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

REPORTABLE

Case Number: 10354/2017

In the matter between:

TELKOM SA SOC LTD First Applicant

HILDA ISABEL KALU N.O. in her capacity as
THE EXECUTRIX OF THE ESTATE
LATE BIRCH KALU Second Applicant

and

CITY OF CAPE TOWN Respondent

JUDGMENT DELIVERED 10 MAY 2018

Andrews AJ

Introduction

[1] The Applicants seek a declarator that the provisions of the City of Cape Town's Municipal Planning By-laws 2015 ("By-law"), Zoning Scheme Regulations and Telecommunications Mast Infrastructure Policy (Policy no. 40544) ("Mast

Policy"), are in conflict with the provisions of Section 22 of the Electronic Communications Act 36 of 2005 ("ECA") and are accordingly invalid.

[2] In the alternative, the Applicants seek a declarator that the By-law, the City of Cape Town Zoning Scheme Regulation and the Mast Policy are declared unconstitutional and invalid insofar as they require the Respondent's consent for the erection of any telecommunications infrastructure in its area of jurisdiction.

[3] In a counter-application, the Respondent seeks a declarator that the First Applicant's erection and use of the mast on the property of the Second Applicant are unlawful for want of planning authorisation and building plan approval.

[4] The application was heard on 13 March 2018. Adv P Ellis (SC) appeared on behalf of the First and Second Applicants, assisted by Adv K Hofmeyr. Adv R Paschke appeared on behalf of the Respondent.

Factual Background

[5] On 9 November 2015, Mr Gary Kalu, the owner of the residential property situated in Heathfield, Cape Town ("the Kalu property"), entered into an agreement with the First Applicant ("Telkom") who is a licensee under the ECA. In terms of the agreement, a portion of the residential property of the Second Applicant would be leased to the First Applicant for the purposes of erecting an electronic communications base station infrastructure. Pursuant thereto, a freestanding base telecommunication station ("a mast") was built without building plan approval or an

exemption under the National Building Regulations and Building Standards Act 103 of 1977 ("Building Act").

[6] The Kalu property is zoned under the By-law as Single Residential 1: Conventional Housing. Single Residential 1 zoning provides predominantly for single family dwelling houses and additional use rights in low- to medium-density residential neighbourhoods. The By-law prohibits the erection of a mast on land zoned Single Residential 1.

[7] On or about 22 January 2016, the First Applicant applied in terms of Section 42(a) of the By-law to rezone a $9m^2$ portion of the Kalu property from Single Residential 1 to Utility Zoning in order to permit a mast on the property. The First Applicant was informed on 24 February 2016 that the rezoning application could not be processed because the said application was incomplete and because the requisite application fee was not paid. On 23 March 2016 the First Applicant provided the outstanding information, and later paid the prescribed fee. On 5 April 2016 the application procedure was completed in terms of Section 76 of the By-law; whereafter the Respondent began processing it. The First Applicant proceeded to erect a mast on the Kalu property without:

(a) obtaining rezoning of the Kalu property in terms of the By-law;

(b) building plan approval or a minor building work exemption under the Building Act; and

(c) notice to the Respondent.

[8] In terms of Sections 99(4) and 130(2) of the By-law, the First Applicant may not consider an application submitted by a person who has contravened the By-law until an administrative penalty has been determined and paid. To ensure compliance, the Respondent on 15 April 2016 requested the First Applicant to apply for an administrative penalty in terms of Section 129 of the By-law. The First Applicant failed to apply for an administrative penalty which caused the Respondent to invite comment from the First Applicant in terms of Section 129(3) of the By-law. Consequently, the City Manager complied by applying for an administrative penalty which was supported by a report dated 20 December 2016. Shortly before the City's Municipal Planning Tribunal was scheduled to consider the application for an administrative penalty, the First Applicant and the Respondent agreed that the hearing would be postponed so that the First Applicant could institute an application for a declaratory order on the legal issues in dispute.

[9] It is common cause that the City has not yet considered the merits of the First Applicant's application for rezoning of the Kalu property.

Issues for determination

[10] A number of arguments were raised at the hearing of this application. However, in light of the conclusion to which I have come, I will only deal with the pertinent submissions made in order to address the crisp issues. To this end, the main issues that require exploration and determination are:

(a) Whether the By-law and the Mast Policy are in conflict with national legislation and therefore invalid as provided for in Section 156(3) of the Constitution.[1]

(b) Whether the By-law and Mast Policy overstep the boundaries of municipal planning and encroaches on an area of national planning.

Parties' Principal Submissions and applicable law

[11] The Electronic Communications Act ("ECA")[2] was promulgated with the stated purpose of providing "for the regulation of electronic communications in the Republic in the public interest".[3] The primary section of the ECA under examination is Section 22,[4] which appears to grant extensive statutory rights to electronic service licensees such as the First Applicant. This Act was examined by the Constitutional Court in the matter of ***Link Africa***[5] wherein the Court recognized the societal importance of electronic communications:

> *"Fast and reliable electronic communication services have the potential to improve the quality of life of all people in South Africa. They do so through increasing the availability of texts, audio and other media at schools,*

[1] The Constitution of the Republic of South Africa.

[2] 36 of 2005.

[3] *Ibid* at section 2.

[4] *"**Section 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 <u>any land</u>, 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."

[5] *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 (6) SA 440 (CC) (*Link Africa*) at para 121.

universities and colleges, and boosting business and employment opportunities."

[12] The Applicants contended that the imperatives of the ECA are underscored by the public's right to receive and impart information. The Applicants in argument referred to the objects of the ECA[6] and argued that in order for it to achieve these aims, Section 22(1) of the ECA permits electronic communications network services licensees the right to enter upon any land, railway or waterway of the Republic and to construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across that land, railway or waterway.

[13] In support of these contentions the Applicants argued that the Constitutional Court, in ***Link Africa***, has recognised that the unhindered universal role out of electronic communications services, serves a legitimate and important legislative purpose, which has attracted considerable public interest. Furthermore, in ***Link Africa*** it was recognised that the right to access and construction as encapsulated in Section 22(1) promotes economic growth, education, public service delivery and had the potential to improve the quality of life in South Africa.[7]

[14] The legislature, recognising this pressing need, injected a sense of urgency into the Act through Section 21[8] which calls for the rapid deployment of communications

[6] Sections 2; 2(c); and 2(g) of the ECA.

[7] *Link Africa* at paras 36, 120-1 and 180.

[8] This section provides:

"*Rapid deployment of electronic communications facilities.—*

facilities. However, these rights are not completely without restraint as Section 22(2) provides that *"[i]n taking any action in terms of subsection (1), due regard must be had to applicable law and the environmental policy of the Republic*."

[15] The powers of municipalities derive mainly from Section 156 of the Constitution.[9] In terms of its constitutionally allocated legislative competence the Respondent promulgated the By-law which seeks to regulate, among other things, the use of land.[10] In terms of Section 35(2) of the By-law:

> *(1) The Minister must, in consultation with the Minister of Cooperative Governance and Traditional Affairs, the Minister of Rural Development and Land Reform, the Minister of Water and Environmental Affairs, the Authority and other relevant institutions, develop a policy and policy directions for the rapid deployment and provisioning of electronic communications facilities, following which the Authority must prescribe regulations.*"

[9] *"Powers and functions of municipalities*
(1) A municipality has executive authority in respect of, and has the right to administer-
(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
(b) any other matter assigned to it by national or provincial legislation.
(2) A municipality may make and administer By-laws for the effective administration of the matters which it has the right to administer.
(3) Subject to section 151 (4), a By-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a By-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the bylaw must be regarded as valid for as long as that legislation is inoperative.
(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if-
(a) that matter would most effectively be administered locally; and
(b) the municipality has the capacity to administer it.
(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions."

[10] The preamble to the By-law reads:

> "*WHEREAS section 156(1) of the Constitution of the Republic of South Africa, 1996 confers on municipalities the executive authority and right to administer local government matters set out in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution;*
>
> *WHEREAS Part B of Schedule 4 to the Constitution lists municipal planning as a local government matter;*
>
> *WHEREAS section 156(2) of the Constitution empowers municipalities to make and administer laws for the effective administration of matters that it has the right to administer*".

> *"No person may use or develop land unless the use or development is permitted in terms of the zoning scheme or an approval is granted or deemed to have been granted in terms of this By-law."*

[16] The By-law empowers the City to enforce compliance through various measures, including the issuing of directives,[11] imposing administrative penalties,[12] and approaching the High Court for appropriate relief, which may include a demolition order.[13] Furthermore, the By-law provides that using land "in a manner other than permitted by the development management scheme" is an offence exposing the perpetrator to a fine or imprisonment not exceeding 20 years or both.[14]

[17] In addition to the By-law, the City has a Mast Policy. The Respondent submitted that the City has a constitutional mandate to regulate the use of masts. The "*overarching premise*" of the Mast Policy "*is to facilitate the growth of new and existing telecommunications systems and facilitate the provision of [masts] in an efficient, cost-effective, environmentally appropriate and sustainable way*".[15] This Mast Policy sets out factors that must be taken into account when the Respondent considers a rezoning application for the construction of telecommunication stations. Part 6 of the Mast Policy facilitates the mode by which the objectives of the ECA may be obtained. Additionally, it sets out the relevant statutory framework with a specific

[11] Section 128.

[12] Section 129.

[13] Section 131.

[14] Section 133.

[15] Part 2 of the Mast Policy.

requirement that calls for the Respondent's consent for the construction of telecommunication mast infrastructure.

[18] The City of Cape Town, in recognition of the increasing importance of telecommunications to the growth of the economy, reviewed its existing telecommunication infrastructure policy in 2015. The Respondent submitted that the Mast Policy provides that the decision maker, under the By-law, must consider rezoning, consent use or other applications to permit the erection and use of a mast, as well as relevant objectives and guidelines. According to the Respondent, the Mast Policy serves to balance economic and communication objectives against the environmental and health objectives by recommending the design and siting of masts so as to mitigate any potential adverse impact. The Respondent submitted that the First Applicant has not in any way challenged the Mast Policy as being unreasonable.

[19] This policy furthermore underpins the provisions of the By-law which require the City's consent for telecommunications stations to be erected in many of the zones under the development management scheme. Herein lies the central complaint of the First Applicant, namely that the By-law, by requiring the municipality's consent prior to the exercise of its rights under Section 22 of the ECA, is in conflict with national legislation.

[20] The Applicants argued that the By-law, which requires licensees such as the First Applicant to obtain the municipality's consent prior to constructing telecommunications masts, is in essence frustrating the purpose of the ECA. In

support of this contention, the Applicants submitted that although Section 22(2) of the ECA requires that due regard is to be had to applicable law, it was held in ***Link Africa*** that licensees must comply with other laws *"provided that compliance with applicable law cannot be taken to mean that the right given to network licensees under s 22 (1) is defeated or eviscerated".*[16] According to the Applicants, this implies that if the laws which it is required to comply with thwarts the purpose of the ECA, then they are not required to comply therewith.[17] The Applicants contend that requiring municipality's consent before the right can be exercised is in conflict with Section 22 of the ECA and is accordingly invalid.

[21] The Applicants referred to ***Dark Fibre Africa***[18], and whilst conceding that the facts are distinguishable, argued that it nevertheless bears relevance as the Court found that there was no suggestion that the condition imposed by the City made the licence holder's access to the City's land dependant on its consent. The Court held that *"[n]owhere 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 right".*[19]

[16] *Ibid* at para 126.

[17] *Ibid* at para 189.

[18] [2017] ZAWCHC 151.

[19] *Ibid* at para 78.

[22] In ***Maccsand v City of Cape Town and Others***,[20] the Constitutional Court was seized with a similar, if not directly analogous, matter concerning an alleged conflict between provincial legislation regulating land use[21] and national legislation regulating mining[22]. The Respondent, referring to ***Maccsand*** argued that the fact that the First Applicant may not erect a mast until the land in question is appropriately rezoned is permissible in terms of constitutional imperatives.

[23] In ***Maccsand*** the main issue for determination was whether land over which a mining permit had been granted needed to be rezoned in terms of the provincial legislation before mining could take place. Maccsand, a private company and holder of a mining permit commenced to mine sand on a property owned by the City of Cape Town. The land in question was zoned as public open space and in terms of provincial legislation, mining was not permitted without rezoning. The City approached the Court to interdict Maccsand from mining until the land had been rezoned. Arguments were raised in that matter which mirror the arguments of the Applicants. However, these arguments were dismissed by the Constitutional Court which concluded that, when one considers the constitutional allocation of powers, there was no conflict between the provincial and the national legislation.

[24] The Respondent submitted that the By-law is valid and does not conflict with Section 22(1) based on the ***Maccsand*** principle which is recognised in Section 22(2) of the ECA. Much emphasis was made by the Applicants, in an attempt to distinguish

[20] 2012 (4) SA 181 (CC) (*Maccsand*).

[21] Land Use Planning Ordinance 15 of 1985 (LUPO).

[22] Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

Maccsand, on the grounds that in that matter the Court was seized with an examination of an alleged conflict between national and *provincial* legislation, whereas this matter concerns an alleged conflict between national and *municipal* legislation.

[25] This argument is in my view without substance. In ***Maccsand,*** the Court found that there was no conflict and thus did not invoke the conflict-breaking mechanism prescribed by the Constitution. Moreover, the principle of respecting the legislative competence, concomitant authority and legitimate exercise of power of each sphere of government is directly applicable and resolves the dispute in the Respondent's favour.[23]

[26] The Respondent also referred to ***Habitat Council***[24] where this principle was reinforced. In this matter it was decided that all municipal planning decisions that encompass zoning lie within the competence of municipalities. By parity of reasoning, the Respondent contended that zoning of land or a land-use decision which has national implications fall within the exclusive competence of 'municipal planning'.

[27] The Applicants in further advancement of their argument in challenging the constitutionality of the By-laws referred to Section 156(3) of the Constitution which

[23] See *Dark Fibre Africa (Pty) Ltd v City of Cape Town* [2017] ZAWCHC 151 at para 77.

[24] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC) at para 19.

essentially provides that a by-law that conflicts with national or provincial legislation is invalid. In interpreting Section 156(3), the Applicants argued that even by-laws that fall within the legislative competence of a municipality will be invalid to the extent that they conflict with national legislation. The Respondent however contended that because there is no conflict, there is no need to consider the provisions of Section 153(6).

[28] In order to establish whether the By-law and the Mast Policy are in conflict with national legislation, it is apposite to establish whether the Applicants have succeeded in showing that there is indeed a conflict. In determining whether there is a conflict between the By-laws and Section 22 of the ECA, the starting point is to seek fortitude through the prism of the Constitution.

[29] Section 172(1) of the Constitution provides that:

> *"When deciding a constitutional matter within its power, a court –*
>
> *(a) must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency…"*

[30] The By-law itself expressly provides:

> *"When considering an apparent conflict between this By-law and another law, a court must prefer any reasonable interpretation that avoids a conflict over any alternative interpretation that results in a conflict."*[25]

[25] Section 2(3).

[31] It is trite that each sphere of government is granted autonomy to exercise its powers and perform its functions within the parameters of its defined space.[26] Furthermore trite is that a municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent that the Constitution permits.[27] The Constitution provides that each sphere of government is enjoined to respect the status, powers and functions of government in the other spheres.[28] This is foundational to decide whether the By-law and Mast Policy overstep the boundaries of municipal planning and encroaches on an area of national planning.

[32] The Constitution specifically provides that the functional areas described in Schedule 4B and 5B are exclusively reserved for municipalities. In other words, municipalities have exclusive executive authority over the right to administer schedule 4B and 5B matters and need no authority from elsewhere to exercise those powers. Schedule 5 describes the exclusive provincial powers, and Schedule 4 describes the concurrent national and provincial competencies. In both instances, provincial powers exclude the powers in Schedule 4B and 5B, which have already been 'carved out' for municipalities.

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[26] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 126 and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Other*s 2010 (6) SA 182 (CC) at para 43 "*Section 40 of the Constitution defines the model of government contemplated in the Constitution. In terms of this section the government consists of three spheres: the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and ―not assume any power or function except those conferred on [it] in terms of the Constitution.*"

[27] *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) at paras 59-60.

[28] Section 41 of the Constitution.

[33] The First Applicant seeks to rely on provisions in SPLUMA to argue that the By-law's provisions regarding masts are part of 'national planning' and not 'municipal planning'. The First Applicant frames the issue as a 'conflict'. The Applicants identified diverse impugned provisions in the By-law in relation to the Respondent's zoning scheme which regulates the use rights and control of land within the City.[29] To this end, the First Applicant claims that the impugned provisions of the By-law exceed the ambit of 'municipal planning' and instead raises a question of legislative competence.

[34] The Applicants submitted that each sphere of government, having been granted autonomy through the Constitution, exercises it powers and perform its function within the parameters of its own defined space. In order to advance this argument, the Applicants contended that "municipal planning" is listed as an exclusively local competency in Part 4 of the Constitution but suggested that the concept "planning" used in the Constitution should be accorded its ordinary dictionary meaning, thus widening the interpretation thereof to include spatial and land use management planning. Additionally, the Applicants referred to Section 5 of the Spatial Planning and Land Use Management Act[30] ("SPLUMA") which distinguishes between municipal, provincial and national planning within the context of spatial and land use management planning. The Applicants submitted that Section 5(1)(c) of SPLUMA contains a very important limitation to the competency of municipalities relevant to

[29] See Sections 24(1), 25(1), 26 (1), 26(3), 35(2), 39, 42(a) of the By-law.

[30] 16 of 2013.

municipal planning as it allocates to municipalities the power of "control and regulation" of the use of land within the municipal area, where the nature, scale and intensity of the land use do not affect the national interest.

[35] According to the Respondent, SPLUMA cannot assist the Court in deciding the ambit of legislative powers, as an Act of Parliament cannot be used to interpret the Constitution. The Respondent contended that the First Applicant is wrong in claiming that the roll-out of electronic communications networks and facilities is an incidence of 'national planning' and is consequently excluded from the local competence of 'municipal planning'.

[36] Additionally, the Respondent avers that even if SPLUMA applies, it nevertheless provides that a development application which affects the national interest much be considered by the relevant municipality. There are diverse provisions within SPLUMA reinforcing municipality involvement, such as Section 33(1) which provides that *"[e]xcept as provided in this Act, all land development applications must be submitted to a municipality as the authority of first instance".* The Respondent argued that the erection and use of a mast falls squarely within the ambit of 'land development'. This essentially means that even land development applications which affect the national interest must be lodged with, and be considered by, the relevant municipality.

[37] The term 'municipal planning' was examined by the Constitutional Court in the matter of ***City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others***:[31]

> *"Returning to the meaning of 'municipal planning', the term is not defined in the Constitution. But 'planning' in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships."*

[38] In this regard, I agree with the Respondent's contention in that 'municipal planning' includes the regulation of the use of land for masts. Of pivotal importance is the fact that since the By-law was enacted in terms of the Constitution, the permissible ambit of the By-law is determined by the Constitution and not by SPLUMA. It follows that SPLUMA can therefore not assist a court in deciding the ambit of legislative powers which the Constitution grants to municipalities.

[39] The Applicants contention that telecommunication is a matter of national competence leaving no role for municipalities is in my view also without substance. As pointed out by the Respondent, Section 151(4) of the Constitution is the starting point. This provision underpins the interdependence of the governmental spheres subject to the imperative that *"[t]he national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.*"

[31] 2010 (6) SA 182 (CC) at para 57.

[40] Local government is not only imbued with power through the Constitution, it is both an independent and interdependent arm of government, and also subject to constraints permissible under the prescripts conferred on it through the Constitution. Section 151(3) clearly cloaks a municipality with *"the right to govern, on its own initiative, the local affairs of its community,* ***subject to*** *national and provincial legislation, as provided for in the Constitution."* (my emphasis) Based on this understanding, the legislature anticipated that governance had to be dovetailed in order to achieve the primary objective envisioned in the ECA. The municipality's Mast Policy and By-law cannot be interpreted to mean that it wishes to regulate the system of telecommunication. On the contrary, it is my view that it seeks to give credence to this interpretation. The Respondent, in my view has a clear understanding of its constitutional mandate, which is evident through the amendments it affected to the By-laws and adoption of the updated Mast Policy. The ECA requires multiple authorisations from different spheres of government under different statutes. It is therefore evident that such a requirement does not give rise to a conflict.

[41] In light hereof, I am not persuaded that a conflict has been established, thus rendering the argument of the Applicants, that By-laws are invalid where it conflicts with national law, baseless. The By-laws are clearly not rendered invalid as contended by the Applicants. On the contrary they are valid.

[42] In the event that I should err in this regard, then regard is to be had to the provision of Section 149 which reads:

"A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remain"

[43] This Section is contained in the chapter of the Constitution dealing with "Conflicts between national and provincial legislation". No decision has been taken under Section 149 and thus the national legislation is still operative. In which event, national legislation would prevail over a By-law as per Section 156(3). The more relevant argument here concerns the principle that one sphere may not usurp the functions of another and that municipalities are specifically protected from interference. This is reinforced through the provision of Section 41(1)(f) of the Constitution which provides that "*[a]ll spheres of government and all organs of state within each sphere must…not assume any power or function except those conferred on them in terms of the Constitution*".

[44] The Applicants argued that even by-laws that fall within the legislative competence of a municipality will be invalid to the extent that they conflict with national legislation. Having regard to the aforegoing, I do not agree with the Applicants' argument pertaining to the provision in the Constitution concerning the interpretation of conflicts. The Applicants specifically referred to Section 150 of the Constitution which is silent on conflicts *apropos* municipalities. This provision, in my view should not be read in isolation. The entire sub-chapter commencing from Section 142 up to and including Section 150 deals with Provincial Constitutions and conflicting laws in relation to national and provincial legislation. It is my view that

these provisions were not intended to cover conflicts between municipal and / or national and / or provincial legislation. In my view, the Applicants argument is clearly taken out of context.

[45] Chapter 7 of the Constitution, which is the very next chapter after Section 150, deals exclusively with local government. Section 156(3) only cross-references to one provision in the preceding chapter, namely Section 149 (quoted above). In this regard, Section 156(3) reads:

> *"Subject to section 151 (4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the bylaw must be regarded as valid for as long as that legislation is inoperative."* (my emphasis)

[46] The Respondent argued that the Constitutional Court has made it clear that courts are duty bound to read the provisions of the legislation in conformity with the Constitution and are encouraged to avoid conflicts with the Constitution where reasonably possible.[32] This means that a court when considering an apparent conflict between a By-law and national or provincial legislation is enjoined to prefer any reasonable interpretation which avoids a conflict, over any alternative interpretation that results in conflict.

[47] According to the Respondent, there is no indication in the language of Section 22(1) that it exempts a licensee from obtaining rezoning required by law. Additionally, there is nothing in the provisions of the ECA which indicate that its

[32] See *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28(c).

purpose is to regulate zoning or land use. It is clear that the ECA regulates electronic communication, while the By-law regulates zoning and use of land. Moreover, it is pellucid that the Respondent has, through the amended Mast Policy and updated By-laws, sought to collaborate with the constitutional vision pertaining to telecommunication infrastructure. The Applicants have not, according to the Respondent, suggested that any of the considerations in the Mast Policy are inappropriate nor did the Applicants challenge the reasonableness of the Mast Policy.

[48] The Applicants submitted that Section 22 has been authoritatively interpreted so as to trump the fundamental right of ownership. I do not agree with this contention. It is my view that the Applicants are misinterpreting the ***Link Africa*** decision. Section 22 cannot operate in a vacuum. I agree with the Respondent's contention that it has to co-exist in a web of other laws including municipal by-laws. I am therefore of the view that the Respondent's zoning requirements do not conflict with Section 22(1) because before a licensee may exercise its right in terms of Section 22(1) of the ECA, the licensee must comply with all applicable law, including laws enacted by the municipality. As Section 22(2) clearly provides that *"due regard must be had to applicable law and the environmental policy of the Republic"*, it follows that apart from the municipality's consent, which is required in terms of the By-law, the licensee is still required to obtain all other permits, licenses and authorisations required by law which do not constitute a 'municipality's consent', such as rezoning or departure, building plan approval or exemption (which the First Applicant concedes is required), environmental authorisations, heritage authorisation, and civil aviation permits, amongst others. It is for these reasons that I am not in agreement with the Applicants'

contention that the By-law and the Mast Policy exceed the boundaries between spheres of planning law. I am not persuaded that it is the intention of the legislature to grant a licensee unqualified rights to conduct activities on land without obtaining any permit, license or authorisation required by any law from any authority. If this were so, the public would be without the protection of a range of constitutionally compliant laws which serve the public interest.

[49] Consequently, I am not in agreement with the Applicants contention that because the Respondent seeks to impose limitations on licensees to exercise their rights and duties in terms of Section 22(1) of the ECA, the By-law and Mast Policy should be declared unconstitutional and invalid. Inasmuch as this matter concerns a constitutional consideration, I am not persuaded that the Applicants have succeeded in showing that the City of Cape Town Municipal Planning By-laws, the City of Cape Town Zoning Scheme Regulations and the City of Cape Town Telecommunications Mast Infrastructure Policy are unconstitutional and invalid to the extent that they require the Respondent's consent for the erection of telecommunication infrastructure in its area of jurisdiction.

Respondent's Counter-Application

[50] The Applicants indicated that they no longer persist in their opposition to the counter-application insofar as it relates to the absence of building plan approval for the telecommunications mast that was erected on the Second Applicant's property.

[51] The First Applicant conceded that unless exempted, a licensee must comply with the requirements of the Building Act and as such requires building plan approval for the mast on the Kalu property. The Respondent argues that on this ground alone, it is entitled to the order sought in the counter-application. It was further submitted that the First Applicant's defences have no merit, and that the Respondent has made a case for the declarator that the Applicants' conduct is unlawful.

[52] On the Applicants' concession alone, the Respondent's counter-application should succeed.

Conclusion

[53] The Constitutional Court authorities referred to above have firmly established that municipalities' constitutional legislative power regarding "municipal planning" includes the control of zoning, even in respect of a use of land, such as for telecommunications, which fall within the exclusive authority of national government. ***Link Africa*** and ***Maccsand*** support the conclusion that the By-law does not conflict with Section 22 of the ECA. In keeping with the Constitutional Court's findings, it is overtly clear that a municipality must regulate land use, including matters which affect national interests.

[54] Therefore, I find that the Respondent has the exclusive legislative competence to regulate zoning of all land in its area for all purposes, regardless of whether the purpose affects a national interest. Consequently, the Respondent has the constitutional power and right to regulate the zoning of land to determine whether it

may be used for masts. I find that the By-law is valid and that the zoning of land for the use of masts falls within the Respondent's competence of "municipal planning".

[55] In the result the following orders are made:

(a) The Applicants' application is dismissed with costs.

(b) The erection of a freestanding base telecommunications station on Erf 80708, 47 Fourth Road, Heathfield, Cape Town (the property) on or about April 2016 is declared to be unlawful.

(c) The use and development of the property for the purposes of a freestanding base telecommunications station is declared to be unlawful.

(d) The First Applicant (Telkom) is to pay the costs of the Respondent's (the City's) counter-application.

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P ANDREWS, AJ

Acting Judge of the High Court

REPORTABLE

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

Case Number: 10354/2017

In the matter between:

TELKOM SA SOC LTD	First Applicant
HILDA ISABEL KALU N.O. in her capacity as THE EXECUTRIX OF THE ESTATE LATE BIRCH KALU	Second Applicant
and	
CITY OF CAPE TOWN	Respondent

CIVIL

JUDGE	**:**	Andrews A J
JUGDMENT DELIVERED BY	:	Andrews AJ
FOR APPLICANT	**:**	Adv. P Ellis SC, Assisted by: Adv K Hofmeyr
INSTRUCTED BY	**:**	Hogan Lovells (South Africa) Inc.
FOR RESPONDENT	**:**	Adv. R Paschke
INSTRUCTED BY	**:**	Webber Wentzel
DATE OF HEARING	**:**	13 March 2018
DATE OF JUDGMENT	**:**	10 May 2018