in the rapid rollout of the facilities in question and the protection of individual fundamental rights. That failure lies at the heart of the substantive arbitrariness of section 22.

[64] Moreover, section 22 is also procedurally arbitrary. The section authorises the licensee to enter private land and build its electronic infrastructure without notice and permission of the landowner. The landowner's property rights are rendered subservient to the licensee's. The section places the rights it creates for the licensee

[39] Id at para 52.

[40] See *Mabaso v Law Society of the Northern Provinces and Another* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at paras 13-4 and *Van der Merwe v Road Accident Fund and Another* (*Womens Legal Centre Trust as Amicus Curiae*) [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at paras 7-8.

above the constitutional rights of the landowner without a procedurally fair process. In fact it does so without any process at all. This is not in line with our Constitution which does not rank any of the rights it guarantees above other rights.[41] On the contrary, the Constitution seeks to ensure that rights in the Bill of Rights reinforce one another so as to promote human rights generally.[42] Where two rights are in conflict, a balance must be found that results in the protection of both rights. What makes matters worse in this case is the fact that rights created by a statute are placed higher than property rights guaranteed by the Bill of Rights.

Does PAJA apply to section 22?

[65] The Supreme Court of Appeal sought to remedy the section's procedural deficiency by introducing the application of PAJA to its operation.[43] PAJA is not suitable for the circumstances of section 22. In the first place, the section does not require an administrative decision to be taken before the rights it confers are exercised. Nor is there any provision in the Act which requires a decision of that kind to be taken. This means that there is no legal basis for a decision of that nature.

[66] Of course a licensee may take a decision to exercise its rights under section 22. But that is not the type of decision that triggers the application of PAJA. For PAJA to apply, the decision must be of an administrative nature. A decision is administrative if it is taken in the exercise of public power or in the performance of a public function. In the absence of an empowering provision, there can be no public power or public function.[44]

[67] The fact that the function we are concerned with here was previously performed by an organ of state does not prove that we are dealing with a public

[41] *S v Mamabolo* (*E TV and Others Intervening*) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 41.

[42] *NM and Others v Smith and Others* (*Freedom of Expression Institute as Amicus Curiae*) [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) at para 134.

[43] *MTN* above n 9 at paras 21 and 29.

[44] See the definition of "administrative action" under section 1 of PAJA, in particular paragraph (b).

function. There are many functions which were performed solely by the state in the past but which now are carried out by the state and commercial entities. For example, there are private hospitals licensed to provide health care for profit, and private schools authorised to offer education for gain. It can hardly be argued that these private hospitals and schools perform a public function, regardless of the fact that the Constitution imposes an obligation on the state to provide health care and education. As we see it, there are two health care systems and two school systems in this country. One is public and the other is private.[45] Both exist side by side.

[68] In a similar vein, it cannot be argued that all radio stations in the country perform a public function only because in the past, radio and television services were the exclusive preserve of the South African Broadcasting Corporation (SABC). The SABC is a public broadcaster and an organ of state. Nor can it be argued that commercial companies that provide a mobile telephone service to the public like Mobile Telephone, Vodacom and Cell C, perform a public function since this service is also offered by Telkom which is an organ of state. However, in these proceedings, it is not necessary to express a firm opinion on whether these companies perform a public function or not.

[69] A commercial decision by Link Africa to choose the City's municipal area as the place where it would like to build electronic infrastructure for financial gain, cannot pass as an administrative action. This is so even if the general public and business entities would eventually benefit from the infrastructure: PAJA does not apply to commercial decisions.

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[45] Section 29(3) of the Constitution provides:

> "Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
>
> (a) do not discriminate on the basis of race;
>
> (b) are registered with the state; and
>
> (c) maintain standards that are not inferior to standards at comparable public educational institutions."

[70] A further difficulty in the applicability of PAJA is that the licensee for whose benefit the decision is taken is the decision-maker. This is not compatible with a procedurally fair administrative action guaranteed in section 33 of the Constitution. This is the section to which PAJA gives effect.

[71] In our law, administrative justice has always forbidden decision-makers from taking decisions in matters where they have an interest. For decision-makers cannot be impartial if they stand to gain from the very decision taken by them. In essence, the presence of bias is excluded in the process of administrative decision-making as it is in judicial decisions.[46] But it is not actual bias only that renders an administrative decision invalid; a reasonable suspicion of bias also vitiates the decision.

[72] In *Liebenberg*, Solomon J proclaimed the principle against bias in these terms:

> "Every person who undertakes to administer justice, whether he is a legal official or is only for the occasion engaged in the work of deciding the rights of others, is disqualified if he has a bias which interferes with his impartiality, or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial. . . . The impartiality after which the Courts strain may often in practice be unrealised without detection, but the idea cannot be abandoned without irreparable injury to the standard hitherto applied in the administration of justice."[47]

[73] Administrative action that is tainted with bias is void and falls to be set aside on review. The common law rule against bias is part of the principles of natural justice.[48] The other principle is the *audi* rule[49] which requires that a person to be affected by an administrative decision must be afforded a fair hearing before the decision is taken. Both these principles have now been codified in PAJA as grounds of review. Section 6(2) of PAJA permits a court to review and set aside

[46] Baxter *Administrative Law* 2 ed (Juta & Co Ltd, Cape Town 1984) at 557.

[47] *Liebenberg and Others v Brakpan Liquor Licensing Board and Another* 1944 WLD 52 (*Liebenberg*) at 54-5.

[48] It is commonly known as the *nemo judex in causa sua* principle.

[49] Commonly known as the *audi alteram partem* rule.

administrative action that is procedurally unfair or if the decision-maker who undertook it was biased or was reasonably suspected of bias. The rule against bias is underpinned by the principle that administrative justice must not only be done but must also be seen to be done. The purpose of the rule is to establish and maintain public confidence in administrative justice. Therefore, section 22 of the Act cannot be read as authorising administrative action that is invalid under PAJA, owing to non-compliance with the requirements of PAJA.

[74] In the context of section 22, a decision by a licensee, that has a commercial interest in where the infrastructure is to be constructed, would certainly give rise to a reasonable perception of bias on the part of the decision-maker. Such decision would be inconsistent with the right to administrative justice promised by section 33 of the Constitution and PAJA. Section 6(2)(a) of PAJA declares that a reasonable suspicion of bias on the part of the decision-maker constitutes a ground for review.[50]

[75] The legal difficulties identified in this judgment as standing in the way of applying PAJA to the section 22 procedures were not considered by the Supreme Court of Appeal in *MTN* and *Msunduzi*. That Court merely proceeded from the premise that any decision taken in terms of section 22 constitutes administrative action, without any analysis of whether the section confers rights or public power. Not all decisions taken in terms of a statute amount to administrative action. Put differently, it is not the exercise of every power conferred by statute that leads to administrative action. But in our view, section 22 does not even confer power. Instead, it creates statutory rights enjoyed by licensees.

[50] This section provides:

> "A court or tribunal has the power to judicially review an administrative action if—
>
> (a) the administrator who took it—
>
> (i) was not authorised to do so by the empowering provision;
>
> (ii) acted under a delegation of power which was not authorised by the empowering provision; or
>
> (iii) was biased or reasonably suspected of bias."

[76] These licensees bear no administrative obligation to develop electronic communications facilities. They do so purely as a matter of commercial business. No member of the public may demand that the licensees must build infrastructure, even on that member's own property. The decision to build infrastructure and where it must be constructed is that of the licensee. That decision is informed by the licensee's internal commercial interests and nothing else. Section 22 leaves it to the whims of each licensee to determine where it wishes to build the electronic communications infrastructure.

Justification

[77] As observed earlier, there was no information furnished to defend section 22 against the constitutional attack. Apart from the purpose of Chapter 4, no reasons were advanced for justifying the limitation caused by the section. Moreover, we have already held that the deprivation authorised by the section is arbitrary. It is unlikely that an arbitrary deprivation may still be justified under section 36 of the Constitution.[51] This is because both the arbitrariness and justification enquiries involve the same analysis and consideration of similar factors.

Review

[78] The City's review claim depended on the construction that said section 22 authorised a licensee to make an administrative decision. Since we hold in this judgment that the section does not empower administrative action, a review claim does not arise.

National and local spheres of government

[79] During the hearing a debate developed between this Court and counsel for the parties on whether sections 22 and 24 of the Act were consonant with sections 151, 155 and 156 of the Constitution. In these sections, the Constitution sets out the

[51] *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) at paras 73-80.

powers and rights of municipalities. In terms of section 156(1) read with Parts B of Schedules 4 and 5, municipalities alone exercise powers over beaches and amusement facilities, cemeteries, local sports facilities, local amenities, markets, municipal parks and recreation, municipal roads, pounds, public places, traffic and parking, storm water, management systems and sanitation services including sewage disposal systems.[52] Section 151(4) guarantees to municipalities the exclusive rights to exercise those powers without interference by the other spheres of government.[53] Notably, section 155(7) imposes an obligation on the national government to legislate on matters falling within the exclusive domain of municipalities for the effective performance by municipalities themselves of functions pertaining to matters listed above.

[80] While it is accepted by all parties that the Act does not regulate a matter allocated to the local sphere of government, it is apparent from the language of both sections 22 and 24 of the Act that licensees are empowered to enter all public spaces, controlled by municipalities and build their electronic facilities, with municipalities having no say in the matter. Although section 24 requires that written notice be given, the section authorises a licensee to "break or open any street, road or footpath" to alter or remove the licensee's infrastructure. The section does not require the licensee to repair the damage once the removal is done. Instead, it obliges the licensee to pay reasonable expenses incurred by the municipality in connection with the removal.

[81] If national government is prohibited from passing legislation that authorises it to impede or interfere with the right of municipalities to exercise public power or

[52] Section 156(1) of the Constitution provides:

> "A municipality has executive authority in respect of, and has the right to administer—
>
> (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
>
> (b) any other matter assigned to it by national or provincial legislation."

[53] Section 151(4) of the Constitution provides:

> "The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

perform their functions,[54] equally it must be forbidden from passing legislation that authorises commercial entities to undertake actions that have a potential to impede municipalities in the performance of their functions. However, we think the point may not be the basis of invalidating the attacked provisions because it was not pleaded and was not fully ventilated at the hearing.

Divergence

[82] We have read the judgment prepared by our colleagues, Cameron J and Froneman J (majority judgment). We differ from the majority judgment on five points. These are: the distinction between the interpretation of a statute and its application; the meaning of *civiliter modo* in the context of the common law on servitudes; the approach to adjudicating a constitutional challenge based on a right in the Bill of Rights; whether the Expropriation Act 63 of 1975 (Expropriation Act) applies to this case and the issue of deciding a case on a point not raised or argued by the parties. We deal with each of these matters in turn.

Distinction between application and interpretation

[83] In our view the majority judgment conflates the interpretation of section 22 with its application. This section is divided into two parts, namely section 22(1) and 22(2). Section 22(1) is further broken down into parts (a), (b) and (c). It sets out the rights conferred on a licensee and starts by stating that the licensee may enter any land in the Republic for purposes of constructing and maintaining an electronic communications network or facility. Section 22(1)(c) says that a licensee may alter or remove its network or facility that has been constructed. This is what section 22(1) means. It is not disputed that the language of the section does not require the licensee to obtain consent of the landowner before exercising the rights it confers. Nor does its language require the licensee to give notice for consulting the landowner.

[54] Id.

[84] On the other hand, section 22(2) imposes a condition on how the rights conferred by section 22(1) should be exercised. It stipulates that a licensee, in exercising the rights in subsection (1), must pay due regard to applicable law and the environmental policy of the Republic. Section 22(2) does not tell us what meaning we may attach to section 22(1). Instead, it tells us how section 22(1) must be applied. Section 22(2) has been construed to mean that a licensee is required to comply with applicable law whenever it exercises the rights in section 22(1). In determining whether section 22(2) was indeed followed, one has to identify the applicable law and examine if there was compliance with it. We emphasise that section 22(2) does not define the meaning of section 22(1). In our law, interpretation and application of a statute are distinct concepts.[55] Consequently, it is incorrect to collapse them into one and contend that a provision that regulates the application of a statute also defines a meaning to be assigned to the applied provision.

[85] Therefore, even assuming that section 22(1) creates a servitude, the label given to the rights in the section does not help in its interpretation. Instead, when a licensee exercises those rights, it would be required to comply with the common law on servitudes. As a result we stress that the limitation created by section 22(1) on property rights guaranteed by section 25 of the Constitution cannot be removed or justified by the common law on servitudes.

Meaning of civiliter modo

[86] Assuming that we are concerned with a servitude, and that the common law on servitudes is the law applicable to the exercise of the rights conferred by section 22(1), the question that arises is what are the common law principles a licensee must comply with. The majority judgment states that the common law on servitudes introduces the servitude requirement that the licensee must give notice and consult with the landowner. The landowner is also entitled to compensation in terms of the common

[55] *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC) at para 172 and the authorities cited therein.

law. If the consultation between the licensee and the landowner fails to yield an agreement, the dispute must be judicially resolved.[56]

[87] We disagree. The common law on servitudes merely requires that a servitude be exercised *civiliter modo*. In *Motswagae*, Yacoob J explained what *civiliter modo* means. He said:

> "The municipality's defence is that it has a servitudinal right to enter property to perform work related to the provision of public services. The argument that a municipality can lawfully enter upon property on which a home is situated to carry out its duty, absent urgency or other exceptional circumstances, in the face of the objection of the home occupier without a court order is just wrong. For one thing, the common law requires that *a servitude be exercised civiliter modo, that is respectfully and with due caution*. Patently this would not include non-consensual bulldozing. Indeed, it would be no more than the sanctioning of self-help and the encouragement of the municipality to take the law into its own hands. Our society is based on the rule of law and the rule of law does not authorise self-help. There is little difference between a municipality forcibly entering upon a property to do its work and a person forcibly extracting a debt from another. Indeed, the municipality as an organ of state has the duty to protect its citizens in their homes rather than to invade their homes."[57]
> (Emphasis added and footnotes omitted.)

[88] What emerges from the statement in *Motswagae* is that this Court held that it was wrong for a municipality to enter a person's home, in the face of an objection from the homeowner. This Court rejected the contention that the municipality's servitudinal rights entitled it to enter the home in question without permission from the homeowner. The Court held that the common law required the municipality to exercise its servitude *civiliter modo*, that is, "respectfully and with due caution". It concluded that *civiliter modo* does not include non-consensual action by the holder of a servitude.

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[56] Majority judgment at [150] to [155].

[57] *Motswagae and Others v Rustenburg Local Municipality and Another* [2013] ZACC 1; 2013 (2) SA 613 (CC); 2013 (3) BCLR 271 (CC) (*Motswagae*) at para 14.

[89] We hold that *civiliter modo* does not incorporate notice for consultation and compensation.

Approach to adjudication

[90] From quite early in its operation, this Court adopted a two-stage approach in deciding a constitutional challenge based on a right in the Bill of Rights.[58] It is now trite that where, as here, the validity of a statutory provision is challenged on the basis that the impugned provision violates a right in the Bill of Rights, the Court determines first whether properly interpreted, the impugned legislation limits a right in the Bill of Rights. In this matter the complaint is that sections 22 and 24 of the Act limit property rights guaranteed by section 25(1) of the Constitution. Therefore, when applying the correct approach, we must first determine whether the impugned sections limit the relevant constitutional rights.

[91] The majority states that section 22 confers "wide powers on licensees and clearly limits property rights". We also find that a limitation is established. This finding leads us to the second leg of the enquiry, namely, a justification analysis. This is where we part ways with the majority judgment. Instead of embarking on a justification examination, the majority finds that the limitation is justified by section 22(2) which requires due regard to the applicable law when a licensee exercises the rights in section 22(1).[59] This, in our view departs from the established jurisprudence of this Court. In section 36, the Constitution proclaims that rights in the Bill of Rights may only be limited by a law of general application that meets the requirements of that section. One of those requirements is to determine whether the limitation is reasonable and justifiable. Therefore, where a limitation is established, the Court is obliged to do the justification analysis.

[58] *Coetzee* above n 35.

[59] Majority judgment at [125] to [127].

Whether the Expropriation Act applies

[92] The majority also grounds the landowner's right to compensation, in the Expropriation Act.[60] We disagree. Section 22(1) does not authorise expropriation of land at all. On the contrary, this section permits a licensee to use another person's land to construct a communications network or facility. It is clear from section 3 of the Expropriation Act that this Act is incompatible with section 22(1).[61] Section 3 permits the Minister of Public Works to expropriate land on behalf of certain juristic persons or entities. While accepting that the licensees involved in this case are corporate entities, section 3 does not authorise them to expropriate land. In contrast, the section requires juristic persons to apply to the Minister to expropriate on their behalf. Section 22(1) does not mandate the Minister of Public Works to do anything, let alone expropriate for licensees.

[93] Compensation is not payable for deprivation but is paid for expropriation. This comes directly from section 25(2) of the Constitution. That section permits expropriation under certain conditions.[62] In *Agri SA*, Mogoeng CJ drew a line between deprivation and expropriation. He said:

> "Sebenza was deprived of components of its mineral rights in that the MPRDA brought about a substantial interference and limitation that went beyond the normal restrictions on the use or enjoyment of its property found in an open and democratic society. Although expropriation is a species of deprivation, there are additional requirements that set expropriation apart from mere deprivation. They are

[60] Id at [156] to [157].

[61] Section 3 is quoted in [156] of the majority judgment.

[62] Section 25(2) of the Constitution provides:

> "Property may be expropriated only in terms of law of general application—
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

> (i) compulsory acquisition of rights in property by the state, (ii) for a public purpose or in the public interest, and (iii) subject to compensation."[63] (Footnote omitted.)

[94] Deprivation authorised by section 22(1) entails only the use of another person's land for constructing and maintaining an electronic communications facility or network. The licensee does not acquire ownership of the land concerned. The landowner retains full ownership, even though the landowner's enjoyment is limited by the exercise of the section 22(1) rights. This constitutes nothing more than a diminished enjoyment of the property. Whereas in the case of expropriation there is a complete loss of the expropriated right, hence the need for compensation.

[95] On the majority's approach in this matter, SMI Trading was entitled to compensation for the loss of approximately 110 square metres on which Mobile Telephone had constructed its base station. None of the parties raised the question of compensation for what is authorised by section 22(1).

Constitutional issues raised mero motu

[96] The issues of servitudes and the question of the application of the Expropriation Act to this matter were not raised by any of the parties both in written submissions and at the oral hearing. Deciding the case on the basis of points in respect of which the parties were not heard would violate the *audi* principle. This principle is the bedrock of our system of justice. A decision reached in non-compliance with the *audi* principle breaches the affected parties' right to a fair hearing protected by section 34 of the Constitution.[64]

[63] *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (*Agri SA*) at para 67.

[64] Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[97] The majority contends that it is entitled to base the decision on these points mentioned for the first time in the judgment because from the start the interpretation of sections 22 and 24 were at the heart of this litigation.[65] For this proposition reliance is placed on *CUSA*[66] and *Director of Public Prosecutions*,[67] both of which are decisions of this Court. While it is apparent from those decisions that a court may raise a constitutional issue of its own accord, there are requirements which must be met. One of them is that the parties must be heard on the point raised by the Court. This accords with the *audi* principle.

[98] In *Director of Public Prosecutions* this Court tabulated these requirements:

> "It must be stressed that the constitutional issue sought to be raised must arise on the facts of the case before the court. *In addition, the parties must be afforded an adequate opportunity to deal with the issue*. A court may not ordinarily raise and decide a constitutional issue, in abstract, which does not arise on the facts of the case in which the issue is sought to be raised. A court may therefore, of its own accord, raise and decide a constitutional issue where (a) the constitutional question arises on the facts; and (b) a decision on the constitutional question is necessary for a proper determination of the case before it; or it is in the interests of justice to do so."[68] (Emphasis added.)

[99] Both *CUSA* and *Director of Public Prosecutions* are not authority for the proposition that a court may in its judgment rely on points which were not raised with the parties and to do so without affording them an opportunity to deal with those points. For these reasons we would have declared the impugned provisions invalid.

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[65] Majority judgment at [119].

[66] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC).

[67] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) (*Director of Public Prosecutions*).

[68] Id at para 43.

CAMERON J and FRONEMAN J (Khampepe J, Madlanga J, Molemela AJ and Theron AJ concurring):

Introduction

[100] We have had the benefit of reading the minority judgment of Jafta J and Tshiqi AJ. We agree that leave to appeal and the applications for intervention must be granted. But we disagree that sections 22 and 24 of the Act[69] are constitutionally invalid. Less even is the whole of Chapter 4 invalid. The minority judgment finds that the statute permits an arbitrary deprivation of property. That is to us incorrect. Our jurisprudence says that courts must adopt a reasonable interpretation of legislation that avoids its invalidity. That jurisprudence is based, in part, on respect for the role of the Legislature. It must prevail here. The statute at issue is not invalid. It is a beneficial intervention by the Legislature that deserves to be given the validity and power Parliament designed for it. And that can be done without any strain to our existing law.

[101] The challenged statutory provisions are modelled on statutes that go back to 1911. For over a century, provisions of this kind have conferred necessary powers on agents installing communications and other networks for the public good.[70] And they do so in conformity with ample protections our law affords.

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[69] Alternatively referred to as the ECA.

[70] See *Telkom SA Ltd v MEC for Agricultural and Environmental Affairs, KwaZulu-Natal, and Others* [2002] ZASCA 96; 2003 (4) SA 23 (SCA) (*Telkom*), which sets out the history, going back to 1911, of the telecommunications legislation that preceded the present statute. Section 70 of the Telecommunications Act 103 of 1996 (Telecommunications Act) in issue there, similarly to the statute in issue here, provided as follows:

> "Entry upon and construction of lines across any lands—
>
> (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.

[102] Both private law and public law recognise that the law may grant to one person a right in the property of another, entitling the former to use and enjoy that person's property or to prevent the latter from exercising certain entitlements flowing from the usual rights of ownership. But where the law imposes this obligation on landowners, it requires fair procedures and equitable compensation in appropriate circumstances. This finds expression in the principles applicable to a right of way of necessity (*via necessitatis*) in private property law.[71] In public law, it is not uncommon that legislation may provide for compensation to be paid when exercising the kind of rights at issue here.[72]

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(2) In taking any action in terms of subsection (1), due regard must be had to the environmental policy of the Republic."

[71] See [147] to [149] below for a further discussion of the right of way of necessity.

[72] Further examples are to be found in the predecessors of the impugned provisions in the Act. The origins of the impugned provisions are found in sections 82 and 83 of the Post Office Administration and Shipping Combination Discouragements Act 10 of 1911 (Post Office Administration Act) which provided as follows:

"82. The Postmaster-General may, for the purposes of this Act, enter upon any lands belonging to any person, including streets, roads, footpaths, or lands reserved for public purposes, and any railway, and may construct and maintain a telegraph line or any work upon, under, over, along, or across any land, street, road, footpath, or waterway, or any railway, and may alter or remove the same; and may, for the purpose, attach wires, stays, or any other kind of support to any building or other structure.

83. The Postmaster-General may, after reasonable notice in writing to the local authority or person owning or having the care and management of any street, road, or footpath, construct and maintain in the manner specified in that notice any telegraph lines, pipes, tunnels, or tubes, required for telegraphic purposes under any such street, road or footpath, and may alter or remove the same; and for such purposes may break or open up any street, road, or footpath, and alter the position thereunder of any pipe (not being a sewer drain or main) for the supply of water, gas, or electricity: Provided that the alteration in the position of any such pipe shall not be made except under the supervision of the local authority or person to whom the pipe belongs or by whom it is used, unless that local authority or person fail to supervise at the time specified in the notice for the commencement of the work, or discontinue the supervision during the work. The Postmaster-General shall pay all reasonable expenses to which any such local authority or person may be put in connection with any alteration or removals as aforesaid or on account of the supervision aforesaid."

These sections are to be read with section 84 of the Post Office Administration Act which provides in relevant part:

"(1) In the carrying out of all such works the Postmaster-General shall take all reasonable precautions for the safety of the public, but the Postmaster-General shall not be liable to give any compensation, save so far as actual injury may be caused to any work or property, or standing crops, other than trees or underwood as hereinafter referred to, or save so far as injury to any person may be caused by the failure of the Postmaster-General to carry out the provisions of this section . . . .

[103] The explanation as to why there is no explicit mention of this in section 22(1) is straightforward. The existing private law protection is covered by the reference to "applicable law" in section 22(2). The public law protection of compensation for expropriation is covered by the relevant provisions of the Expropriation Act relating to the need for expropriation by juristic persons other than the state.[73] The absence of an explicit reference to it in section 22 is explained by the fact that electronic communication network services are now provided by private persons and not only by the state, as was the case previously.

[104] Servitudes conferred by statute have conveniently, and without any doctrinal problems, been referred to for many decades as public servitudes. Their existence is reflected in virtually every title deed in South Africa. Almost every property in urban areas has servitudes registered over it for sewage, water reticulation, electricity supply and the provision of telephone services. These servitudes are routinely registered as part of the process of opening a township register. The same is the case with rural properties. These may include road and rail reserves, power line servitudes, rights of way, rights to convey water and various mining servitudes.

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(2) The compensation in the case of the injury aforesaid being caused to any work, property, or standing crops, shall, if the amount cannot be otherwise agreed upon, be settled by arbitration."

The Post Office Act 44 of 1958 (Post Office Act) replaced the Post Office Administration Act. Sections 80-1 of the Post Office Act read with section 82 are almost identical to sections 82-4 of the Post Office Administration Act.

The Telecommunications Act replaced and re-enacted provisions of the Post Office Act and, in 2005, the ECA finally replaced the Telecommunications Act.

Malan JA in *MTN* above n 9 at para 11 discusses the transition from the Telecommunications Act to the ECA:

> "The rights contained in sections 70 to 77 of the Telecommunications Act came to be re-enacted as sections 22 to 29 of the ECA. The purpose of the older sections was to eliminate all possible constraints on the state in its providing of communication services. Due to the convergence of these services and the introduction of competition in the telecommunications industry the rights and privileges that existed under the older sections now had to be extended to persons other than the state or the fixed line operator. Hence the enactment of sections 22 to 29 of the ECA."

For a fuller exposition of these developments in our law see *Telkom* above n 70 at paras 17-21.

Further examples may be found in Van der Merwe *Sakereg* 2 ed (Butterworths, Durban 1989).

[73] See [156] to [157] below for further discussion.

[105] The minority judgment disregards this nuanced position in our existing law. And it disregards the plain legislative history that precedes the provisions now sought to be invalidated. Its effect is to require Parliament to re-invent, in new legislation, procedural and substantive safeguards that already exist in our law.

[106] It proceeds from an outdated, over-rigid and absolute notion of ownership. That conception is alien to the holding of property under the common law, the Constitution and other applicable law. A more supple conception of ownership rights – one this Court has repeatedly embraced – shows a clear and inviting path to upholding the statute's validity.[74] That will enable an important piece of legislation to do the work that Parliament, in the exercise of its rightful powers, designed for it.

[107] At the outset, we note that no party before this Court seeks to challenge the whole of Chapter 4. The pleadings are careful to impugn only sections 22 and 24 of the Act. We have not heard argument challenging the constitutional validity of all 11 provisions of Chapter 4.[75] This makes it quite wrong to pronounce on the Chapter's cumulative validity. Our analysis and findings are confined, as were the parties' arguments, to the two contested provisions.

[108] We differ fundamentally from the suggestion that property ownership under the common law affords the owner an absolute bar to entry without consent. The proposition runs counter to the jurisprudence of this Court and to the common law of ownership before it.

[109] This Court has recognised that property as an individual right is not absolute. It is subject to societal imperatives.[76] Indeed, pre-constitutional property concepts

[74] *FNB* above n 36; *Reflect-All* above n 36; and *Agri SA* above n 63.

[75] Sections 20-9 of the Act.

[76] *FNB* above n 36 at para 49 and *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* [2015] ZACC 23 (*Shoprite*) at para 48.

recognised that property should also serve the public good.[77] This is a widely recognised general principle of the common law. Happily for the Act's validity, it finds specific expression in the common law of servitudes. Servitudes are rights enjoyed over the property of another. They may be granted by agreement. Or they may be imposed by law. It is this category, where servitudes are granted by force of law,[78] and not by consent between the parties, that rebuts the challenge to the validity of the Act's provisions.

[110] To pose the question whether consent is a general requirement for entry to property does not help in assessing the validity of these provisions. The real question is this: what is the common law position if the owner of a servient property, one over which a servitude is granted, is confronted by a servitude created by law? The common law provides flexible and equitable principles that protect the servient owner. So the common law does not bump its head against (and is therefore not "trumped" by) the Act. The common law principles regarding servitudes show illuminatingly that section 22 of the Act inflicts no arbitrary deprivation of property. It is good and beneficial statute law.

[111] While section 24 does not contain the express injunction found in section 22(2) to the effect that other applicable law (i.e. the common law on servitudes) applies, it too must be interpreted in a manner that is least invasive of fundamental rights if it is reasonably possible to do so. And that is indeed so. Section 24 contains express procedural and substantive safeguards including requirements of notice and compensation. The result is that deprivation of property under section 24 will not be arbitrary.

[77] *FNB* id at para 52.

[78] A servitude or the power to exercise a servitude may be created by statute. Van der Merwe and de Waal "Servitudes" in *LAWSA* 2 ed (2010) vol 24 (*LAWSA*) at para 615.

[112] The Constitution's broad standing provisions do not allow the City to assert section 25(1) property rights.[79] Indeed the City acknowledges that, in the ordinary course, it is not itself a bearer of those rights. While the City may enjoy public interest standing under section 38(d) of the Constitution,[80] it has never suggested in its pleadings or argument that its challenge was prosecuted to defend the property rights and interests of the members of the public within its boundaries. It was acting solely in its corporate capacity as a government entity. This elides the need to assess the City's purported rights under section 25. But the rights of private landowners, such as the sixth intervener, SMI Trading, remain at issue.

[113] Finally, the High Court (Avvakoumides AJ) aptly noted that our country faces serious problems because of its grossly deficient broadband capacity. These in turn stifle intellectual growth and inquiry, and compromise economic development and efficiency.[81] The statute's legislative scheme resonates with the Minister's call for greater broadband capacity. It aims meaningfully and practically to remedy these problems in a way that promotes economic growth. It does so in a way that is fair, reasonable and justifiable. We find nothing arbitrary in it.

Statutory interpretation

[114] Section 39(2) tells courts they must interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. That is our first duty in interpreting legislation. All legislation must be enacted, and all public power must be exercised, in accordance with the Bill of Rights. The Bill of Rights applies to all law. It is pivotal to the interpretation of all legislation and to the development of customary

[79] Minority judgment at [52] to [55].

[80] Section 38 provides in relevant part:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> . . .
>
> (d) anyone acting in the public interest."

[81] *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* [2014] ZAGPPHC 166; [2014] 2 All SA 559 (GP) (High Court judgment) at para 3.5.

law and the common law. It bears directly on disputes that are subject to legislation and other laws connected with constitutional rights.

[115] It is by now commonplace in our constitutional jurisprudence that all statutes must be interpreted through the prism of the Bill of Rights.[82] Approached on this footing, the general rule is that a statute must be given its ordinary grammatical meaning, unless to do so would result in absurdity or create discord with the Constitution. And, most importantly, in following these interpretive prescripts, where it is reasonably possible, legislation must be given a meaning that preserves its constitutional validity. These principles were clearly set out in *Cool Ideas*:

> "There are three important interrelated riders to this general principle, namely:
> (a) that statutory provisions should always be interpreted purposively;
> (b) the relevant statutory provision must be properly contextualised; and
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[83]
> (Footnotes omitted.)

[116] This is what this Court has always understood section 39(2) to demand: that judges read legislation, where reasonably possible, in ways that give effect to the Constitution's fundamental values. Consistently with this, when the constitutionality of legislation is in issue, judges "are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution".[84]

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[82] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 21.

[83] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28.

[84] *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) quoting *Hyundai* above n 82 at para 22.

[117] This has a plain practical consequence. When this Court interprets legislation, it must avoid conflicts with the Constitution where reasonably possible. We must give preference to interpretations that fall within constitutional bounds. Our only constraint is the lawyer's daily tool: language. The ordinary, elementary, meaning of words must not be strained.[85]

[118] So that is what we must do here: we must find, if reasonably possible, an interpretive path that preserves the Act's constitutional validity.

[119] The minority judgment's suggestion that deciding the matter on this basis violates the *audi* principle overlooks the fact that the interpretation of sections 22 and 24 have, from the start, been at the heart of this litigation.[86] The core issue all along has been whether the provisions are capable of an interpretation that renders them constitutionally compliant. That this Court undertakes its constitutional mandate to find a reasonable interpretative path that preserves the Act's constitutional validity by using additional interpretative considerations,[87] especially when it reaches the same conclusion as the courts below, cannot raise an *audi* point.

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[85] *Hyundai* id at paras 22-3.

[86] Minority judgment at [96] to [99]. In particular, the issue of what "due regard to applicable law" means in respect of section 22(2) has been before two High Courts and two Supreme Court of Appeal panels. Moreover, in the hearing before this Court, counsel for both the City and Link Africa were asked whether "applicable law" included the common law. While counsel for the City agreed that the common law was indeed applicable, Link Africa contended that the common law is supplanted by the Act. This judgment has thus permissibly proceeded to elaborate on the existing findings in the courts below and arguments proffered by counsel, and extends the reasoning by instancing servitudes as a part of the common law, which is "applicable law" to which "due regard" must be had in terms of section 22(2) of the Act.

[87] See generally *CUSA* above n 66 at paras 67 and 132. See also *Director of Public Prosecutions* above n 67 at para 36:

> "The rationale for permitting a court to raise, of its own accord, a constitutional issue is rooted in the supremacy of the Constitution. Apart from this, our Constitution contemplates that there will be a coherent system of law based on the Constitution, in particular, the Bill of Rights. Courts have a crucial role to play in developing this system of law with the Constitution as their guide. It is the duty of all courts to uphold the Constitution and a court may thus raise a constitutional issue of its own accord." (References omitted.)

See also *Cronimet Chrome Mining SA (Pty) Ltd and Others v Brodsky Trading 224 CC t/a Platinum Unlimited Estates, In re: Brodsky Trading 224 CC t/a Platinum Unlimited Estates v Nell and Others* [2013] ZASCA 155 at para 16 citing *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA (A) 16 at 24B-C:

> "If . . . the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discerned and stated, the Court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues

The Act

[120] The primary object of the Act is to regulate electronic communications in the public interest. Section 2 sets out its ancillary objects. These include open, fair and non-discriminatory access to broadcasting services and communication networks so as to encourage investment and innovation in the communications sector.[88] The purposes of the Act encourage the realisation of fundamental rights, in particular the right to equality, education, access to information and freedom of trade, occupation and profession.

[121] Fast and reliable electronic communication services have the potential to improve the quality of life of all people in South Africa. They do so through increasing the availability of texts, audio and other media at schools, universities and colleges, and boosting business and employment opportunities. Anyone who has seen a teenager using a mobile telephone or other electronic devices to access the internet for homework, research or inquiry will understand the statute's objectives.

[122] Reliable electronic communications go beyond just benefiting the commercial interests of licensees to the detriment of ownership of property. The statute is designed to avoid this no-winner conflict. What it seeks, is to bring our country to the edge of social and economic development for rural and urban residents in a world in which technology is so obviously linked to progress.

[123] The spirit and purport of the Bill of Rights command that the Act must be interpreted to promote access to fundamental rights rather than to hinder them. That is our clear duty here.

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actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision."

[88] Section 2 of the Act.

[124] Section 22 provides for 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."

[125] This language is broad. It provides access to any land in order to construct electronic communications facilities. This is intended to serve a legitimate and important legislative purpose which is essential for the unhindered universal roll out of electronic communications services. On the face of it, the provision appears to confer wide powers on licensees and clearly limits property rights. But the exercise of the power is not unhindered. The provision makes sure of this. That power is constrained by the plain, ordinary grammatical meaning of the provision itself, which demands that regard must be had "to applicable law and the environmental policy of the Republic."

[126] "Applicable law" is unlimited. Nothing in the statute limits it. So it must include the common law and Constitution.[89] How can it not? In *Msunduzi*, the Supreme Court of Appeal held that "due regard" must be taken to mean "comply

[89] However, section 94 of the Act provides that "[i]n the event of any conflict between the provisions of this Act, the related legislation or any other law relating to the regulation of broadcasting or electronic communications, the provisions of this Act prevail".

with", provided that compliance with applicable law cannot be taken to mean that the right given to network licensees under section 22(1) is defeated or eviscerated.[90]

[127] The important point is this. The grant of the right under section 22(1) to a network licensee does not determine how that licensee may exercise it. For that, one has to go to section 22(2). And this explicitly requires that "[*i*]*n taking any action* in terms of subsection (1) due regard must be had to applicable law".[91] Here the analogous principles and rules of the common law of servitudes point the way to the statute's validity.

[128] Section 24, entitled "Pipes under streets", provides:

> "(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."

[90] *Msunduzi* above n 15 at para 11.

[91] Emphasis added.

[129] Section 24 differs from section 22 in that it does not contain the express injunction that "due regard must be had to applicable law and the environmental policy of the Republic".[92] However, the provision harmonises the exercise of licensees' powers and the protection of local authorities or ownership interests, by incorporating express procedural and substantive safeguards. First, the licensee is required to provide 30 days' prior written notice of its intention to construct, maintain or alter electronic communications facilities.[93] Second, the notice must specify the manner in which the infrastructure is to be constructed and maintained (presumably the notice must also specify alterations to be undertaken in accordance with subsections (1)(b) and (c)).[94] Third, it may provide for compensation for "all reasonable expenses incurred or any supervision of work relating to such alteration".[95]

[130] The provision thus clearly contemplates a measure of agreement between licensee and landowner. This is necessary to determine "reasonable expenses incurred". And it demands sufficient deference to the local authority or owner, because they are entitled to "supervise" the licensee's work on their property.[96]

[131] So it is true that sections 22 and 24 of the Act permit a licensee to exercise powers without prior consent. But their precursors' substantially similar provisions, are of long-standing origin, dating back to 1911. Their purpose then and now is equally compelling. It is to bring the modern world closer and more productively to us all through the medium of communication. In 1911, the need to transmit telegraphs was compelling to move toward an interconnected society. Now, it is mobile phones and the internet. But this is not achieved by disregarding property rights. As we explain below, in undertaking the means necessary to provide modern communication infrastructure, ample procedural and substantive safeguards provide protection to

[92] Section 22(2).

[93] Section 24(1).

[94] Section 24(1)(a).

[95] Section 24(3).

[96] Section 22(2) (the general provision), read with sections 23-9 (the specific and "fairness" provisions relating to more particular matters) must be read together as constituting a careful recognition and balancing of various interests. And, again, they are all of long-standing origin, similar to provisions starting in 1911.

property rights. And they define, albeit broadly, the nature and scope of a licensee's power.

Common law on servitudes

[132] The minority judgment foregrounds the common law requirement that intrusions on private property require the owner's consent. It adopts a rigid and constricting approach to it. This is the premise that leads the judgment to finding the Act invalid. That, in our view, is in conflict with the interpretive canons this Court has developed and adopted over the last two decades. It also does Parliament an injustice: for a statute that can be made to do its important work is instead consigned to invalidity. We find that approach in conflict with these basic principles, and unnecessary.

[133] The common law rule is generally expressed in the notion that one may enter property only with consent of the property owner. Stated in this barefaced way, this may seem to run counter to section 22(1) of the Act. But that is only the general rule. It is where we start. Not where we stop. The common law is far more nuanced. This the common law on servitudes shows. It showers the question of statutory construction before us with flexible and equitable principles that protect the servient owner.

[134] It may well be that a statute prevails over the common law when the two are in irresoluble conflict. That is not so here. Longstanding authority points to a subtler path rather than brute primacy. For well over a century, courts have insisted that common law and statute must as far as reasonably possible be read in harmony.[97] And we show below that the common law on servitudes can reasonably be read in harmony with section 22(1). There is no question of conflicting statutory provisions "trumping" the common law. So the common law is "applicable law" – and "due

[97] *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823 (*Johannesburg Municipality*) and *Stadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A) at 784F-H (*Van Wyk*).

regard" must be had to it. These lessons lie deep in our legal history, and the Constitution enjoins us to apply them to the legislation of our modern democracy.

[135] In *Willoughby's,* Innes J regarded that a servitude as a real right carved out of the full dominium of the owner and transferred to another.[98] In *LAWSA* a servitude is defined as—

> "a limited real right that imposes a burden on movable or immovable property by restricting the rights, powers or liberties of its owner in favour of either another person (in the case of a personal servitude) or the owner of another immovable property (in the case of a praedial servitude). Put differently, it is a right of one person in the property of another entitling the former to use and enjoy that person's property or to prevent the latter from exercising certain entitlements flowing from the normal rights of ownership."[99]

[136] Roman-Dutch law infused early stages of the common law on servitudes. It limited the types of servitudal rights to a fairly strictly confined number.[100] Traditional common law rooted in the Roman-Dutch tradition distinguished between two types of servitudes – personal and praedial.[101] A praedial servitude is one where there are at least two pieces of land implicated. The servitude confers benefits on one piece of land, the dominant tenement, while imposing corresponding burdens on the other, the servient tenement.[102] A praedial servitude vests in the owner of the

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[98] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 (*Willoughby's*) at 281 where Innes J stated that: "[t]here is nothing in principle to prevent portion of the globular *dominium* of fixed property being transferred to an individual for his life, instead of an adjoining property in perpetuity". See also at 280:

> "I say servitude rights advisedly, because, in order that notice of the existence of prior rights should affect a purchaser of land held under unencumbered title, it is necessary that the rights should be real, so that their delivery would take away something from the *dominium* which he is seeking to acquire. And the rights now claimed, if they are real, must necessarily be of the nature of a personal servitude; they are either that or they are not *jura in rem* at all."

[99] *LAWSA* above n 78 at para 540.

[100] Badenhorst et al (ed) *Silberberg and Schoeman's The Law of Property* 5 ed (LexisNexis Butterworths, Durban 2006) at 321.

[101] Id.

[102] Id.

dominant land. But neither its benefit nor its burden can be detached from the land. These are passed from one landowner to the next.[103]

[137] By contrast, a personal servitude is a real right that attaches to the burdened land, but is also always connected to an individual. He or she holds the right to use and enjoy another's property. That right is non-transferable: it cannot be passed on to another. However, personal servitudes are always enforceable against the owner of the property burdened by it – even when that owner changes.

[138] In modern South African law, types of rights and restrictions found in traditional servitudes have been relaxed. This relaxation has been so extensive "that their number is 'practically unlimited' although certain general requirements have to be fulfilled".[104] To determine whether a right in property is a servitude is often a matter of judicial policy. It depends in part on whether the nature of the right is capable of being recognised as a real right:[105]

> "The essence of a servitude is therefore, that it confers 'a real right [to use and enjoyment of the property of another]', and it is this direct relationship between the holder of the servitude and the property to which it relates that distinguishes it from a mere contractual right against the owner of the property."[106] (Footnotes omitted.)

[139] The crucial point is this: the common law on servitudes illustrates that property rights have dimension, colour and complexity far beyond any barefaced general proposition about ownership. Servitudes limit the rights of ownership and place certain burdens on property by affording power of use and enjoyment to another. That has been the case for thousands of years, for our law of servitudes, both consensual and non-consensual, is derived from the Roman law.

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[103] Id at 321-2.

[104] Id at 321.

[105] Id at 321 and fn 5.

[106] Id at 321.

[140] What section 22 does is wholly conformable with this long history. In effect, the statute creates what used to be called "public servitudes".[107] The term is in some cases a misnomer, because the public can hardly be said to be direct right-holders of a servitude.[108] That objection does not apply in the case of the public servitudes sections 22 and 24 create. The statutory provisions provide powers and rights to electronic communications network service licensees (network licensees) that they must exercise for the benefit of the public in general.[109] The rights vest in the network licensees upon grant of the licence.[110]

[141] What of the fact that the network licensees are not holders of dominant property in relation to the servient property? Does this mean the servitude cannot be a

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[107] A servitude or the power to exercise a servitude may be created by statute. *LAWSA* above n 78 at para 615. See also *South African Mutual Life Assurance Society v Durban City Council* 1948 (1) SA 1 (D). and *Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd and Others* 2014 (6) SA 286 (KZP).

[108] De Wet "Boekbesprekings" (1943) 187 *THRHR* 190.

[109] Illuminating in this regard are the remarks of Malan JA in *MTN* above n 9 at para 11:

> "These services may be provided only by the holders of certain licences (section 7). The ECA granted the rights and privileges that in the past belonged to the fixed line operators, such as Telkom, to all electronic communications network service licensees. The rights contained in sections 70 to 77 of the Telecommunications Act came to be re-enacted as sections 22 to 29 of the ECA. The purpose of the older sections was to eliminate all possible constraints on the state in its providing of communication services. Due to the convergence of these services and the introduction of competition in the telecommunications industry the rights and privileges that existed under the older sections now had to be extended to persons other than the state or the fixed line operator. Hence the enactment of sections 22 to 29 of the ECA."

And at para 14:

> "The powers given by section 22 are, as I have said, required to enable the providers of both fixed-line and wireless telecommunications operators to achieve their objectives. It does not follow, counsel for SMI countered, that these operators may appropriate significant portions of land on which to construct permanent or semi-permanent installations as part of their networks. This is no doubt correct. The power given by section 22 is understandable in the case of a fixed-line operator which would otherwise have to negotiate with thousands of land owners for permission to erect telephone poles and suspend cables across their land. In [*Telkom* above n 70] it was said:
>
> > 'By contrast, to lay cables on land would require permission or servitudes from a huge number and variety of owners. Hence the need for an all-embracing permission such as is contained in section 70 [now section 22].'
>
> The same need does not exist with regard to sites required to build base stations such as those of MTN and Vodacom. The phrase 'due regard must be had to applicable law' did not appear in section 70 of the repealed Act. Stricter requirements than before were thus introduced for the exercise of the powers now given by section 22(1)."

[110] See Chapter 3 ("Licensing Framework"), section 5 ("Licensing"), section 9 ("Application and Granting of Individual Licences"), and section 16 of the Act which set out the process for granting individual and class licences.

praedial servitude? Not necessarily. A fitting analogy is personal servitudes. The licence rights the statute grants are more in the nature of personal servitudes. This fits well within the scheme of our common law and the way statutes are interpreted within it. As far back as *Willoughby's*, the Court recognised that "there are many instances in which South African courts have recognised as personal servitudes rights which, had they been attached to the ownership of other land, would have constituted praedial servitudes".[111]

[142] Nonetheless, the rights section 22 grants are similar to a general servitude. These allow the dominant owner to select the essential incidental rights of the necessary premises and to take access to them as needed for the exercise of the servitude. But the right is not unrestricted. The dominant servitude holder cannot just barge in. A large part of the argument on behalf of the City of Tshwane and Msunduzi was premised on the outrageous notion of the licensee just barging in, brazenly disregarding municipal protections and duties and works. That can never be. It is alien to our law's conception of rights over another's property. As stated in *Hollman*, exercise of a servitude is subject to the important condition that incidental rights must be "exercised *civiliter*".[112]

[143] This Court has embraced the principle that rights over the property of another must be exercised *civiliter modo*. In *Motswagae*, Yacoob J on behalf of the Court stated that "the common law requires that a servitude be exercised *civiliter modo*".[113] The Court translated the Latin into plainer language. It said this meant that a servitude must be exercised "respectfully and with due caution".[114]

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[111] *Willoughby's* above n 98 at 281-2.

[112] *Hollman and Another v Estate Latre* 1970 (3) SA 638 (A) (*Hollman*) at 645D.

[113] *Motswagae* above n 57 at para 14.

[114] Id. In *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* [2006] ZASCA 118; [2007] 2 All SA 567 (SCA) at para 21 the Court stated that—

> "[i]n accordance with the principles applicable to servitudes, the owner of a servient property is bound to allow the holder to do whatever is reasonably necessary for the proper exercise of his rights. The holder of the servitude is in turn bound to exercise his rights *civiliter modo*, that is, reasonably viewed, with as much possible consideration and with the least possible inconvenience to the servient property and its owner."

[144] What does it mean to exercise a right to enter another's property respectfully and with due caution? Our existing law tells us. It is bound up with the facts. And the common law is amply flexible and adaptable enough to cater for the novel needs the statute creates. Electronic communications networks may be constructed over the land of others only with respect and due caution. This is the path away from consigning important statutory provisions, serving a vital public function, to oblivion.

[145] In relation to a servitude of way (right of way) over a defined route, the existing common law rule was that it could be altered only by mutual consent.[115] In *Linvestment*, the Supreme Court of Appeal pointed out that developing the common law was necessary in "mitigating the burden of servitude".[116] That Court's approach is vividly apposite:

> "In addition this court has always possessed an inherent power to develop the common law. The fullest discussion of which I am aware is to be found in Hahlo and Kahn, 'The Second Life of the Roman-Dutch Law'. The power is confirmed in section 173 of the Constitution 'taking into account the interests of justice'. Thus, without abandoning our legal heritage, the courts can and should examine how developed legal systems cope with common problems. By appropriate application of the knowledge thus derived, a modification of our existing law may better serve the interests of justice when the existing law is uncertain or does not adequately serve modern demands on it. The present appeal, in my view, is just such a case."[117] (Footnote and references omitted.)

[146] The Court further held that:

[115] See *LAWSA* above n 78 at para 552.

[116] *Linvestment CC v Hammersley and Another* [2008] ZASCA 1; 2008 (3) SA 283 (SCA) (*Linvestment*) at paras 26 and 31-2.

[117] Id at para 25.

> "In line with the extensive international trend of legal development in this respect, I therefore propose that, in circumstances falling within the problem posed by the stated case, the law be developed to ensure that injustice does not result."[118]

The Court in *Linvestment* then sought to make provision in its order for a requirement that it was only if the existing use of the servient property would materially inconvenience the owner that a change to the servitude could be made, and if the change was permitted it should not cause prejudice to the owner of the dominant property.[119]

[147] The common law way of necessity (*via necessitatis*) provides another instance of how rights over the property of another must be exercised in a flexible and fair manner. If no agreement can be reached between the owners of a servient and dominant property on the grant or exercise of a way of necessity, it must be obtained by a court order.[120] Without judicial resolution of the dispute, occupation of the servient property may be unlawful.

[148] A distinction was originally made between a full way of necessity (*jus viae plenum*) and a precarious one (*via precario*). The former allowed continuous use. The latter allowed only occasional use, when specific necessity required the use of the road. Compensation was payable in the case of the former, in the latter, not.[121] But in *Van Rensburg*, Jansen JA doubted whether this distinction could still hold in modern times.[122] He implied that compensation will always be payable.

[149] The point is this. When the court grants a way of necessity, an instance of a servitude imposed by law without the landowner's consent, it is treated as a kind of

[118] Id at para 33.

[119] Id at para 35.

[120] *Van Rensburg v Coetzee* 1979 (4) SA 655 (AD) (*Van Rensburg*) at 676H.

[121] Id at 671H-672A.

[122] Id at 672A-E.

expropriation.[123] And the compensation to the burdened landowner must "be in proportion to the advantage gained by the plaintiff and the disadvantages suffered by the defendant".[124] That may include special damages.[125] In addition, the route and dimensions of the road had to be determined in accordance with the principle of "along the closest way and with the least intrusion" (*ter naaster lage en minster schade*).[126]

[150] From this it appears that the following general principles apply to our common law of servitudes:

(a) servitudes may not be enforced on landowners, except in the case of a way of necessity. Enforcement of a way of necessity may only be done through the courts. Compensation in proportion to the advantage gained by the plaintiff and the disadvantages suffered by the defendant is payable when this happens;

(b) the holder of the right of a general servitude may select the essential incidental rights to exercise the servitude, like the premises needed and the access thereto. This selection must be exercised in a civil or reasonable manner (*civiliter*). Disputes about this choice must also be determined in court if no agreement between the parties can be reached; and

(c) where changed circumstances require it, the common law of servitudes must be adapted to arrive at a solution that is just to the parties and does not prejudice them. In the case of enforced servitudes this must be done in a manner that least inconveniences the servient owner.

[151] So we know that the common law and statutes must be read in harmony as far as reasonably possible. Section 22 grants public servitudes to network licensees.

[123] Id at 677H.

[124] Id at 676B

[125] Id at 659E.

[126] Id at 677C.

These must be exercised in compliance with common law principles. Because they are enforced general servitudes, not determined by agreement between network licensees and landowners, the cautionary inhibitions the common law imposes apply.

[152] This means:

(a) network licensees may select the premises and access to them for the purposes of constructing, maintaining, altering or removing their electronic communications network or facilities in taking action in terms of section 22(1);

(b) this selection must be done in a civil and reasonable manner. This would include giving reasonable notice to the owner of the property where they intend locating their works. The proposed access to the property must be determined in consultation with the owner;

(c) compensation in proportion to the advantage gained by the network licensees and the disadvantages suffered by the owner[127] is payable in respect of the exercise of the public servitudes section 22(1) grants; and

(d) where disputes arise about the manner of exercising the rights under section 22(1) or the extent of the compensation payable, these must be determined by way of dispute resolution to the extent that it is possible,[128] or by way of adjudication.[129] Access to the property in the absence of resolution will be unlawful.

[153] Under the common law, a cardinal principle of statutory interpretation presumes that legislation should not alter the common law more than necessary.[130] Its constitutional equivalent is this: an interpretation of a statutory provision that is least invasive of fundamental rights must be adopted if it is reasonably possible to do so.[131]

[127] Id at 676A-D.

[128] As envisioned in section 21(2)(b) of the Act.

[129] *Van Rensburg* above n 120 at 676H-678.

[130] *Johannesburg Municipality* and *Van Wyk* above n 97. See also *Litako and Others v S* [2014] ZASCA 54; 2015 (3) SA 287 (SCA) at para 52.

[131] *Minister of Defence and Military Veterans v Thomas* [2015] ZACC 26 at paras 38-9.

As demonstrated above, it is eminently reasonable to interpret section 22(2) to give effect to the common law. Once that is done, there is no warrant for concluding that "taking any action" in terms of section 22(1) may be done, unabashedly, without having "due regard" to, or complying with, the common law.

[154] And from this flows a statute-saving conclusion. The possible deprivation of property under section 22(1) is not procedurally or substantively arbitrary. This is because notice and consultation about the manner in which the rights are to be exercised, as well as about the compensation payable, must take place.

[155] While the legislation does not expressly include notice and compensation requirements in section 22(1), it is equally silent on disclaiming notice and compensation requirements. It is true that provisions expressly stating that compensation and notice are not required could have been included. But, instead, the legislation has section 22(2). Therefore common law requirements of notice, consultation, and compensation apply. If these fail to achieve a proper result, the dispute must be judicially resolved. This interpretation fully respects common law rights without defeating or eviscerating the rights section 22(1) gives to network licensees.

[156] In addition, section 3 of the Expropriation Act provides:

> "Expropriation of immovable property by Minister on behalf of certain juristic persons or bodies
>
> (1) *If a juristic person or body mentioned in subsection (2) satisfies the Minister charged with the administration of the law mentioned in connection therewith that it reasonably requires any particular immovable property for the attainment of its objects and that it is unable to acquire it on reasonable terms, the Minister may, at the request of the first-mentioned Minister, and subject to the provisions of subsections (4) and (5), expropriate such immovable property on behalf of that juristic person or body as if it were required for public purposes*.
>
> (2) The juristic persons or bodies contemplated in subsection (1) are—

(a) a university as defined in section 1 of the Universities Act, 1955 (Act 61 of 1955);

(b) a university college as defined in section 1 of the Extension of University Education Act, 1959 (Act 45 of 1959);

(c) a technikon mentioned in section 1 of the Technikons (National Education) Act, 1967 (Act 40 of 1967), or section 1 of the Technikons Act, 1967 (Act 40 of 1967);

(d) a governing body as defined in section 1 of the Educational Services Act, 1967 (Act 41 of 1967);

(e) the Atomic Energy Board mentioned in section 11 of the Atomic Energy Act, 1967 (Act 90 of 1967);

(f) a college as defined in section 1 of the Indians Advanced Technical Education Act, 1968 (Act 12 of 1968);

(g) the Council mentioned in section 1 of the National Monuments Act, 1969 (Act 28 of 1969); and

(h) *any juristic person, other than a juristic person mentioned in paragraph (a), (b), (c), (e), (f) or (g), established by or under any law for the promotion of any matter of public importance*.

(3) If the Minister expropriates any immovable property on behalf of a juristic person or body in terms of subsection (1), such juristic person or body shall become the owner thereof on the date of expropriation in question.

(4) There shall be payable in respect of the expropriation of any immovable property in terms of subsection (1) the fees, duties and other charges which would have been payable by the juristic person or body concerned in terms of any law if it had purchased that property.

(5) All costs incurred by the said Minister in the performance of his functions in terms of subsection (1) shall be refunded to him by the juristic person or body concerned." (Emphasis added.)

[157] Section 22(2) requires that due regard must also be had to this statute when action is taken under section 22(1) of the Act. The wording of section 22(1) contains no express or necessary exclusion of the operation of the Expropriation Act. Therefore, the public law protection of compensation for expropriation by juristic persons other than the state found in the Expropriation Act also applies to action taken under section 22(1). A tenable explanation why no explicit mention was given to

expropriation in section 22 is the fact that electronic communication network services are now provided by private persons and not only by the state, as was the case previously. Once again, this route shows there is no arbitrary deprivation of property.

PAJA

[158] In *MTN*[132] and *Msunduzi*,[133] the Supreme Court of Appeal held that action taken by a licensee under section 22(1) is administrative action for the purposes of PAJA. Network licensees acting under both the contested provisions are empowered by the Act to exercise public power and perform an important public function. Under PAJA, a decision taken by a private entity wielding public power and performing a public function in terms of an empowering provision, constitutes "administrative action" if it adversely affects the rights of another and has a direct, external legal effect. The actions taken by network licensees under the Act, the Court held, fall within the provisions of PAJA. It would follow that action a licensee takes in terms of the provisions must be lawful, reasonable and procedurally fair.[134]

[159] However, the ample statutory provisions and common law principles that we have set out above make it unnecessary to determine the question whether PAJA applies. We prefer to leave that question open.

Section 25 of the Constitution

[160] The High Court found that there is no authority that the City is a bearer of property rights under section 25.[135] The contrary approach, it said, would be inconsistent with section 7(1) of the Constitution.[136] The City contends that, even though it is not a bearer of section 25 rights, the Constitution's broad standing

[132] *MTN* above n 9 at para 21.

[133] *Msunduzi* above n 15 at para 20.

[134] See sections 6(2)(c), (h), and (i) of PAJA.

[135] High Court judgment above n 81 at paras 41, 43 and 48.

[136] Id at para 42.

provisions do not preclude it from asserting protection under section 25(1). This contention is not persuasive.

[161] Section 38 of the Constitution provides that:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) *anyone acting in the public interest*; and
>
> (e) an association acting in the interest of its members." (Emphasis added.)

[162] This provision undoubtedly allows persons to assert that a right in the Bill of Rights has been infringed, even if they are not acting in their own interest. Section 38(d) may indeed afford the City the capacity to act in the interest of the public within its municipality. But the City neither pleaded this capacity, nor did it proffer any submissions to that effect.

[163] This is hardly surprising. The City's case was a frontal challenge to the lawfulness of the licensee's intended conduct. It was acting, and expressed itself to be acting, solely as a government entity. No question of public interest representative capacity was suggested. And, in the face of the statute's beneficent purposes, it would have been hard for the City to contend that it was acting on behalf of the citizens whom it was depriving of quick broadband access.

[164] And there is indeed no evidence to suggest that residents of the City of Tshwane would be detrimentally affected by the construction and installation of electronic communications infrastructure or networks, or that residents' private land may be similarly affected by licensees' actions. So nothing suggests that the

City's challenge is intended to protect broader interests. While the City may have been able to advance an argument (however shaky) that its challenge is in the public interest or that it is in fact acting on behalf of its residents, it just did not.

[165] It remains necessary to address the rights of private landowners under section 25. Their position is emblematised in the sixth intervener, SMI Trading.

Property and deprivation

[166] What a network licensee does under section 22(1) on a private landowner's land may, of course, subtract from ordinary rights of ownership. The provision, after all, allows the licensee to enter land, hook up a cable network, and keep it in good shape. That entails a loss of pure ownership rights. Depending on the extent of the loss, this may constitute a deprivation of property under section 25(1) of the Constitution.

[167] Does section 22 inflict a deprivation? This depends on the extent of the intrusion in the property or limitation of its use or enjoyment. There must be interference with property that is significant enough to "have a legally relevant impact on the rights of the affected party before deprivation of property under section 25 is established".[137]

[168] First, the City. Even if the City did have section 25 rights, there has been no showing that Link Africa's intended actions amount to substantial interference with the City's infrastructure. The High Court correctly found that even if the Bill of Rights property provision applied to the City, the provisions are nevertheless valid.

[169] The High Court acknowledged that, although the statute's constitutionality was not challenged in *SMI Trading*, the Supreme Court of Appeal's reasoning bears directly on the section 25 argument. That Court adopted the reasoning in *MTN*, and

[137] *Shoprite* above n 76 at para 73. See also *Mkontwana* above n 36.

rejected the argument that section 22 allowed for an arbitrary deprivation of property because "[n]ot all deprivations of property are arbitrary. Everything depends on the extent of the deprivation, viewed against the purpose of the deprivation"[138] and "[a]ny decision by the ECNS [electronic communication network services] licensee which gave rise to an arbitrary deprivation of property would not be permitted by section 22 and would be set aside on review".[139]

[170] The Court found that the City failed to adequately explain why Link Africa's installation of fibre-optic cables was so intrusive as to amount to an arbitrary deprivation of property. The reasons were all in the evidence: fibre-optic cables are installed using existing underground infrastructure, so the technology avoids the disruption and high costs associated with traditional road-digging.[140]

[171] This is strong and persuasive reasoning. In fact, the High Court found the deployment of Link Africa's network in the City's sewer system actually provides advantages to the City and people and businesses requiring network access.[141] Fibre-optic cables are the fastest and most effective product on the market to implement electronic communications networks,[142] and provide a safe and secure system that has practically unlimited bandwidth.[143]

[172] In this Court, the City has equally shown no harm. The City's attack on the statute and the vital broadband expansion it permits is entirely notional, based on the idea of intrusion on municipal powers, without any real-world substance. There is no iota of evidence that installing Link Africa's electronic communications network damages or impairs City infrastructure. Nor is there any evidence that it could cause harm or prejudice to the City or its people. Precisely put, the City has provided no

[138] High Court judgment above n 81 at para 44.1.

[139] Id at para 44.2.

[140] Id at para 47.3.

[141] Id.

[142] Id.

[143] Id.

evidence that Link Africa's installation of fibre-optic cables is beyond normal restriction of use and enjoyment of the property where the cables are installed.

[173] SMI Trading's position is different. The MTN base station located on SMI's property is big. Very big – approximately 110 square metres. That provides the Court with a basis for finding intrusiveness. That kind of construction, and the activity it necessitates, may indeed amount to substantial interference. So circumstances may arise where a licensee's activities may interfere so sharply with a property owner's rights that there is a deprivation.

Arbitrariness

[174] Even so, we struggle fruitlessly to find the arbitrariness. The deprivation is in fact entirely reasonable.[144] This is because of the landowner's multiple safeguards, both substantive and procedural. The statute provides not only sufficient reason for the deprivation, but affords a compelling basis showing that the provisions at issue are needed.

[175] The Minister provided fulsome evidence showing the acute need to roll out electronic communication networks so as to avoid negative consequences for the South African economy. That evidence neither the City nor SMI contested. They could not. And, crucially, the City accepted the "provisions of sections 22 and 24 of the ECA are intended to serve a legitimate and important legislative purpose [that is] essential for the universal rolling out of electronic communications services".

[176] The Minister explained that one of the main purposes of the Act is to "facilitate the speedy and effective roll out of telecommunications networks for the benefit of the South African public as a whole"; promote the universal provision of electronic communications networks and electronic communications services and connectivity for everyone in South Africa; and encourage "an environment of open, fair and

[144] See *FNB* above n 36 at paras 65-6 and *Shoprite* above n 76 at para 134.

non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services".

[177] The Minister's deposition added important facts that provided context for sections 22 and 24 of the Act. Currently, South Africa's access to broadband telecommunications sorrowfully lags behind comparable countries. To remedy this, national government has committed itself to ensure universal access to electronic communication network services. This is expressed in the Act, and also in a national broadband policy that aims to give effect to the constitutional commitment to "improve the quality of life of all citizens and free the potential of each person".

[178] The public's increased access to broadband telecommunications offers realistic promise of increases in economic output, new jobs, educational opportunities, enhanced public service delivery and rural development. As the Minister contended in argument, there is increasing evidence "of linkages between investment in electronic communications infrastructure and improvements in the economy". By contrast, what we now have is a lack of "always-available, high-speed and high quality bandwidth required by business, public institutions and citizens" which "has impacted negatively on South Africa's development and competitiveness".

[179] And what has cost the most and caused the majority of delays in the roll-out of these networks? The Minister tells us. It has been the burden of negotiating with individual municipalities and state agencies for wayleaves[145] and rights of way. It is estimated that civil works account for about 80% of the cost of constructing networks. In the case of the City of Tshwane alone, the roll-out has been becalmed for four petrifying years.

[180] Why? The Minister's evidence shows that the rollout of broadband telecommunications is good for economic growth, education and public service delivery. South Africa lags behind comparable countries. The remedy demands

[145] Minority judgment at [7].

increased network infrastructure. These considerations – undisputed, and indisputable – show compellingly why the powers the contested provisions provide are necessary to achieve the ends sought. They are not substantively arbitrary.

[181] We now revisit the common law of servitudes. The application of this body of law means the provisions at issue are not arbitrary. Because sections 22 and 24 impose what amount to public servitudes, licensees must exercise their statutory rights in a civil and reasonable manner. This means the licensee must give reasonable notice to the owner of the property where it intends locating the works. And of course, the licensee must consult with the owner about proposed access.

[182] Section 24 imposes several conditions limiting a licensee's power when it seeks to construct, maintain, alter or remove pipes, tunnels, or tubes required for electronic communications network facilities, rendering it constitutionally compliant. First, the provision requires that licensees afford 30 days' prior written notice to the local authority or person owning or responsible for the care and maintenance of the street, road or footpath. Next, a local authority or person to whom the pipe belongs may at all times supervise work in connection with alteration of the pipes. The provision also requires a licensee to pay all reasonable expenses incurred by the local authority or person in connection with any alteration or removal under section 24. Lastly, it requires a licensee to pay for any supervision of work relating to alteration.

[183] In this way, section 24 provides multiple procedural protections to landowners.

[184] In sum: the public-compelling need for the provisions in issue, taken together with the common law protections that govern the exercise of the power they confer, establish that sections 22 and 24 are not arbitrary.

Powers and duties of municipalities

[185] Local authorities are in a distinctive position from private landowners. As far as municipalities are concerned, "applicable law" in section 22(2) refers to laws that

they may make within their constitutional legislative competence in terms of Chapter 7 of the Constitution. If laws fall within that competence, they must be complied with before section 22(1) may be exercised. In each case where a local authority asserts that it has the constitutional competence to require compliance with its own laws, it must be tested against the provisions of Chapter 7 of the Constitution to determine whether it really has that constitutional competence.

[186] Telecommunications is not an area over which local authorities hold constitutional competence. Here, we agree with the minority judgment that the City failed to make out a case that any of its competencies under the Constitution or legislation have been infringed.

[187] But Msunduzi advanced an illuminating argument that commands attention. Although it conceded that electronic communications fall within the national domain, it urged that municipalities have rights and powers to regulate *the manner* in which the national power is exercised. Hence, Msunduzi argued, the licensee has some obligation to engage with the local authority when it plans to enter upon public land. It must take into account practical considerations about order and safety.

[188] In argument, Msunduzi propounded that a licensee cannot simply come into a municipality and without warning dig up a busy intersection, or lay cables along a busy pedestrian walk without consulting the local authority. Counsel for all the licensees were quick to agree. And rightly so. We think Msunduzi's argument is sound. Section 151(4) of the Constitution 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". This must be read with section 151(3), which provides that "[a] municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution". And section 156(3) provides that "[s]ubject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid".

[189] These provisions indicate that licensees, though empowered by national legislation, must abide by municipal by-laws. The only limit is that by-laws may not thwart the purpose of the statute by requiring the municipality's consent. If by-laws exist that regulate the manner (what counsel called the "modality") in which a licensee should exercise its powers, the licensee must comply.

[190] Msunduzi also argued that this forms part of the licensee's obligation to act in a manner that is lawful, reasonable and procedurally fair as required by PAJA. As noted above, we prefer to leave this issue open.

Order

[191] For these reasons the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The City of Tshwane Metropolitan Municipality is ordered to pay the costs of Link Africa (Pty) Limited.

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