IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: 7748/2017

In the matter between:

DARK FIBRE AFRICA (PTY) LTD Applicant

And

THE CITY OF CAPE TOWN Respondent

JUDGMENT: 14 December 2017

DAVIS J

Introduction

[1] The applicant ("DFA") is a licensee in terms of s 22 (1) of the Electronic Communications Act 36 of 2005 ("ECA"), legislation which confers upon it a public servitude. Exercising this right as a licensee, DFA has installed fibre optic cables in underground ducts or pipes, through which it sells broadband access. Some of these pipes are installed under roadways and sidewalks in the road reserve on land, owned by the respondent ("the City"). It appears that DFA's method includes digging of trenches in sidewalks to install these ducts through which the fibre optic cables run.

[2] On 30 May 2016, DFA informed the City that certain conditions, which the City had inserted in his wayleaves, including those related to the payment of a roadway trenching deposit, were unacceptable and it would refuse to accept these

conditions. On 13 January 2017 DFA declared that the roadway trenching deposit would not be paid by it and that it would commence with construction without abiding by this condition.

[3] On 06 February 2017, it notified the City of its intention to construct a fibre optic route in the City's road reserve in Durbanville. It invited the City 'to comment on the contemplated construction, which comments will be considered by DFA', and it provided that, if the parties failed to reach consensus on practical matters relating to the construction within 30 days, it would commence with the proposed construction.

[4] On 16 February 2017, the City granted DFA a wayleave and a work permit containing its standard conditions for this project. When it received the documents, DFA crossed out four conditions, including the requirement to pay roadway trenching deposits. In correspondence with the City, DFA reiterated its refusal to pay these deposits and declared that it alone would decide whether to trench a roadway. It adopted the position that it did not require a wayleave from the City to construct this network. The City pointed out that it had never used the wayleave process to deny DFA a right to enter the road reserves, but that s 22(2) of the ECA required DFA to comply with applicable law, including its bylaws. In exercising its rights, the City requested DFA to adhere to its conditions, which the City claimed were designed to protect the public and the City from unsafe and damaging practices.

The critical questions

[5] Following upon this summary of the facts, there are four questions which require determinations from this court:

1. may the City impose on a statutory licensee installing electronic communications networks the conditions in issue in this matter;
2. may the City invoke its budget setting powers to do so in particular to demand deposits, one of which is not refundable from the applicant;
3. may the City demand in separate conditions two 'deposits', one of which is not refundable?
4. may the City impose a condition which includes a right to levy a future tariff, which it justifies as a measure to 'disincentive' the use of trench digging for the purpose of laying cables?

These conditions flow from the amended notice of motion, granted in terms of an interlocutory application, which, to the extent relevant, reads thus:

> 'Interdicting the respondent from enforcing, prescribing or imposing conditions on any works carried out by the applicant in constructing or maintaining any electronic communications network within the area of jurisdiction of the respondent that are similar to the conditions imposed by the respondent in:
>
> (b)(i) paragraphs 1(b), 1(c), 1(d), 7 and 11 of the wayleave approval issued by the respondent under reference number BW/075/2017 on or about 16 February 2017; and
>
> (b)(ii) the first sentence of paragraph 1(f) of the permit to work issued by the respondent under reference number BW/075/2017 on or about 16 February 2017.
>
> or from interfering in such works on the basis of such conditions.
>
> (b)A. The conditions imposed by means of:

(b)A.1 paragraphs 1(b), 1(c), 1(d), 7 and 11 of the wayleave approval issued by the respondent under reference number BW/075/2017 on or about 16 February 2017; and

(b)A.2 the first sentence of paragraph 1(f) of the permit to work issued by the respondent under reference number BW/075/2017 on or about 16 February 2017

are reviewed and set aside in terms of s 6 read with s 8 of PAJA.'

Thereafter, the notice of motion includes further prayers which follow the subject of this application, to the extent that the DFA suggests that they may be necessary in order to grant the relief as set out in prayers (b) and (d) A, reproduced above.

The conditions

[6] The amended set of relief needs to be read with the wayleave approval for the proposed construction work of DFA of 16 February 2017 as issued by the City. When it granted the wayleave application, the City made it the subject to a series of conditions, four of which were deleted by DFA and which in turn, as indicated, are the subject matter of this dispute. These are:

1. Payment of refundable or nonrefundable deposit which must be paid prior to the issuing of any wayleave/permit together with a trench reinstatement deposit; further
2. a reservation by which the City reserves a right to impose a tariff charge in respect of the use of City land for the installation of telecommunications infrastructure; and
3. a condition which provides that, should these services (or part thereof) have to be relocated for whatever reason as determined return by the

City then these service owners will immediately do so at no cost to the City.

In the founding affidavit deposed to by Mr van Deventer, on behalf of applicant, it is suggested that these conditions;

1. do not constitute applicable law to which DFA has to have regard as envisaged by s 22 (2) of the ECA and have no bearing on the manner in which DFA will be executing its works;
2. amount to discretionary requirements by the City, entirely unassociated with any bylaw related to the actual execution of the works.

The relevant legislation

[7] Section 22 of the ECA provides:

'**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.'

[8] The critical question in this case, which unlocks much of the dispute, is the meaning of s 22 (2), in particular the phrase 'due regard must be had to applicable law and the environmental policy of the Republic'.

[9] This section has been subjected to intensive judicial scrutiny in *Tshwane City v Link Africa and others* 2015 (6) SA 440 (CC). The importance of this judgment to the present dispute requires that it be afforded careful analysis. The facts were briefly thus. In 2013 *Link Africa*, a network license holder and operator under the ECA, notified Tshwane City that it planned to run fibre optic cabling through the latter's underground infrastructure. At some point, Tshwane City sought to interdict this activity. The High Court found that s 22 did not require the consent of the Tshwane City and, further, it was doubtful that the Tshwane City was a bearer of rights under s 25 of the Constitution of the Republic of South Africa, 1996, being the property clause.' Further, it found that s 22 of the ECA did not authorise the arbitrary deprivation of property. What Link Africa proposed to do was for the benefit of Tshwane City residents and did not constitute a deprivation.

[10] The dispute finally reached the Constitutional Court. In their majority judgment, Cameron and Froneman JJ held that the real dispute before the court was not about entry without consent but about the common law rights of a property owner confronted by a public servitude over his or her land. See para 110. This observation then brought the court to an examination of the ECA in general and s 22 in particular. The court found that s 22 effectively created a public servitude and that 'the rights s 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.' (para 142)

[11] Then comes a judicial caveat: '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 Hollmann, the exercise of the servitude is subject to the important condition that incidental rights must be exercised "civiliter". This court has embraced the principle that rights over the property of another must be exercised *civiliter modo*.' (at 142-143)

[12] Translating this to the facts of the *Tshwane* case, Cameron and Froneman JJ said: '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 a path away from co-signing important statutory provisions serving a vital public function, to oblivion.' (para 144)

[13] In further distilling the general principles which flowed from this analysis, the two learned justices said the following:

> '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.

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. 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.

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 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, or by way of adjudication. Access to the property in the absence of resolution will be unlawful.' Paras 150-152

[14] The judgment then turned to deal with the power and duties of municipalities. In this connection the following paragraph in the judgment is relevant:

'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 Ch 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 Ch 7 of the Constitution to determine whether it really has that constitutional competence.

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.' para 185-186

[15] Finally, the following conclusion holds significance for the present dispute:

'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.' Para 189

[16] It is clear that in *Link Africa*, the City of Tshwane failed to make out a case that any of its competencies under the relevant constitutional legislation had been infringed. But this alone does not answer the key question as to what is meant by the statement that bylaws may not thwart the purpose of the ECA by requiring the municipality's consent.

[17] On behalf of the City, Mr Budlender, who appeared together with Mr Paschke, submitted that what was meant by this phrase, read in the context of this dispute, was that a bylaw could not provide that a right granted under the ECA to a licensee to access another person's land could be made subject to the consent of the landowner. He submitted that a municipality may impose its own conditions to deal with matters within a municipality's specific legislative competence but which did not negate the essential content of the statutory public servitude right enjoyed by the licensee.

[18] In this connection, he referred to the judgment in *Maccsand (Pty) Ltd v City of Cape Town and others* 2012 (4) SA 181 (CC). In this case, the court was required to deal with the interplay between the Mineral and Petroleum Resources Development Act 28 of 2002 ('MPRDA') and Land Use Planning Ordinance 15 of 1985 ('Lupo'). The issue was whether the application of LUPO ended once the grant of a mining right and permit had been given to a party in terms of the MPRDA. The Constitutional Court found that there was no conflict between these two pieces of legislation because they were concerned with different subject matters. The exercise of a mining right granted in terms of the MPRDA was subject to the provisions of LUPO. See para 51 of the judgment.

[19] The argument of the City did not entail that a valid decision by DFA under the ECA to install its service could extend to action by the latter which was in breach of applicable municipal law. Such a conclusion would run against the approach which had been adopted in *Maccsand supra*. The City could impose conditions on licensees in terms of valid laws which the Constitution provided the City a legal power to administer. When the City exercised its rights in terms of s 22 (1) and 24 of the ECA, a licensee must comply with these laws when it exercised its own rights granted pursuant to the provisions of the ECA.

[20] There was some suggestion from Mr. Gauntlett, who appeared with Mr. Pelser on behalf of DFA, that this description of the law needed to be qualified in the light of a decision in *Msunduzi Municipality v Dark Fibre Africa* [2014] ZACA 165 (SCA). However, this case appeared to turn on a municipality seeking to interdict the construction of an underground fibre optic network cable along certain streets within its jurisdiction, following the exercise of rights obtained by the licensee in terms of the ECA. This judgment does not constitute authority for the proposition that a municipality may not impose its own conditions which deal with matters within the municipality's specific legislative competence where the exercise thereof does not negate the statutory public servitude of the licensee in terms of the ECA.

[21] To the extent that in paragraph 21 of the judgment in *Msunduzi, supra* there is a *dictum* which suggests, that a provision that a party, such as the applicant in this case, cannot dig on the municipality's roads and thoroughfares without permission of the City Engineer would fall 'foul of the principle that applicable law may not be used to limit the very act authorised under s 22', this finding appears to be

inconsistent with the approach adopted later by the Constitutional Court in *Link Africa, supra*.

[22] Having found that a municipality's powers need to be reconciled with rights under s 22 of the ECA, it is now necessary to evaluate the legal justifications upon which the City purported to act.

The legal basis by which the City can act pursuant to a license in terms of s 22

[23] In order to understand the context of the City's action, it is necessary to define a wayleave which is central to the impugned decision of the City. It is 'a right of way granted by a landowner, generally in exchange for payment and typically for purposes such as the erection of telegraph wires or laying of pipes'. Thus it is, in essence, a contract which reflects a landowners agreement that a licensee may use its land which it may specify the conditions attached to such agreement.

[24] There are, as indicated earlier in this judgment, four conditions which are the subject of the present dispute. The question arises as to whether the City has a legally justified rightin imposing these conditions.

[25] In his supplementary affidavit, on behalf of the City Mr. Henry Du Plessis the Director: Asset Management and Maintenance in the Transport and Urban Development Authority of the City of Cape Town justified the imposition of the four disputed conditions as follows:

> '**Conditions 1(b) / 1(c) and part C of Chapter 66 of the City's 2017/18 Tariff Book**

Conditions 1(b) / 1(c) of annexure F1 (p49) comprise a single deposit intended to disincentive trenching roadways, and where trenching takes place, to provide part of the compensation to which the City is entitled for the inherent degradation of the structural integrity of the pavement.

This pair of conditions states:

b) Refundable deposit:

Local Roads = L X Approved Tariff/ m (VAT not charged)

Metro Roads = L X Approved Tariff/ m (VAT not charged)

(Tariff Description: Refundable Deposit for the prevention of trenching across roadways: Local Roads / Metro Roads)

c) Non-refundable deposit:

Local Roads = L X Approved Tariff / m (VAT charged)

Metro Roads = L X Approved Tariff / m (VAT charged)

(Tariff Description: Refundable Deposit for the prevention of trenching across roadways: Local Roads / Metro Roads. However: The tariff becomes vatable when the deposit is forfeited in the event when trenchless technology was not used)'

…

For a licensee which has not provided a guarantee, conditions 1(b) / 1(c) operate as follows:

1. The deposit (excluding VAT) contemplated in condition 1 (b) is payable before construction commences.
2. If after construction, the City confirms that a trenchless method was used for road crossings, then the deposit is refunded within a reasonable time.
3. If a trench must be used for a road crossing, the license is permitted to dig the trench but then the deposit is not refunded. In that case, the deposit becomes vatable. This is what is contemplated in condition 1(c).'

[26] Mr. Du Plessis continues:

'As I have explained, the tariff in Part C of Chapter 66 (and conditions 1(b) / 1 (c) which give effect to it) is intended to disincentivise (or discourage) trenching across roadways because of the harm that such trenches cause. The tariff provides licensees with a financial incentive (refund of the deposit) to use trenchless technologies where feasible and safe. Disincentivisation of roadway trenching serves rational, reasonable and legitimate purposes.

As explained in the City's answering papers, the City accepts however that roadway trenches are sometimes necessary. In such cases, the City approves applications for roadway trenches.

Hence, conditions 1 (b) / 1 (c) do not prevent DFA from installing its network and do not thwart the purposes of the ECA. They do not make a licensee's access to the City's land dependent on the City's consent and they do not purport to empower the City to refuse consent.

When roadway trenching takes place, the deposit is 'forfeited'. In other words, according to condition 1 (c), the deposit is 'non-refundable' in the event of roadway trenching. This payment provides part of the compensation to which the City is entitled for the inherent degradation that roadway trenches cause to the structural integrity of the pavement. The payment contributes to increased future road maintenance costs and compensates the City for the reduction in the road's lifespan.

The amount of the payment in condition 1 (c) is based on the costs of directional drilling (the road crossing method which it incentivises) and the likely disadvantages to the City of roadway trenching (the road crossing method which it disincentivises).

The disadvantages to the City of roadway trenching include (i) increased maintenance costs; and (ii) when the pavement fails, the costs of completely repairing the affected portion of the road.

Increased maintenance in (i) includes resealing the joint between the reinstated and pre-existing asphalt, repair of cracks, the repair of potholes, traffic accommodation, administration, supervision, and procurement. These maintenance tasks must be performed in addition to the complete repairs which will also be required.

The inherent degradation of the structural integrity of the pavement will require a complete repair about twice in the life cycle of the road. Even though many roads in the City are not new, this is a conservative assumption – especially considering the poor quality of reinstatement work typically performed by licenses, including DFA. As mentioned in the City's answering papers, roadway trenches reinstated by DFA are already showing signs of failure, in some cases less than 12 months after reinstatement.

A complete repair includes the cost of: breaking open the road; removing compromised materials from the trench and deposing of them; new materials for the subgrade, base, and surface layers; reinstating and compaction of the new layers; compaction testing and control; traffic accommodation; overheads; administration; supervision; and procurement. These costs are higher per linear meter for the repair of a failed trench (which is an ad hoc, small project) than for a new road construction (which has economies of scale).

The difference in the costs for the two types of road is because, compared with a Local Road, the pavement of a Metro Road has a significantly higher construction standard and thickness and there is a greater cost of accommodating traffic on a Metro Road.'

[27] Turning to the further condition referred to as 'compensation reservation', in terms of which the City reserves the right to impose a tariff charge in respect of the use of City land for the installation of telecommunication infrastructure, Mr. Du Plessis says:

'The facts in relation to compensation are the following

1. It would take considerable time to determine compensation on a case-by-case basis for each of the 5,000 wayleaves per year across Cape Town. The City lacks the capacity to do so.
2. If the City had to attempt to determine compensation on a case-by-case basis the City would be unable to grant wayleaves nearly as efficiently as it currently does. The process could grind to halt and overwhelming backlogs could develop.
3. Since a licensee may not lawfully access land before an agreement is reached on compensation (or failing that adjudication), a case–by-case method for determining compensation is highly impractical and is likely to thwart the ECA's purpose of promoting the rapid deployment of electronic communication facilities.
4. As mentioned in the City's answering papers, the City has attempted to engage with DFA about a reasonable and practical method for determining the amount of the compensation payable by DFA. The City invited DFA to make proposals on a methodology for determining compensation and proposed an information exchange.
5. DFA has failed to respond. It refuses even to acknowledge that in principle it is liable to pay compensation for use by DFA of the City's land.
6. The City is currently engaging with all licensees which are active in Cape Town on the process for determining compensation payable to the City. Subject to input received from licensees (those which are open to engagement) the City is currently minded to formulate an appropriate formula or tariff which takes consideration of all relevant considerations. It could provide for exceptions in special cases, and would therefore not necessarily have to be a one-size-fits-all approach. In short, the City intends to draft a formula, which may or may not be incorporated in a tariff, which enables the efficient determination of compensation which is rational, reasonable and proportionate.

7. A licensee which disputes the amount of compensation payable in a particular case will be able to resolve the dispute in an appropriate forum. This might be by way of appeal, arbitration, review or adjudication.'

[28] With regard to the question of relocation costs, Mr. Du Plessis pointed out that, in its indemnity of 15 March 2010, DFA consented to this arrangement and signed the acceptance of the relevant paragraph of the City's standard conditions. Since June 2012, he contends that DFA had thus waived whatever statute right it might have had in terms of s 25 (1) of the ECA to require the City to pay the relocation costs.

[29] I have cited at length from this affidavit because these justifications, as offered by the City, are the prism through which to examine DFA's case to which I now turn.

DFA attack on these conditions and the justification therefrom

1. <u>The refundable deposit</u>

[30] Mr. Gauntlett submitted that the City had considerable difficulty in finding a legal basis for the imposition of this deposit which would withstand legal scrutiny. Mr. Gauntlett turned to the City's reliance on s 11 (1) (b) of the Street Bylaws, which prohibits a person 'making or causing to be made an excavation or digging or causing to be dug a pit, trench or hole in a public road… other than in accordance with the requirements prescribed by the City.'

[31] He submitted that what had occurred in this case was the imposition, of conditions on an *ad hoc* basis as opposed to providing in advance a specific requirement demanded of a party.

[32] Referring to the meaning of the word 'prescribed' as contained in s 11 (1) (b) of the relevant bylaw, Mr. Gauntlett contended that this word had a clear meaning as evidenced in the approach adopted in *Goldberg and others v Minister of Prisons and others* 1979 (1) SA 14 (A) 48 B:

> 'the word "prescribed" in that sub-regulation means a previous ordering or ordaining and not an *ad hoc* determination (*cf Read v SA Medical and Dental Council* 1949 (3) SA 997 (T) at 1009 and 1013), and that the sub-regulation, therefore, contemplates rules or guidelines laid down by the Commissioner which would be implemented by, inter alios, the officials charged with the task of censorship.'

[33] Even if the City had prescribed general conditions, these could not 'thwart the purpose' of s 22 (1) of the ECA. Mr. Gauntlett then turned to the further justification proffered by the City, namely the effect of s 75 A (1) (a) of the Local Government: Municipal Systems Act 32 of 2000 which provides:

> (1) A municipality may-
>
> (a) levy and recover fees, charges or tariffs in respect of any function or service of the municipality; and
>
> (b) recover collection charges and interest on any outstanding amount.

[34] Mr. Gauntlett submitted that the City is not authorised to impose tariffs on service providers instead of service users. DFA cannot be subjected to tariffs when it is required to construct a network upon, under or over a street. The street is not a conduit used beneficially by a licensee for its intended purpose, namely vehicle traffic. Streets impede the provision of the service which the Act authorises. Accordingly, the City is not entitled to invoke s 75 A to justify the imposition of this condition.

[35] Mr. Gauntlett also attacked the manner in which the various conditions duplicated themselves. The City had contended that the refundable deposit was designed to prevent trenching. But the second condition simultaneously serves the same object, the third condition simultaneously provided for a 'trench reinstatement' and the fourth purported to reserve a power to exact compensation by tariff in the future. In his view, no legitimate governmental objective identified by the City was served by the simultaneous imposition of all four conditions.

[36] A further fundamental objection raised by DFA on the facts is that trenching was sometimes unavoidable if a party such as DFA is to perform that for which it has been licensed under s 22(1) of the ECA. The impugned conditions 'are in clear violation of the principles that had been laid down in the *Link Africa* case; that is they thwart the rights of DFA. If the street bylaw is analysed it was clearly intended to be applied to deal with ordinary cases of disorderliness not to prevent licensees authorised by national legislation such as the ECA to perform important public functions.

[37] Mr. Gauntlett contended, contrary to the City's assertions, that DFA had been instructed to stop trenching, on pain of incarceration. Further, an essential purpose of the ECA is to provide networks to people living, for example in Kraaifontein, that is in disadvantaged as well as sub economic neighbourhoods. Thus there was no justification that the so called disincentivisation condition was proportionate to the corresponding advantages and disadvantages claimed by the City. There was, in short, no proportionality between the objective of the condition and its effect.

[38] Mr. Gauntlett submitted that trenching a street in Kraaifontein is 'not the road to riches which the City assumes'. Instead, DFA suffered a loss of R 11 million for the period during which the City sought to prevent the Kraaifontein project. Therefore the City's attempt to share in supposed profits by purportedly imposing an additional form of tax on DFA when it provides a public service was illconceived.

[39] To the argument raised by Mr Du Plessis that 'road way trenches reinstated by DFA are already showing signs of failure in some cases less than twelve months after installation' Mr. Gauntlett referred to an affidavit deposed to by Mr. Kevyn Weber a director of Kevyn Weber Consulting Engineers (Pty) Ltd ('KWCE'). Mr. Weber described how KWCE was appointed by DFA, *inter alia*, to do quality assurance on construction work to ensure that the City is satisfied with the standard of work completed:

> 'KWCE acts as an intermediary between the contractor and the City. For example, where a road requires to be trenched, as indicated by the circumstances, KWCE will compile a report to the City to obtain approval to trench rather than drill at the location.'

[40] The City then conducts an inspection of DFA routes together with KWCE and, if satisfied, accepts the completed works. Then 'the City takes over the reinstatement and remedial work done by the DFA contractor'. DFA rather than the City was liable for the period up till twelve months after conducting the work to repair any defects that might have arisen. Thus the alleged 'poor quality of reinstatement work' to which the City referred, is not legitimately dealt with by imposing an additional trench condition in that there was already a timeline month defect liability provision.

[41] Turning to the non-refundable deposit, Mr. Gauntlet submitted that the City had conflated two conditions. The second condition was, in effect, the same as the first condition. It served no legitimate independent purpose and was thus irrational and liable to review. In short, the second condition stands and falls with the first because the City did not advance any independent justification.

The trench reinstatement deposit

[42] Mr. Gauntlett submitted that this condition was not authorised by law because it purports to provide for "pre-emptive damages". No mechanism was provided for the determination thereof. Nothing in any of the statutory provisions invoked by the City, in his view, permitted the latter to impose obligations on a licensee, duly authorised, and hence required to carry out functions in terms of on the license which it possessed. Mr. Gauntlett submitted that the justification provided by the City in this connection revealed the irrationality of the condition.

[43] In the first place, it contended that 'the purpose of this condition is to cover the potential costs to the City of remedying any substandard reinstatement works'. But then the City went on to say that the purpose 'is for possible damages to the road reserve', resulting from a licensee performing substandard reinstatement works. Furthermore, the contention that the conditions imposed upon DFA because of examples of defective work performed by the latter were isolated incidents and representative of a record of 'substandard reinstatement work' conducted by DFA. The claim found no support, in the expert affidavit filed by the City which merely listed isolated incidents thereof. Furthermore, as it was the licensee's responsibility to repair defective reinstatement, there could be no more than "a probability" that

the City “may” have to incur the costs itself. At best, the condition was based on potential costs rather than the actual costs.

The reservation condition

[44] Mr. Gauntlett submitted that nothing in any statutory provision pleaded by the City permitted it to impose a condition reserving a stated right to impose a tariff charge ‘in respect of the use of City land for the installation of telecommunications infrastructure’. The City could not in law use its general budget setting powers to impose “tariffs” which were not really tariffs but rather the imposition of pre-paid “possible damages” or “deposits” from which, in an unregulated way it may “help itself”. The City could not employ general powers conferred for one purpose, being revenue raising, to achieve another purpose, however laudable that might be. Recourse to the tariff book was not sufficient because this self-evidently did not itself purport to impose fees, charges or tariffs.

The relocation of services

[45] The applicant's submission was that there was no statutory provision to justify this right. Mr. Gauntlett further submitted that the waiver had not taken place. In an email dispatched immediately, after the initial heads of argument were filed by DFA on 08 September 2017, DFA clarified its stance, namely that the purported imposition of the relocation costs condition was properly assailable as a public law act.

Evaluation

Streets bylaw

[46] As noted, section 11 (1) (b) of the Street Bylaw prohibits a person 'from making or causing to be made any excavation or digging or causing to be dug, pit, trench or a hole in a public road otherwise in accordance with requirements prescribed by the City'. There is nothing in the wording of this widely phrased provision which would indicate that a licensee falls outside the scope thereof. In respect of the *dictum* of Corbett JA (as he then was) employed by DFA in support of the meaning of 'prescribed', Mr. Budlender noted that this was a minority judgment and that the majority judgment in this case given by Wessels ACJ contained the following passage at 32 C-H:

> 'In my opinion the word "prescribed" is used in a non-technical sense and means no more than the Commissioner has determined the manner in which the appellants are to be treated.'

This *dictum* indicated clearly that 'prescribed means making known to the public by way of a publication in a newspaper or a government or provincial gazette, for example.'

[47] If the bylaw empowers the City to impose conditions in relation to excavation pits, trenches or holes, it would be difficult to conceive how it would know precisely the nature of any or all of these occurrences in every conceivable case. Furthermore, unlike the issue in *Goldberg, supra* which related to the Prisons Act, the Streets Bylaw does not contain a provision empowering the City to prescribe regulations which means that the word 'prescribe' cannot refer to 'a previous ordering or ordaining by way of regulations'. To the extent relevant, in s 20 (1) (a) of the Bylaw provision is made for the City, by written notice, '(to)allot any number to any premises in any public road and direct the owner of such premises to display the number allotted to

the premises and the City may also, in exceptional circumstances, prescribe the position where it is to be displayed'.

[48] As the word "prescribe" is used again in the same bylaw it indicates that the word "prescribed" read as a whole does not admit of the narrow interpretation advocated by DFA, but should be given a consistent meaning in the interpretation of the bylaw.

[49] Turning to the application of the Systems Act, Mr Budlender submitted that, among the matters constituting a municipal function and/or service contemplated in s 75 A (1)(a) of the Systems Act, are the provision and maintenance of structurally sound municipal roads in a financially sustainable manner, the protection of the municipal road infrastructure from degradation and damage, the provision of the road reserves for ducts, pipes and other facilities to facilitate the provision of services, the preservation of the value to the City of the land comprising the road reserve and widening realignment, re-levelling and other work on municipal roads to increase their capacity and maintain their function.

[50] The City was thus entitled to levy and recover fees, charges or tariffs in respect of any of these functions or services.

[51] It thus followed that the charges imposed in terms of s 75 A of the Systems Act are levied in respect of the City's function and service of providing roads together with the administration thereof. The DFA derived a benefit from the service, that is enabling it to use the City's roads for the purposes of its specific activity.

The impugned conditions

[52] The further question arises as to whether the City exercised its power in a justifiable fashion. For this reason, one must return to the various conditions which are the subject of the dispute. Conditions 1 (b) and (c) appears to operate as follows. A deposit (excluding VAT) as contemplated in condition (1) (b) is payable before construction commences. If it is clear that a trenchless method is used for the road crossing, the deposit must be refunded within a reasonable time. If a party such as DFA employs a trench method, then although the license is permitted to dig the trench based upon its license in terms of ECA, the deposit is not refunded and, further, this deposit becomes vatable.

[53] The City claims that the deposit is forfeited because it represents a part compensation to which the City is entitled for the inherent degradation that roadway trenches cause to the structural integrity of its roads. The payment contributes to the increased future of road maintenance costs and compensates the City for the reduction in the road's lifespan. Were this is not to be the case, ratepayers would be required to 'foot the bill', as opposed to the private party which has obtained significant financial advantages following upon it being a license holder in terms of s 22 of the ECA. There is thus no double payment in this case. One deposit is required: the deposit may be refunded if a trenchless method is used; if not, the deposit is retained by the City. Significantly, when one has recourse to Part C of Chapter 66 of the City of Cape Town 2017/18 Tariffs, Fees and Charges, it is made clear that there is a refundable deposit for the prevention of trenching across roadways. Under the remarks column, the following appears:

> ‘Payable upfront prior to issuing of construction permit to applicant where a public road reserve is being utilised for the installation of pipes, cable or ducting for water, electrical or communication services.’

In the remark section the following then appears:

> ‘This tariff is only applicable to external service infrastructure owners. The tariff becomes vatable when a deposit is forfeited in the event when trenchless technology was not used. The deposit will be refunded once each roadway is inspected to confirm a trenchless installation method where used in still pipes, cables and ducting. This deposit does not apply when a trench is required to be dug to a service situated below the road services running parallel to the roadway.’

[54] It is clear that conditions 1 (b) and 1(c) are coupled together and apply as one deposit with two potential outcomes, depending on whether trenching takes place. DFA made much of the phrase ‘Services rendered refundable deposits for the prevention of trenching across roadways’. But whatever the words employed in this description, when the text is read as a whole it is clear that trenching is not prevented. Trenching can take place. The deposit is only forfeited when an enterprise such as the DFA does not employ trenchless technology. Hence, this is not a case in which it can be said that the City refuses a request by DFA to trench when it is necessary to do so. Agreed that the description as contained in the Tariff Book refers to prevention. However, as noted when the entire segment of the Tariff Book is read, as I have set it out, the only manner in which it may be contended that the deposit achieves prevention is that it may deter trenching by possibly reducing the financial viability of trenching. But that is not the basis of the case which is made out by DFA as an objection to the deposit.

[55] The City has also provided expert evidence which does not appear to be contested that roadway trenching which effectively involves, as I understand it, the breaking open of the sealed service layer road and the digging through each of the underlying separate road layers, introduces a weak line in the pavement layers where water penetration can occur. This creates a vulnerability to joint cracking, thermal movement and differential movement caused by differences in the age and quality of materials. In turn, this allows water ingress which may lead to the rapid deterioration of the pavement integrity and hence shorten the life of the road.

[56] In this connection, it is necessary to refer specifically to the affidavit of Mr. Johan Snyman, the Area Manager of the Asset Management and Maintenance Department in the Transport and Urban Development Authority of the City. Mr. Snyman says the following about trenching:

> 'Trenching involves breaking open the sealed surface layer road and digging through each of the underlying, separated road layers. The trench introduces a weak line in the pavement layers where water penetration can occur. Trenching creates vulnerability to joint cracking, thermal movement, and differential movement caused by differences in the age and quality of materials. These processes allow water ingress, which leads to rapid deterioration of the pavement integrity and shortens the life of the road.
>
> These processes are apparent in the City. Roadways which have been trenched show significant cracks, deterioration and early signs of failure even within a year of trenching.'

[57] By contrast, these averments are not dealt with at all by Mr. Weber, who deposed to an affidavit on behalf of DFA, presumably as its expert.

[58] There was considerable debate about whether the DFA only drills when necessary. Its written policy in respect of road work trenching entitled "Civil works standard" was finally provided in reply. Significantly, in this document the following appears: 'The choice of trenching techniques is the sole discretion of the Contractor to meet the conditions likely to be encountered on site.' Dealing with a trenchless road crossing technique, the document states: 'Horizontal direction drilling within embankments is considered a high risk operation and must be avoided unless the drill plan and method statement is drafted by a professional geotechnical engineer and approved by the relevant road authority.'

[59] It is clear that this technique is hardly used in the main, given the warning that 'it must be avoided unless the drill payment method statement is drafted by a professional geotechnical engineer…'. Significantly, there is recognition that the relevant road authority must grant approval which, in turn, raises the interesting question about how far the DFA are prepared to recognise that a road authority like the City has a role to play in dealing with the implementation of a license under the ECA. There is also recognition that, on occasion, DFA has employed sub-contractors who are 'either entirely unregistered or registered at an inadequate grade for public infrastructure work.'

[60] To the extent that there was an argument that the Street Bylaw does not authorise the imposition of a deposit system, this was not the case made out by the City. Its argument was that based on the tariffs prescribed in terms of s 75 A (1) (a) of the System's Act. Accordingly, I am not required to determine whether a deposit system could be validly imposed in terms of the Street Bylaw.

Proportionality

[61] This brings me to a critical question, central to much of the argument of DFA; that is the doctrine of proportionality.

[62] To recap: DFA makes the argument that the imposed conditions breach its rights in terms of s 22 and 24 of the ECA because they require DFA to pay compensation which is disproportionate to any advantage gained by DFA and any disadvantage suffered by the City as a result of the former's exercise of its rights pursuant to the ECA. I have already set out, by way of extensive reference to Mr. Du Plessis' affidavit, the City's evidence as to how to calculate and justify the payment amount in terms of condition 1 (b) and (c).

[63] The problem for DFA, is that while denying the basis of these calculations, it hardly puts up any evidence to debunk the City's justification on the grounds of proportionality, save for some evidence provided by Mr van Deventer, on behalf of the DFA, who does not claim to be an expert in this regard. In particular, DFA argues that the City should be content with a twelve month defects liability; that is that DFA is not liable or responsible for its work after the twelve month period has lapsed. But as I have indicated earlier, there is no dispute from Mr. Weber in his affidavit that suggests that deterioration in the roads may manifest itself only thereafter and in particular damage caused by trenching may occur only a few rainy seasons later. Significantly, in attempting to argue that the amount is disproportionate, DFA does not suggest that any different amount would be proportional. It relies on the bald allegation of disproportionality which is surely not sufficient, particularly in that DFA must prove its disproportionality argument in order to establish a clear right. To the extent that there is any doubt so that there

is then a genuine dispute of facts which cannot be resolved, on the papers, then, on the basis of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 H-I, the City's version must be accepted .

[64] Turning to the trench reinstatement deposit, much was made by Mr. Gauntlett that there were only fourteen examples given by the City of defective work by DFA, notwithstanding that at any point in time, DFA is engaged in between 300-400 projects throughout the City's jurisdiction. The City, however, had made out a case that these are but examples which represent DFA record of substandard reinstatement work and lack of adequate engineering supervision, control and testing.

[65] In a letter of 15 June 2017 to DFA, the City set out the history of DFA's work on City land. It stated that the City 'can not rely upon DFA to ensure that work done on its behalf is performed safely and to an adequate standard and that the current situation poses an unacceptable risk to public safety into the integrity of the City's infrastructure'.

[66] In reply, it is suggested that these averments 'did not establish the authority the City claims and are accordingly irrelevant.' It seeks support in a statement by Mr. Weber that, among the reasons for his appointment, was the assurance that the City would be satisfied with the standard of work. Nothing, however, is said about any routine compliance with the City's standards.

[67] In any event, if a licensee is required to pay the condition 1 (d), that is a refundable deposit, the City retains a portion of the deposit only in the event that there is substandard reinstatement which the licensee fails to remedy. The deposit does not prevent DFA from installing its network and it does not thwart the purpose of ECA, to the extent that trenching is still possible.

[68] There is no suggestion that this condition makes DFA's access to the City's land dependent on the City's consent and there is no argument that it would purport to empower the City to refuse consent.

[69] In terms of the compensation reservation condition, the City reserves the right to impose a tariff charge in respect of the use of City land for the installation of telecommunication infrastructure. It appears that what the City has attempted to do is to reserve the right, which is provided under the common law namely, to require a licensee, acting under ss 22 and s 24 of the ECA, to pay compensation for the use and occupation of the City's land.

[70] In *Link Africa, supra* the Constitutional Court accepted that, given the public servitude granted to licensees in terms of s 22 of ECA 'compensation in proportion to the advantage gained by the network licensees and the disadvantage suffered by the owner is payable in respect of the exercise of the public servitude's s 22 (1) grants'. (para 152)

[71] It must follow, on the basis of this *dictum,* that the City is entitled to reserve the right to impose a compensation charge for the use and occupation of its land. Indeed, it appears that the City could impose rental or some other charge to ensure it receives compensation without statutory authority on the basis of the *dictum* to which I have made reference.

[72] The relocation costs condition states:

> 'Should these services (or part thereof) in future have to be relocated, for whatever reason as determined by the City of Cape Town, then these service owners will immediately do so at no cost to the City of Cape Town.'

[73] In its indemnity of 15 March 2010 DFA consented to this arrangement which included the following:

> 'AND WHEREAS City of Cape Town may at any time require DFA to relocate, remove or protect the Works and Services;
>
> AND WHEREAS DFA has agreed that, in the event of damage or destruction, or disruption of services caused by the City of Cape Town, or any other third parties or in the event of relocation, removal or protection of the Works and Services, it shall not hold the City of Cape Town liable for any costs or damages suffered, or for the costs incurred in relocating, removing or protecting the Works and Services;
>
> NOW THEREFORE this deed witnessed:
>
> DFA hereby holds the City of Cape Town harmless and indemnifies the City of Cape Town for any claims in respect of damages caused to the Works and/or disruption of Services by the City of Cape Town, or any other third parties or the cost to be incurred by DFA to relocate, remove or protect the Works.'

[74] For four years DFA did not object to this condition. In the initial heads filed on its behalf on 08 September 2017, it was stated that the indemnity 'which is not disputed… means that Dark Fibre is not entitled to a final interdict (in respect of the relocation condition)'. It thus seems that there is no basis now by which it can be argued that the DFA has not waived whatever right it might have possessed.

[75] To the extent that it is argued that there is no public law source for this condition, the City has relied on its private rights as a landowner and as a holder of an indemnity given by DFA, including an assertion under oath in these proceedings. Notwithstanding that the Constitutional Court in *Link Africa, supra* referred to the power of a municipality to make bylaws, it does not appear, particularly from the

earlier passages of the judgment that I have set out (para 152), that the City is prevented from relying on a common law property right in this connection.

Conclusion

[76] At the outset of his argument Mr. Gauntlett correctly noted that this case raised four questions: May the City impose on a statutory licensee installing electronic communication network the conditions in issue in this matter, secondly could it invoke its budget setting powers to do so; thirdly may it demand separate conditions for deposits and fourthly may it record a right to levy future tariffs for its disincentivising purposes.

[77] Two decisions are of particular importance in providing the legal basis to answer these questions. In the first place, from the judgment in *Maccsand supra*, it is clear that the task of a court, when faced with national legislation and a potential application of legislation passed by the local authority is to work on the basis that 'each is concerned with a different subject matter'. (para 51) Each must, if possible be given application and treated in a fashion which would ensure that both can apply in a seamless manner. Further, in terms of the judgment *Link Africa, supra,* this principle was clearly in the mind of the court:

> 'These provisions indicate that licensees, though empowered by national legislation, must abide by municipal bylaws. The only limit is that bylaws may not thwart the purpose of the statute by requiring the municipality's consent. If bylaws exist that regulate the manner … in which a licensee should exercise its powers, the licensee must comply.' (para 189) (my emphasis)

[78] This dispute is a case study in the application of these *dicta*. Nowhere in the papers does it appear that a case has been made out by DFA that their rights in terms of s 22 have been negated, that is to the extent that it cannot implement its ECA rights. True the DFA actively is regulated, to the extent that as a licensee, it must abide by municipal bylaws. But that is a very different situation from a contention that the purpose of the Act has been thwarted, particularly in the light of the need to reconcile national with local legislation.

[79] In each of the four conditions, the City has provided clear justifications for the imposition thereof. In many instances, as I have documented, this justification has not been met by a plausible evidential counter narrative. To the extent that there are legitimate disputes, as this is an application for a final interdict, it follows that the rule in *Plascon-Evans* must apply in favour of the City. Its version does not stand to be dismissed on any of the exceptions to the *Plascon-Evans* rule.

[80] Conceptually, the justifications offered by the City amount to a ‘nudge’ by the City for licensees to employ trenchless technology; that the City seeks to impose conditions that will influence a choice in behaviour without prohibiting the exercise of whatever choice the actor makes. It seeks in this way to influence behaviour so as to reduce the potential financial burden that would otherwise fall upon hard passed ratepayers. See Richard Thayler and Cass Sunstein: Nudge. Improving decisions about health, wealth and happiness (2008).

Review of the Durbanville wayleave

[81] In its prayers, DFA has asked for the review and setting aside of the City's specific decision on 16 February 2017 to impose disputed conditions in respect of the so called Durbanville project.

[82] For all of the reasons that I have outlined above, there is no substantive basis for setting aside the conditions imposed therein. To the extent that it is argued that in this case there was the exercise of administrative action on the part of the City, it is difficult to find, once the conditions as set out are justified for all of the reasons that I have advanced, that the inclusion of two tariff based conditions insofar as the Durbanville wayleave projects are concerned constitute administrative action.

[83] In this context I agree with Mr. Budlender that the *dictum* in *Nedbank Ltd v Mendelow and another NNO* 2013 (6) SA 130 (SCA) paras 24-25 is applicable in this case:

> 'not every act of an official amounts to administrative action that is reviewable under PAJA. … A decision must entail some form of choice or evaluation. Thus while both the Master and the Registrar of Deeds may perform administrative acts in the course of their statutory duties, where they have no decision-making function but perform acts that are purely clerical and which they are required to do in terms of the statue that so empowers them, they are not performing administrative acts within the definition of the PAJA or even under the common law.'

[84] There does not appear to be a basis to argue that the official who issued the wayleave in Durbanville had a discretion to override the determination of the City Council of the amounts to be charged, in terms of the clear policy adopted by the

City. It cannot be that every time a municipal official issues an account for services rendered it exercises an administrative action; *mutalis mutandis* in the Durbanville case.

[85] For all the reasons set out, the application is dismissed with costs, including the costs of two counsel.

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DAVIS J