REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 3013/09

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED ✓

15/02/2011
DATE

SIGNATURE

In the matter between:

SMI TRADING CC (CK86/06684/23)	Applicant
and	
MOBILE TELEPHONE NETWORKS (PTY) LTD (REGISTRATION NUMBER 1993/001436/07)	First Respondent
and	
VODACOM (PTY) LTD (REGISTRATION NUMBER 1993/000367/07)	Second Respondent
and	
MINISTER OF COMMUNICATIONS	Third Respondent

JUDGMENT

COPPIN, J:

[1] The applicant seeks an order that the first respondent remove its base station including its cellphone tower and other equipment (all of which I refer to as "*the base station*") from the applicant's property described as "the Remainder of the Farm known as Farm Langgewacht No. 235, Registration Division HT in the Province of KwaZulu-Natal" (I refer to it as "*the property*"). In the alternative, the applicant seeks an order declaring s. 22 of the Electronic Communications Act 36 of 2005 ("*the ECA*") to be unconstitutional. The alternative relief depends on whether this Court finds that the first respondent is entitled to retain the base station on the property in terms of that section and in the absence of an agreement between the applicant and the first respondent to that effect or otherwise, without the applicant's consent.

[2] It is common cause that the applicant owns the property and that the first respondent is an electronic communications network service licensee in terms of and as contemplated in the ECA.

[3] The first respondent contends that it is entitled to retain its base station on the property in terms of s. 22 of the ECA, alternatively, it avers that there is

a monthly lease in place in terms of which it is entitled to occupy the property and that the applicant has not cancelled that lease.

[4] By way of background, it is common cause that Sisal Landgoed CC ("*Sisal*"), the previous owner of the property, during the currency of its ownership of the property, entered into a written agreement of lease with the first respondent on the 21st of April 1998 in terms of which the latter rented a portion (110 m²) of the property and was permitted to erect and maintain the base station on the property. Subsequently, the property was purchased by Fynbosland 256 CC ("*Fynbosland*") from Sisal. Fynbosland concluded an addendum to the lease agreement with the first respondent on the 17th of May 2005 in terms of which the first respondent was permitted to sublet a portion of the leased property to the second respondent.[1]

[5] The lease agreement thus commenced on the 1st of February 1998 and expired on the 1st of February 2008. The first respondent did not exercise its option to renew it. The applicant purchased the property from Fynbosland and became its registered owner on or about the 31st of March 2008.

[6] The applicant and the first respondent were unsuccessful in negotiating a new lease. More particularly, they were unable to agree on a monthly rental.

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[1] The second respondent has been cited as a party in these proceedings but has not opposed the relief sought and abides the outcome. It has also been noted that the second respondent was not a party to the addendum entered into between the first respondent and Fynbosland.

[7] On the 4th of December 2008 the first respondent sent an e-mail to the applicant's attorney (Mr Marais) in which it intimated that it was planning to relocate its base station; that it had identified a suitable alternative position to erect it and that it was getting the necessary approvals in that regard.

[8] In response to an e-mail from Mr Marais to the first respondent dated the 9th of December 2008, enquiring about compensation payable to the applicant for the period from the expiration of the lease agreement to the date of the removal of the base station from the property, the first respondent, in an e-mail dated the 16th of January 2009, stated that the applicant was not entitled to any compensation but only to an amount of R2 694,08 per month for the period 31 March 2008 to the date of the letter. The first respondent also intimated that it had commenced with preparations to remove the base station and anticipated that the removal would take approximately ten months to complete. The e-mail furthermore states:

> *"In the meantime, since the lease agreement has expired, and no consensus had been reached between the parties regarding the renewal of the lease agreement, we confirm that the terms and conditions of the expired lease agreement shall subsist on a month-to-month basis until such time as the base station has been removed. We confirm our commitment in expediting the process of removal of the site and shall advise you of the progress accordingly."*

[9] Mr Marais replied to the e-mail by letter dated the 20th of January 2009 in which he, *inter alia*, contends that the lease had indeed expired; questions the first respondent's view regarding the issue of compensation; and contends that the period of ten months is not reasonable. Mr Marais also states in the

letter that the amount tendered, namely R2 694,08 per month, is not acceptable to the applicant and if received would be received by it on a "without prejudice" basis.

[10] Further negotiations failed. In a letter dated 30 June 2009 the first respondent appeared to have changed its mind about moving the base station from the property. It intimated that a reasonable rental for the portion of the property it occupied was R2 500,00 per month; it referred to s. 22 of the ECA and stated that it would not move from the property and would continue to pay rentals as determined by it. The applicant disputed that the respondent was entitled to act accordingly and this culminated in the applicant bringing the present application.

[11] Points *in limine* were raised by the respondent in resisting the application but they were argued as part of the entire application and the first respondent did not require of me to give a separate judgment on those points prior to dealing with the merits. Essential to deciding the points is the meaning to be given to s. 22 of the ECA. The first point is that the applicant did not make out a case for the relief it seeks, in particular, that it did not deal with the provisions of s. 22 of the ECA in its founding affidavit. The second point purportedly raised as a point *in limine* is in fact not such a point. The respondent in terms of that point argues that the time which the applicant wants to give first respondent for the removal of the base station from the site in terms of the relief sought in the notice of motion (i.e. 30 days) is too short and requests that it be given 9 months to remove the base station should the

court find that it is not entitled to occupy the property. I will revert to these points later on in this judgment.

S. 22 OF THE ECA

[12] S. 22 of the ECA provides as follows:

> *"Entry upon and construction of lines across lands 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 or wires, stays or any other kind of support to any building or other structure.*
>
> *(2) In taking any action in terms of subs. (1) due regard must be had to applicable law and the environmental policy of the Republic."*

SUBMISSIONS REGARDING THE MEANING OF S. 22

[13] The first respondent contends that it is entitled to retain the base station on the property in terms of s. 22 of the ECA and submits, in essence, the following with regard to that section:

13.1 it applies to private as well as public land. The first respondent submits in that regard that "*any land*" in the section refers to public and private land;

13.2 the fact that it applies to private land does not render it unconstitutional. The argument in this regard is that there is no expropriation as contemplated in terms of s. 25 of the Constitution but merely deprivation for which no compensation is required. Furthermore, the first respondent contends that it did not occupy the property in an arbitrary manner;

13.3 it submits that s. 22 in effect creates a form of statutory servitude in favour of electronic communications network service licensees who act in accordance with that section. The servitude created in terms of that section does not have to be registered and can be in perpetuity and terminated at any time but only at the behest of the holder of such a servitude.

[14] The applicant submits *inter alia* the following with regard to the section:

14.1 it excludes private property and in this regard the applicant submits that the word "*including*" in s. 22(1)(a) must be given the meaning "*comprising of*", and if read with that meaning it excludes private property. The argument furthermore is that if the *ejusdem generis* principle of interpretation is applied then the

words "*any land*" in s. 22(1)(a) must be restricted to public land. It is submitted that the words "*any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic*", excludes private property;

14.2 It is further submitted that s. 22(2) contains a proviso that when taking any action in terms of subs. (1) "*due regard must be had to applicable law and the environmental policy of the Republic*" (emphasis of the applicant). The applicant submits that this means that ss. (1) must be read as subject to "*the applicable common law relating to private property, meaning that the licensee cannot just occupy any land without further ado, but must create rights, either through a lease agreement or sale agreement etc entitling it to occupy such land*". With reference to the predecessor of s. 22 namely s. 70 of the Telecommunications Act No. 103 of 1996 ("the Telecommunications Act"), it was submitted that it was evident that the previous section(i.e. s. 70) did not contain a proviso similar to that contained in s. 22(2) of the ECA, namely, that "due regard must be had to applicable law" and that this was an indication that the Legislature intended to make the provisions of s. 22(1) of the ECA subject to, *inter alia*, the common law;

14.3 relying on the decision in *Telkom SA Ltd v MEC for Agricultural and Environmental Affairs, KwaZulu-Natal and Others*[2] it was

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[2] 2003 (4) SA 23 (SCA) par [40].

> submitted that even when interpreting s. 70 of the Telecommunications Act, which did not contain the aforementioned proviso, the court still interpreted it subject to other law.[3]

[15] The third respondent made submissions in defence of the constitutionality of s. 22 of the ECA. In essence, it was submitted that the purpose of s. 22 was to facilitate access to any property, whether public or private, where there was a need to erect, *inter alia*, base stations and similar electronic communication devices utilised by licensees. It was furthermore submitted that the section was applicable to both private and public land. Regarding the meaning to be assigned to the proviso in s. 22(2), it was submitted that the Legislature intended thereby that any laws governing the utilisation of another's property for the purpose of s. 22(1), must be observed. This includes obtaining the consent of the property owner and entering into a lease agreement with that owner.

[16] In my view it is clear from the wording of s. 22(1) that it refers to both public and private land. The phrase "*any land*" as used in s. 22(1) means exactly what it says. I am fortified in this interpretation by, for example, the specific reference in that subsection to "*land reserved for public purposes*" as being included in the phrase "*any land*". This indicates that the phrase "*any*

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[3] The submission is not correct. In that case the SCA held that section 70 of the Telecommunications Act did not empower Telkom SA Ltd to lay a submarine cable without a lease under the Seashore Act. The latter Act provided that the lease of the relevant portion of the sea had to be obtained before cables may be laid there. The SCA concluded that "*any land*" as used in s.70 did not include the seashore. Accordingly, s.70 did not empower the laying of submarine cables without a lease as contemplated in the Seashore Act.

land" is much wider than and cannot be restricted to "*public land*". In any event, an interpretation that restricts the provision to public land only would be strained, not contextual and inconsistent with some of the objects of the ECA, in particular those that are intended to increase and broaden access to telecommunication services. I accordingly cannot agree with the applicant's submissions to the contrary on that point.

[17] In order to give meaning to the proviso in s. 22(2) of the ECA it is perhaps useful to briefly consider earlier legislative provisions which are similar to s. 22. Section 82 of the Post Office Administration and Shipping Combinations Discouragement Act[4] was followed by s. 80 of the Post Office Act[5] which was then followed by s. 70 of the Telecommunications Act. None of those sections had a proviso similar to that contained in s. 22(2) of the ECA. Section 70 of the Telecommunications Act provided:

> "*Entry upon and construction of lines across any land.*
>
> *(1) A fixed line operator may, for the purposes of provision of its telecommunications services, enter upon any land, including any street, road, footpath or land reserved for public purposes, and any railway, and construct and maintain a telecommunications facility upon, under, over, along or across any land, street, road, footpath or waterway or any railway, and alter or remove the same, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.*
>
> *(2) In taking any action in terms of subs. (1), due regard must be had to the environmental policy of the Republic.*" (emphasis added)

[18] There is a resemblance in the wording of s. 70 of the Telecommunications Act and s. 22 of the ECA. However, the noteworthy

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4 Act 10 of 1911.
5 Act 44 of 1958.

difference is that s. 70(2) does not contain the words "*applicable law*". It only refers to "the environmental policy of the Republic."[6]

[19] Section 69 of the Telecommunications Act which was contained in the same chapter as s. 70 of that Act provided that:

> *"(1) A fixed-line operator shall perform its functions in terms of this chapter in accordance with the regulations contemplated in sub-s. (2).*
>
> *(2) The authority shall prescribe –*
>
> *(a) the manner, form and period of notice to be given by an operator to any person or authority in connection with the performance by the operator of the functions as contemplated in this chapter;*
>
> *(b) the procedure to be followed and consultations to be held between an operator and any affected person or authority."*

[20] The ECA repealed the whole of the Telecommunications Act.[7] The ECA does not have a provision that is identical to s.69 of the Telecommunications Act, but s.21 provides for the development of guidelines which must include procedures and processes for, *inter alia*, resolving disputes that may arise between a licensee and a landowner in order to satisfy the public interest in the rapid roll out of electronic communications networks and facilities.[8]

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[6] Section 70 only dealt with fixed line telecommunication operators. The ECA extended the provisions to include licensees such as the first respondent who did not provide fixed line telecommunications services.

[7] Section 97 of the ECA read with the Schedules of that Act.

[8] It is common cause that these guidelines referred to in section 21 have still not been developed. In an unreported decision of the High Court of the Transvaal Provincial Division namely, *Telkom SA Ltd v Born Game Wild Game Lodge CC delivered on* 6 February 2001;

[21] What is significant is that although neither s.21, nor s.22 of the ECA refers to regulations as s.69 of the Telecommunications Act does, s.21 refers to "guidelines"[9] and s.22(2) refers to "applicable law". According to the first respondent the term "*applicable law*" is confined to environmental type laws such as the laws relating to nuisance, etc and does not include property laws such as the law relating to trespass, ownership, landlord and tenant, expropriation or compensation, etc. The argument being that if the term, i.e. "*applicable law*", is not confined to environmental type laws and is extended to include other laws, s.22(1) of the ECA would be rendered nugatory.

[22] The difficulty I have with the first respondent's interpretation of the term "*applicable law*" is that if it was to be confined to environmental type laws there is nothing that prevented the Legislature from saying so expressly. Instead reference is made to "*applicable law*". The term is not defined in the ECA. However, the term "*law*" is defined in s. 2 of the Interpretation Act[10] as meaning "*any law, proclamation, ordinance, act of parliament or other enactment having the force of law*". That meaning may be given to the term "*law*" as it is used in s. 22(2) of the ECA, unless there is something in the language, or context of s. 22, which is repugnant to the definition in the Interpretation Act or if the contrary intention appears from the ECA. In my

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Case No. 4057/00, in dealing with sections 69 and 70 of the Telecommunications Act in circumstances where the regulations including the procedures referred to in section 69 had not been promulgated at the time of the decision, the court held that the failure to promulgate the regulations did not result in the suspension of the operation of the provisions to which section 69 related i.e. including section 70. The court in that regard referred and relied on the decision of *Vorstappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D&CLD).

9 Including "processes and procedures".

10 Act 33 of 1957

view, the meaning given to the term in the Interpretation Act may be applied here.

[23] The term, "*applicable*", restricts and further defines the term, "*law*". The "*applicable law*" is that which is applicable to the action which is intended to be taken by the licensee in terms of s. 22(1) of the ECA. Thus, for example, if the action the licensee intends to take is to go on to someone's land, there are other applicable laws, such as laws relating to ownership, the law of trespass, etc., for which due regard must be had. In my view the term "*applicable law*" is not confined to "*environmental type*" laws, but refers to all laws (i.e. as defined in the Interpretation Act) that are applicable to the intended action and may include laws, whether statutory or common, relating to ownership, trespass, expropriation, legislation such as the Administrative Justice Act[11] (PAJA), etc. and the Constitution, depending on the nature of the action which the licensee intends to take in terms of s. 22(1)[12].

[24] Section 22(2) requires the licensee to have "*due regard*" for the applicable law. This term can mean nothing less than that the licensee must respect and comply with those laws. It certainly does not mean a mere acknowledgement of the law short of compliance. This interpretation of s. 22(2) does not render nugatory the provisions of s. 22(1), but is consistent with an intention not to allow arbitrary action on the part of licensees and acknowledges the rights of others affected by the action contemplated in s. 22(1). Section 21(2)(b) of the ECA clearly supports and confirms this. That

[11] Act 2 of 2002

[12] If the action contemplated is "administrative action" as defined in section 1 of PAJA then PAJA will be applicable.

section acknowledges that disputes may arise between licensees and landowners including regarding the action taken or intended to be taken by licensees in terms of s. 22(1) and contemplates the development and existence of guidelines, including processes and procedures, for the resolution of such disputes.

[25] Thus, in my view, even if it could be contended that s. 22(1) authorises some form of deprivation[13] it most certainly does not authorise arbitrary deprivation of property[14]. Section 21 of the ECA clearly envisages fair procedures and processes to be put in place to facilitate any action authorised by s. 22(1). It is accepted that any administrative deprivations of property have to be fair and must comply with the procedural prescripts of the relevant administrative justice provision.[15]

[26] The absence of the guidelines including the procedures and processes envisaged in s. 22(1) of the ECA is significant. I do not subscribe to the contrary view. The procedures and processes are clearly intended to facilitate due process and prevent arbitrary action on the part of licensees. Their absence most definitely complicates the position of licensees and landowners.

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[13] Compare what was held in the Born Wild case (supra) regarding the Telecommunications Act.

[14] See the meaning given to the term "arbitrary" in s. 25 of the Constitution in: First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance 2002 (4) SA 768 (CC) at par. [100]

[15] If the action to be taken satisfies the definition of "*administrative action*" as defined in the Administrative Justice Act 2 of 2002 (PAJA) it would have to comply with the due process requirements of that enactment i.e. in the absence of any other fair procedure (s.5). Also compare Chaskalson *et al Constitutional Law of South Africa* 31-11.

[27] Licensees are not confined to public state organs but include private concerns which mainly have profit as a motive. To interpret s. 22 to mean that such a private licensee may enter upon and/or encroach on any land and construct and maintain its communication network or facilities on any private land of its own will or at its own behest, without a fair process and without taking into account the rights, *inter alia*, of the owner of that land in terms of the applicable law, is draconian and allows for arbitrariness which the Constitution does not countenance. The rationale for the proviso in s. 22(2) is to prevent arbitrariness in the action of licensees in terms of s. 22(1).

[28] Having due regard to the "*applicable law*" and by implication to the rights and entitlements of others in terms of those laws, in the context of the action which the licensee envisages is to be taken in terms of s. 22(1), does not render nugatory the provisions of s. 22(1). The proviso contained in s. 22(2) ameliorates the crudeness of s. 22(1) and brings s. 22(1) in line with the dictates of the Constitution. The Constitution does not countenance arbitrary action. Section 25(1) of the Constitution, for example, provides explicitly that there shall be no deprivation of property except in terms of a law of general application and that no law may permit arbitrary deprivation of property.

[29] The mere fact that s. 22(2), in my interpretation of that subsection, acknowledges, albeit by implication, the right of the landowner to refuse to agree to a licensee establishing its communication installation or facilities on its land does not undermine the objects of the ECA. The objects of the ECA are subject to the Constitution. Thus s. 21(2)(b) anticipates disputes between

licensees and landowners and the need to provide for guidelines, including procedures and processes for the resolution of such disputes in order to satisfy the public interest in the rapid roll out of electronic communications networks and facilities. An interpretation of s. 22 of the ECA that a licensee may, subject to its own whim and fancy, occupy another's land with its installations or facilities irrespective of, or without due regard for that person's (or entity's) rights, and without a fair procedure in terms of the applicable law, is unreasonable. Section 39(2) of the Constitution constrains a court, when interpreting any legislation, to interpret it so as to promote the spirit, purport and objects of the Bill of Rights. In my view s. 22 in its context is capable of an interpretation that is in line with the Constitution. The section does not countenance arbitrariness.

[30] It is of significance that the ECA, which extended the entitlement previously confined to fixed line operators (in terms of s. 70(1) of the Telecommunications Act), to other kinds of licensees, (including the first respondent), through the provisions of s. 22(1)[15] includes the proviso in s. 22(2), that in taking the action contemplated in s. 22(1), due regard must be had to, *inter alia*, the applicable law.

[31] The proviso is s. 22(2) is mainly directed at the licensee who intends to take the action contemplated in s. 22(1). Such a licensee must have regard to the applicable law. Section 22 does not authorise action where no regard is

[15] It is very much the same in wording as s. 70(1) of the Telecommunications Act.

had for the applicable law. The right to take the action contemplated in s. 22(1) is dependent upon and inextricably linked to the obligation in s. 22(2).

[32] Now to turn to the facts of the present case. As a general starting-point, the applicant as owner, in terms of the law and subject to limitations, is entitled to occupy all of its land and in its discretion allow others, *inter alia*, to occupy such land. Ordinarily therefore, the applicant may eject anyone who occupies its land without its consent, unless that occupier has a right or legal entitlement to occupy the land. The first respondent clearly does not have the applicant's consent to retain the base station on the property. From the history, summarised earlier, it is clear that the first respondent had come to construct and maintain the base station on the property with the consent of and by agreement with the applicant's predecessors- in- title to the property and more particularly in terms of lease agreements that it had concluded with them. In its answering affidavit the first respondent mentions that s. 70 of the Telecommunications Act did not afford or grant it the same rights as a fixed line operator and that it was therefore obliged to enter into leases with the previous titleholders. One must bear in mind that even though the ECA came into operation on 19 July 2006 it does not appear that the first respondent, at any stage prior to the 30th of June 2009, sought to rely on s. 22 of the ECA. It refers to and places reliance on that section for the first time in the letter dated the 30th of June 2009 that was e-mailed to the applicant's attorney after the first respondent had (apparently) changed its mind about moving the base station from the property. It is not entirely clear from the papers what the reason for this change of mind was.

[33] The continued occupation of the property by the first respondent is based purely on its will and purportedly (since 30 June 2009) in reliance on s. 22 of the ECA, alternatively, in terms of an implied monthly lease, which it avers, has not been terminated. As I have concluded, s. 22 does not authorise arbitrary action on the part of licensees, nor does it allow deprivation without fair or due process. The first respondent's reliance upon s. 22 is, in my view, misplaced and based on a misconception of that section. Section 22 does not authorise occupation of the property based simply on the will of a licensee. The first respondent has provided no motivation why the property, in particular, has to be occupied and no other. Earlier on the first respondent appeared to be quite willing to move the base station from the property to an alternative location. An arbitrary deprivation is illegal and cannot serve as a defence against the landowner's enforcement of its rights. In any event, on the first respondent's own version it did not have due regard for the applicable law when purporting to act in terms of s. 22(1) of the ECA. The "applicable law" is not confined to the environmental laws. Having failed to identify the "applicable law" first respondent cannot be said to have had due regard for it as envisaged in that section. In the absence of a due regard for the applicable law the first respondent's purported action in terms of s. 22(1) is unlawful. The action cannot be lawfully taken if there has been no regard for the applicable law. The absence of a fair process or procedure is detrimental to the lawfulness of the action of the first respondent.

[34] I have raised with the parties, and in particular the applicant and the first respondent, the question whether the provisions of s. 25 of the ECA were applicable here.[17] Both parties in writing submitted that s. 25 is not applicable and have not relied on that section. As a consequence I shall not comment further on it.

[35] The first respondent's contention that there is a tacit monthly lease in place and that the applicant at no stage cancelled that lease, is also flawed. Firstly, the facts do not support the coming into existence of a monthly lease particularly after the first respondent intimated that it was indeed moving its base station from the property. There was never any agreement between the relevant parties regarding, *inter alia*, the rental. The failure to conclude an agreement was the very reason why the first respondent initially opted to move from the property. After the first respondent's change of mind about moving from the property, there was similarly no consensus regarding the first respondent's continued occupation of the property and the rental payable. In the absence of consensus there cannot be a lease. The foisting, by the first respondent, of its will upon the applicant, including regarding the rental payable, did not result in the conclusion of a lease, even of a monthly one.

[36] Briefly, regarding the first respondent's point that the applicant ought to have made specific averments concerning s. 22 to sustain the cause of action for the relief sought by it, I do not agree with that submission. The applicant

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[17] In particular the applicability of section 25(4) *et seq*.

has made adequate averments[18]. It was for the first respondent to aver its entitlement to retain the base station on the property and that included reliance upon any rights in terms of s. 22 of the ECA. As I have mentioned, the first respondent's reliance on s. 22 in the circumstances of this case cannot be sustained.

[37] The first respondent requested that it be allowed more time (nine months) to remove the base station from the property in the event of it being ordered to do so. The applicant has opposed the request and contends that the first respondent has had adequate time to do so. The applicant submits that on the 16th of January 2009 the first respondent had advised that it was removing the base station from the property and that it required ten months to do so. Since then many months have passed. The applicant submits that 30 days from the date of the order would be adequate. In its answering affidavit the first respondent mentions that the base station is substantial and not capable of being moved easily or speedily. It says that it still has to find an alternative site and also mentions that it has certain specified obligations in terms of the ECA (read with the Regulations made in terms of that legislation) regarding the service it provides via the base station and that it cannot simply suspend that service pending the relocation of the base station. The deponent to that affidavit says that the relocation exercise "*will of necessity take a number of months*". He says that it is estimated that it would require nine months. But for the applicant's submissions that I have referred to, it has

[18] Compare, *inter alia*, Unimark Distributors (Pty) Ltd v Erf97 Silvertondale (Pty)Ltd 1999 (2) SA 986 (T) at996A-B;1011 A-B; Hartland Implemente (Edms) Bpk v Enal Eiendomme BK 2002 (3) SA 653 (NC) at 664D-F; Chetty v Naidoo 1974 (3) SA 13 (A) 20D; Krugersdorp Town Council v Fortuin 1965 (2) SA 335 (T).

not gainsaid that it would take nine months for the first respondent to relocate the base station. There is accordingly no basis to deny the request of the first respondent, particularly if its continued occupation pending final removal is on the basis that it continues to make payment to the applicant, subject to the applicant's right to claim from it any damages which the applicant might or may have sustained or shall sustain as a result of the first respondent's occupation of the property with the base station. I am not thereby making a finding that the amount that the first respondent is paying for occupying the property is adequate or reasonable. It is open to the applicant to prove that the amount is inadequate or unreasonable and, if so advised, to claim the difference as damages.

COSTS

[38] As regards the constitutional issue, the third respondent did not seek any costs. The applicant's attack on the constitutionality of s.22 of the ECA was couched in the alternative and subject to the court making certain findings regarding the meaning to be given to that section, in particular the proviso contained in s. 22(2). The first respondent raised s. 22 in defence to the applicant's application that it be ejected from the property. The applicant was entitled to respond to that defence, including by challenging the constitutionality of s. 22 insofar as it was, in essence, contended that it allows for action that is arbitrary. The main issue was the first respondent's continued occupation of the property. In the light of the conclusion I reached on that issue, namely that the first respondent had no right to continue to

occupy the property, and taking into account all the facts before me, the applicant is entitled to the costs of the application.

[39] In the circumstances I grant the following order:

1. The first respondent is ordered to forthwith commence with the removal of its base station, including the cellphone tower and all its other equipment, from the property described as "the Remainder of the Farm Langgewacht No. 235, Registration Division HT, Province of KwaZulu-Natal" ("*the property*") and to complete such removal by no later than nine months from the date of this order.

2. Pending the final removal of the base station from the property the first respondent is to continue to make monthly payment to the applicant of an amount no less than the amount presently being paid to the applicant in consideration for the base station, inclusive of the tower and equipment, being on the property, but subject to the applicant's right to claim any damages from the first respondent which the applicant has suffered or may still suffer as a result of the base station being on the property.

3. The first respondent is ordered to pay the applicant's costs of the application.

P COPPIN
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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COUNSEL FOR THE THIRD RESPONDENT WITH HIM	ADV V S NOTSHE SC ADV P NOBANDA
INSTRUCTED BY	THE STATE ATTORNEY JOHANNESBURG
DATE OF JUDGMENT	15 February 2011