REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2023/044527

1. REPORTABLE: YES/ **NO**
2. OF INTEREST TO OTHER JUDGES: YES/**NO**
3. REVISED: **YES** / NO

DATE: 2024

SIGNATURE OF JUDGE: [redacted]

In the matter between:

METROFIBRE NETWORX (PTY) LTD	**APPLICANT**
and	
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	**FIRST RESPONDENT**
COMPLAINTS AND COMPLIANCE COMMITTEE	**SECOND RESPONDENT**
TELKOM SA SOC LTD	**THIRD RESPONDENT**

JUDGMENT

BRAND, AJ

[1] The facts in this matter are by and large common cause. The history and background to the dispute between the parties will be set out *infra*. In doing so and in dealing with the facts and the law I mean no disrespect for the elaborate, well researched and comprehensive heads of argument by counsel for the parties. I express my gratitude for their thorough work.

[2] During 2015 a developer (M & T Development) ("M & T") undertook 2 sectional title developments in Mooikloof, Pretoria. They were Cottage Creek Estate ("Cottage Creek") and Stone Forest Estate ("Stone Forest").

[3] The developer, M & T, concluded a written agreement with Telkom in terms of which agreement Telkom undertook to supply the materials necessary to build and install the infrastructure necessary to enable Telkom to provide telecommunications services to the developments. The materials were to be supplied at no cost. The agreement between Telkom and the developer contained a clause in terms of which Telkom reserved its ownership of the materials used for the infrastructure, whether movable or immovable. In other words, Telkom would remain the owner of everything used to provide and construct the infrastructure as well as the infrastructure itself.

[4] The infrastructure was duly built by the developer and after completion of the developments, the developments were handed over to the respective Home Owners Associations, who then became the owners of the relevant estates.

[5] It was common cause that Telkom supplied materials for the construction of the infrastructure and that the developer did the necessary construction so as to complete the work according to the specifications of Telkom. Telkom thereafter, rolled out cables in order to supply telephone communications for the home owners.

[6] During 2020, Metro Fibre Networx (Pty) Ltd ("MFN") concluded a written agreement with the Home Owners Associations of the 2 developments in terms whereof MFN obtained permission from the Home Owners Associations to access the ducts, which were constructed in 2015 and roll out fibre optic cables in the ducts. Acting in In terms of the agreement MFN did obtain access to the ducts and rolled out its fibre optic cables.

[7] In 2020, Telkom did an inspection of the ducts and found that MFN had utilised the ducts to roll out its fibre optic cables. This, according to Telkom, was unlawful in that no permission was obtained by MFN from Telkom to utilise the ducts and roll out its fibre optic cables.

[8] Several correspondence between Telkom and MFN ensued – MFN insisting upon Telkom, proving its ownership of the ducts and Telkom, on the other hand, insisting that MFN comply with Section 43 of the Electronic Communications Act, 36 of 2005 ("ECA").

[9] No solution or settlement between the parties was possible, having regard to the diametrically opposed attitudes adopted by them, and on 9 June 2021

Telkom lodged a complaint with the Independent Communications Authority, established in terms of Act 13 of 2002 ("ICASA").

[10] In brief, Telkom complained to ICASA that MFN was obliged by Section 43 of ECA, as well as the Electronic Communications Facilities Leasing Regulations, to approach Telkom for a lease before installing its fibre cables in ducts on the property of the estates and that MFN had failed to do so.

[11] MFN resisted the complaint and, in a nutshell, submitted that on a proper interpretation of Sections 43 and 44 of ECA, as well as the Leasing Regulations, they were not designed and do not cater for a dispute in respect of the ownership of electronic communication facilities. According to MFN, Telkom was not the owner of the ducts and the facility and that such a dispute about the ownership could only be determined by a High Court, after joining the Home Owners Association. It was furthermore contended by MFN that Section 43 does not create an obligation on the part of it to approach Telkom at all. But, even if they did, the obligation could only exist where there was no dispute that the Telkom was the owner of the facility or had some other title to the facility.

[12] The committee of ICASA, which committee was established in terms of Section 17 of ICASA, was tasked to investigate the complaint by Telkom. As a preliminary point *in limine* MFN submitted that the committee had no jurisdiction to entertain the matter as ownership was in dispute and that ownership was required to be proven by Telkom in order to have *locus standi*. Therefore, the question of ownership had to be decided by a court of law.

[13] The committee, correctly in my view, saw fit to entertain this point, firstly.

[14] After hearing counsel for the parties and having regard to the Acts, which are applicable, the committee found that it did in fact have jurisdiction to entertain the complaint (the first decision).

[15] Thereafter, the trial with regard to the merits started and after an inspection *in loco*, hearing evidence, considering documents, etc, the committee came to the conclusion that MFN had contravened Section 43 of the ECA read with Regulation 3 of the Electronic Communications Leasing Regulations in that it gained access to Telkom's electronic communications facility without following the prescribed procedures (the second decision).

[16] Being dissatisfied with both findings, the Applicant approaches this Court for an order in the following terms:

> *"1. To the extent necessary, extending the time period referred to in Section 7(1) of the Promotion of Administrative of Justice Act, 3 of 2000 ('PAJA') to the date of institution of this application in terms of Section 9 of PAJA;*
> *2. That the judgement by the Second Respondent (Complaints and Compliance Committee) in respect of the hearing of 12 November 2021 dismissing the Applicant's point in limine, that the CCC has no jurisdiction to hear the matter, be reviewed and set aside;*
> *3. That the judgement and recommendation granted by the Second Respondent (CCC) dated 22 August 2022 be reviewed and set aside;*

4. *That the decision of the Council of the First respondent, dated 4 November 2022, to approve the recommendation of the Second Respondent be reviewed and set aside."*

EXTENSION OF TIME-PERIOD:

[17] The Applicant alleges that the First and Second Respondent in making the decisions referred to above, ignored and/or contravened several provisions contained in Section 6 of PAJA. In terms of Section 7 of PAJA any proceedings for judicial review in terms of Section 6 must be instituted without unreasonable delay and in any event not later than 180 days after the decisions were reached by the First and Second Respondents. The 180 days referred to in Section 7 may be extended for a fixed period by a Court, on application by the person or administrator concerned.

[18] The Respondents did not agree to the extension of the 180-day period. Applicant therefore asks for an extension of the time in terms of Section 7(1). The decision pertaining to the jurisdiction, was given on 21 January 2021. As regards the second decision, MFN only became aware of the decisions by ICASA and the recommendations of the CCC on 4 November 2002. The present application for review was instituted on 12 May 2023 ±10 days after the 180-day period with regard to the second decision had expired.

[19] What are the reasons given by the Applicant for justification of an order extending the time limit? Firstly, it was submitted that the non-compliance with the 180-day period was relatively insignificant and only a matter of days. This was as a result of counsel being not available, and a miscalculation of the

days. It was also submitted that no prejudice could result to any of the Respondents if the 180 day period be extended.

[20] The Respondents, however, point out that the Applicant stated in its founding affidavit, that, with regard to the first decision, it was advised to wait until the merits of the complaint were decided before challenging the jurisdictional ruling. I am of the opinion that the advice was not correct. I am not inclined to extend the 180-day period with regard to the first decision (the jurisdictional decision), for the following reasons:

[20.1] In terms of Section 46 of ECA, a decision by the CCC concerning any dispute or a decision concerning a dispute contemplated in Section 43(5)(c) is, in all respects, effective and binding on the parties to the Electronic Communication Facilities Leasing Agreement unless an order of court or competent jurisdiction is granted against the decision. Although Telkom and MFN are not parties to a leasing agreement, this section indicates without doubt that the CCC has the authority to make binding decisions.

[20.2] It is trite law that the question of jurisdiction has to be decided having regard to the facts alleged by the complainant or Plaintiff. In its complaint of 9 March 2021. Telkom submitted a complaint in terms of Section 17B(a)(ii) of ICASA. Both Applicant and Telkom are electronic communications network services (“ECNS”) and electronic communications services (“ECS”) licensees as defined in ECA. The complaint is further that Telkom had constructed amongst others,

ducts, manholes and related electronic communications network infrastructures on the relevant housing complexes and that the Applicant, without entering into a hiring agreement with Telkom in terms of Section 43 of ECA, entered the facilities of Telkom and rolled out its fibre-optic cables. The functions of the CCC are clearly set out in Section 17B which states that the CCC "must investigate, hear if appropriate, and make findings" in matters that come before it. As both Telkom and FMN are electronic communication service and electronic communication network service licensees, they fall four square under the jurisdiction of the CCC - having regard to the complaint. The question of jurisdiction must be decided having regard solely to the facts alleged by Telkom. One must not confuse *facta probanda* and *facta probantia*. The question of ownership only becomes relevant (if at all) when the merits are considered.

[20.3] If I am wrong in the aforegoing conclusions, I am nevertheless of the opinion that the Applicant, by not appealing the first judgement or applying for it to be reviewed, acquiesced to the CCC's jurisdiction and cannot now challenge the decision.[1]

[21] In the matter of ***TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerdery Beleggings (Pty) Ltd and Others***, the Supreme Court of Appeal held as follows:

[1] See in this regard ***Standard Bank v Estate Van Rhyn*** 1925 AD 266 at p 268; ***South African Revenue Service v Commission for Conciliation, Medication and Arbitration and Others*** 2017 (1) SA 549 (CC) at para 26

> *"Where the challenge concerns the jurisdiction of a court, and hence the competence of a judge to hear the matter, the decision of the court is considered definitive, and appealable. This is consistent with the principles enunciated in Zweni because the decision as to jurisdiction is considered final. This position is entirely justified because an error as to jurisdiction, if not subject to appellate correction, would permit the court below to proceed with a matter when it had no competence to do so, rendering what it did a nullity. This is plainly an undesirable outcome. Furthermore, a challenge to jurisdiction is taken at the commencement of proceedings. Until this challenge is finally resolved a court should not exercise coercive powers that compel compliance."*[2]

[22] Having regard to the above, and the fact that the Applicant acquiesced in the decision regarding jurisdiction, I am not prepared to extend the 180-day period in terms of section 9 of PAJA with regard to the first decision.

[23] With regard to the second decision (the decision on the merits) I am prepared to extend the 180-day period to 16 August 2024 being the date of the hearing of this application. The time limit was exceeded by a few days only and I regard it in the interest of justice to extend the period as set out above.

[24] Returning to the review application of the Applicant; it has to be borne in mind that both appeals and reviews serve as checks and balances within the legal system, allowing parties dissatisfied with decisions, whether by an administrative tribunal or court of law, to seek corrective action. While both mechanisms aim to rectify errors, they operate differently based on distinct criteria and objectives.

[2] (2023) JOL 58926 (SCA) at para 43

[25] It can be said that an appeal is a formal request made to a Court to reconsider a decision made by a lower court or tribunal, whereas a review is a process where the legality and procedural fairness of a decision made is examined. A review is ultimately concerned with process and regularity and is not directed at correcting a decision on the merits, but is aimed at the maintenance of the legality.[3]

[26] In ***Cell C (Pty) Ltd v The Commissioner of the South African Revenue Service***[4] Tolmay, J remarked as follows, with regard to the distinction between an appeal and review:

> *"The distinction between an appeal and the review was set out Tikly and Others v Johannes N.O and Others. It was said that an appeal in the wide sense is a complete re-hearing and fresh determination on the merits, with or without additional evidence, or information. An ordinary appeal or one in the strict sense, is a re-hearing of the merits, but limited to the evidence or information on which the decision under appeal was given and the only determination is whether the decision was right or wrong. A review on the other hand, with or without additional evidence, or information is not to determine whether the decision was correct or not, but whether the arbiters exercised their power and discretion honestly and properly. This leads to the conclusion that the essential nature of a review, is not directed at correcting a decision on the merits, but is aimed at the maintenance of legality. A review is therefore only concerned with whether a decision is lawful, whereas an appeal is concerned with whether it is correct."*

[27] It is therefore not expected from this court to judge whether the decision that was reached by the CCC as well ICASA is correct but, having regard to the

[3] See in this regard ***Tikly and Others v Johannes* N.O. *and Others*** 1963 (2) SA 588 (TPD)
[4] 2022 (4) SA 183 (GP

dicta supra, whether the decision was reached procedurally in a fair manner, having regard to the grounds for review advanced by the Applicant.

[28] The Applicant, in its comprehensive heads of argument, sets out the basis of the review application as follows in paragraph 31: "*This is an application in terms of section 3(5) of the ICASA Act, alternatively, in terms of section 3(5) of the ICASA Act as read with the provisions of PAJA, alternatively, in terms of the principle of legality, to review the ICASA decision and, to the extent necessary, the CCC's recommendation and the CCC's jurisdictional finding*."

[29] I have already dealt with the jurisdictional finding in this judgement, and consequently need not say anything more in that regard.

[30] As regards to prayers 2 and 3 of the notice of motion, when the wheat is separated from the chaff, it is clear that the fundamental argument by MFN is the following:

[30.1] Because of the principle of accession, the facilities in question adhere to the immovable property of the respective Home Owners Associations of the two estates. This being the position, nobody but the HOA's can be the owners of the facilities-least of all Telkom;

[30.2] Because Telkom is not the owner of the facilities, Section 43 of ECA is not applicable, and no permission from Telkom is required nor is it required by Section 43 from MFN in to enter into a lease with Telkom; and

[30.3] The only permission MFN required, was the permission it obtained in

terms of the two written agreements concluded with the HOA's of the two complexes.

[31] In a letter by MFN to Open Serve, which letter is dated 14 September 2020, MFN remarked as follows: *"Please provide proof that the relevant manholes, ducts and related infrastructure in these estates is the property of Telkom."*

[32] On 5 October 2020 MFN wrote to Telkom again asking for proof of ownership. In paragraph 5 of the letter MFN remarked: *"Should it be proven (ownership) then we can start negotiations regarding lease agreement."*

[33] In a letter to ICASA dated 12 March 2021, in paragraph 7.2.1 it is said by MFN: *"In all of the history that Telkom set out for the CCC, it not once dealt with the ownership of sleeves in the housing complexes. Had the issue of ownership been clarified by Telkom when MPN raised it, the matter could have been resolved one way or the other months ago."*

[34] With regard to the complaint by Telkom, MFN set out its view in reply to the complaint in a letter dated 12 April 2021. In paragraph 4.2 it says: *"Telkom's complaint can only have merit if Telkom can show that the ducts and the manholes at Cottage Creek and Stone Forest housing complexes in Mooikloof Ridge Estate, Pretoria are* its facilities*."* (Own underlining)

[35] Does Telkom own the facilities in question and, if so, is ownership a requirement for Section 43 to become applicable?

[36] In the case of ***Telkom SA Soc Ltd v Chairman, Independent***

Communications Authority of South Africa and Others,[5] Tuchten, J set out the history of the monopoly that Telkom enjoyed statutorily in the telecommunications industry. He noted that the monopoly Telkom had came to an end with the coming into law of the ECA. However, this did not mean that, in terms of ECA, Telkom's infrastructural resources were expropriated. It simply had as a policy to facilitate a compulsory leasing system.[6]

[37] The learned Judge continued: *"One of the problems confronting the industry and the achievement of many of the objects of the ECA was that while Telkom's statutory monopoly had been abolished, its factual monopoly remained pretty much intact. All the users of telecommunication services whether voice (phone calls) or data (messaging, accessing online resources through the Internet and the like) were sourced through Telkom's infra structure."*

[38] This is still, to a large extent, the present position. From a reading of the papers, and especially the notes made by the CCC with regard to the inspection *in loco* that was held, the factual position seems to be the following:

[38.1] Trenches were dug in the soil at certain depths, according to the specifications of Telkom;

[38.2] Ducts were then installed in the trenches;

[38.3] The trenches were covered with soil and manholes were constructed

[5] (38332/18) [2020] ZAGPPHC 443 (15 August 2020)
[6] Paras 3 and 4

with bricks and mortar to give access to the ducts in the trenches;

[38.4] Cables were then installed through pipes (sleeves) in the ducts to connect to the internet and provide data to residents in the estates.

[39] It is common cause that the ducts cannot be removed without damaging it. Furthermore, it seems clear that the cables (whether copper, fiber or otherwise) can in fact be removed and re-used.

[40] The ducts, piping, cabling, manholes and its covers etc. can be referred to as the “infrastructure”. It is quite clear, having regard to the history of the matter, that Telkom envisaged that the infrastructure would belong to it and for its exclusive use.

[41] In its agreement with the developers, Telkom also reserved ownership over all the materials it supplied, whether movable or immovable. Whatever the intention of this clause was, it is quite clear that Telkom never supplied any immovable property to the developer.

[42] As pointed out above, the duct or ducts cannot be removed without damaging them. It is also clear from the evidence that the ducts were in fact supplied by Telkom.

[43] Telkom maintains that it is the owner of the facility and infrastructure. In it’s heads of argument Telkom points out that the facilities did not accede to the land because Telkom:

[43.1] Had no intention of forfeiting and has not forfeited its rights and title to the facilities;

[43.2] Explicitly reserved ownership of the facilities in the agreements it concluded with M & T Development (developers of the estates); and

[43.3] Has not abandoned ownership of the facilities.

[44] On the other hand, the Applicant relies on the decision of ***Dennegeur v Telkom***[7] as authority for the statement that the infrastructure belongs to the Home Owners Association. It is correct that the Court in ***Dennegeur*** said the following: *"The HOA then entered into negotiations with Vodacom to install an optic fibre network in the infrastructure at Dennegeur which, it is common cause, is the property of the HOA."*[8]

[45] Whereas in ***Dennegeur***, the ownership of the infrastructure was common cause, *in casu* - it is not.

[46] It is important to note that the Supreme Court of Appeal accepted that it was common cause between the parties that the ownership vested in the Home Owners Association. The Court did not examine the position and come to a conclusion whether or not ownership vested in the Home Owners Association.

[47] In terms of the Roman law, the *adagium superficies solo cedit* means that

[7] 2019 (4) SA 451 SCA
[8] Para 7 of the judgment

everything that is attached to the soil will form part of the soil and lose its substantive character. Through *accessio* the property will be the property of the owner of the soil.

[48] To determine whether a movable item forms part of this soil, three factors have to be taken into account:

[49.1] The nature and purpose of the movable property;

[49.2] The degree and manner of attachment to the immovable property; and

[49.3] The intention with which the attachment occurred.[9]

[49] In the Law of South Africa, 1st re-issue, Vol 27 at paragraph 228 the learned authors remark as follows:

> *"A principal thing is a distinct entity, which can as such be the object of legal rights. It differs from accessories and auxiliaries in that it is not only part or accessory to a thing but has an independent legal existence. In contrast, an accessory by being incorporated into a principle thing becomes a component or integral part of the principal thing. On being attached to a principle thing it surrenders its separate identity and becomes part and parcel of the principal thing."*

[50] They continue:

[9] These three factors were firstly mentioned in ***Olivier and Others v Haarhof and Company*** 1906 TS 497 500. This decision was followed subsequently in in numerous decided cases. See in this regard the well-known text book "***Sakereg***" CG van der Merwe 2nd Ed on p 248 et seq

> *"In contrast to accessories, things may, without losing their individuality, exist in a relationship of subordination to a principal thing, as in the case of keys to a door of a house and a spare wheel of a motor vehicle. The subordinate thing is thus an auxiliary of the principal thing. Broadly speaking, an auxiliary is a thing which, though preserving its individuality, is destined to serve the economic purpose of the principal thing permanently and not merely temporarily."*

[51] At paragraphs 2 to 9 the position is succinctly summed up as follows:

> *"Accessories, on being attached to the principal thing become the property of the owner of the principal thing. The former owner may, however have a remedy against the owner of the principal thing. An auxiliary on being associated with the principal thing does not become the property of the owner of the principal thing. If the owner transfers the auxiliary to an innocent third party he may in appropriate circumstances be held delictually liable to the owner of the auxiliary."*

[52] Bearing the aforesaid in mind, it is clear that the duct which was supplied by Telkom to the developer was installed in the soil that later belonged to the HOA. It lost its individual character in that it cannot be removed without damaging itself or the property to which it adhered. It is also very probable that the duct was installed with the intention that it would be permanently used by Telkom. As such, I am of the opinion that the duct is the property of the HOA. I am aware that the agreement between Telkom and the developer contains a clause in terms of which the proprietary rights and ownership of all materials were reserved by Telkom. However, the fictitious reservation of an immovable property cannot trump reality.

[53] That being said, I am of the opinion that the pipes, manholes and manhole

covers, can be removed by Telkom without damaging it. Furthermore, the cables whether it be optic or fibre or copper, rolled out by Telkom in the pipes in the ducts, can be removed and remain the property of Telkom.

[54] Whether or not the respective HOA's are bound by the agreement concluded between Telkom and M & T Developments, is, to my mind, of no consequence. It does not affect the ownership of the immovable property (the ducts) or the movable property (cables, pipes, etc which can be removed without damaging it or the principal thing).

[55] The next question which comes to the fore, is whether ownership is a requirement before Section 43 of ECA comes into play.

[56] To recap, Telkom complained to ICASA that MFN accessed its facilities without going through the prescribed motions set out in Sections 43 and 44 of the ECA. Applicant, MFN, alleges that it is only incumbent upon it to adhere to the provisions of Section 44 once Telkom proves it is the owner of the facility in question.

[57] Section 43 of ECA reads as follows:

> *"43. Obligation to lease electronic or communications facilities.*
>
> *(1) Subject to section 44(5) and (6) an electronic communications network service licensee must, on request, lease electronic communications facilities to any other person licensed in terms of this act, and persons providing services pursuant to a license exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.*

(2) Where the reasonableness of any request to lease electronic communications facilities is disputed, the party requesting to lease such electronic communication's facilities may notify the authority in accordance with the regulations prescribed in terms of section 44."

[58] "Electronic communications facilities", is defined as, *inter alia,* wiring cable, circuit cable, landing station, earth station, data centres, carrier neutral hotels, collocation space, monitoring equipment and, also, space on or within poles, ducts, cable trays, manholes, hand holds and conduits as well as associated support systems ancillary to such electronic communications facilities.[10]

[59] Section 22 of ECA reads as follows:

"22. 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.

[10] Section 1 of ECA

> *(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."*

[60] It is of significance that the word "owner" is not used anywhere in any of the aforementioned quoted sections of the ECA.

[61] In its discussion of Section 22, and after quoting the section, the Constitutional Court had the following to say:

> *"This language is broad. It provides access to any land in order to construct electronic communication facilities. This is intended to serve a legitimate and important legislative purpose, which is essential for the unhindered universal rollout of electronic communications services. On the face of it, the provisions appeared to confirm wide powers on licensees and clearly limits property rights. But the exercise of the power is not unhindered. The provisions make sure of this. The power is constrained by the plain, ordinary grammatical meaning of the provisions itself, which demands that regard must be had to 'applicable law and the environmental policy of the Republic'"*[11]

[62] The Court in the ***Link Africa*** decision continued at paragraph 151:

> *"So we know that 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 agreements between network licensees and landowners, the cautionary inhibitions the common law imposes apply."*

[63] In the ***Dennegeur*** decision, *supra*, the Supreme Court of Appeal, said as

[11] ***Tshwane City v Link Africa*** 2015 (6) SA 440 at para 125

follows:

> *"15. The rights afforded by section 22 of the ECA are by their very nature servitutal. Quasi possession of an asserted servitutal right enjoys protection under the mandament to the extent that it is evidenced by the actual or factual exercise of the professed rights. There cannot be any doubt that, by installing the cables into the ducts forming part of the infrastructure in order to deliver its telephone and ADSL internet services, Telkom, by its use of the cables and the space occupied by the cables, exercise the right which it enjoyed in terms of section 22 of the ECA. To that extent it enjoyed quasi possession of the servitutal rights under section 22."*

[64] In paragraph 72 of its findings, the CCC came to the following conclusion:

> "*In our view, Telkom has proven that it has the required entitlement over the underground infrastructure. That is all that it was required to do. In addition, the underground infrastructure in the housing complexes, or electronic communication facilities as defined in the act. Accordingly, section 43 is applicable."*

I agree.

[65] Telkom was entitled to approach ICASA and complain as it did. It was entitled to do so having regard to the fact that it was the holder of the servitude over the land of the HOA's in which the ducts were constructed. It will also, in terms of Section 22, be entitled to remove its electronic communications network, etc - as long as it is movable parts. Obviously, as said above, the immovable duct forms part of the land owned by the HOA's.

[66] I therefore find that ownership was not a requirement for Telkom to lawfully

approach the First Respondent for relief in terms of Section 43 of the ECA.

[67] I shall now deal with the specific grounds of the review. In the first place the Applicant alleges that Section 6(2)(a)(i) of PAJA is applicable in that the CCC and ICASA, who took the relevant decisions, were not authorised to do so by an empowering provision.

[68] The argument is that, because the HOA's of the two complexes are the owners of the land and because of the principle of accession, the CCC had no jurisdiction to investigate the matter and ICASA, consequently, had no lawful authority to endorse the recommendations by the CCC. Again, I have dealt with the history and the salient legal principles applicable to the question of ownership and the applicability of Section 43 of the ECA. I could find nothing in the report and findings of the CCC that indicates that there was any material influence because of an error of law.

[69] Thirdly, the Applicant alleges that action was taken due to irrelevant considerations having been considered or due to relevant considerations not being considered, and that the decision was taken arbitrarily and capriciously.[12] I do not find any substance in this ground for review and it is consequently dismissed.

[70] Applicant alleges that the action itself was not rationally connected to:

[70.1] The purpose for which you it was taken;

[12] Section 6(2)€(iii) and (iv) of PAJA

[70.2] The purpose of the empowering provisions;

[70.3] The information before the CCC; or

[70.4] The reasons given for it by the CCC and ICASA.

[71] Again, after having gone through the record and the findings and recommendation of the CCC, I disagree with the Applicant on this score also .MFN was not obliged to act in terms of section 43 – BUT- once it wanted to utilise the facilities of Telkom it was compelled to enter into a lease agreement with Telkom.

[72] The Applicant avers that the exercise of the power or the performance of its function (the administrative action investigation and judgement and recommendation by CCC) is so unreasonable that no reasonable person could have so exercised the power or perform the functions.[13]

[73] I disagree. All the salient facts, to my mind, were taken into account by the CCC. Again, it has to be remembered that this Court is not called upon to pronounce upon the correctness of the decision, but the procedural correctness of the investigation, judgement and recommendations.

[74] Lastly, the Applicant alleges that the actions by the CCC and ICASA is "otherwise unconstitutional or unlawful". I do not find any grounds for this allegation. It is, to my mind, baseless.

[13] Section 6(2)(h) of PAJA

[75] The principles of legality, which was based on the same grounds as before mentioned, was equally not infringed.

[76] Lastly, in its founding affidavit, the Applicant allege that there was no evidence that ICASA had considered any of the items mentioned in Section 17E(1)(b) – (f). Instead, ICASA had simply endorsed the recommendations and findings of the CCC.

[77] The answer to that allegation is that there is no evidence that ICASA did not consider the items as enumerated above. Furthermore, there is a general presumption that acts or events which occur regularly or routinely have followed a regular or routine course - *omnia praesumuntur rite esse acta.* This is based upon the statistical probability of regularity in an organised community. The presumption is usually one of fact, though in certain manifestations it appears to have hardened into one of law.[14]

CONCLUSION:

[78] I am of the opinion that none of the grounds advanced by the Applicant for review of the investigation findings and recommendations of the CCC or the order by ICASA hold water.

[79] Consequently, the application for review is dismissed with costs which cost shall include costs of two counsel where so employed, costs to be taxed on

[14] See ***Lawsa*** *Vol 9, 2nd Ed para 816* with regard to administrative actions, see ***Lawsa*** *Vol 1 2nd Ed para 90* and the sources quoted in that paragraph

Scale C.

BRAND, AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines.

Appearances

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Date of Hearing:	16 August 2024
Date of Judgment:	11 September 2024