



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 19380/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE 4 May 2021

SIGNATURE

In the matter between:

BESTER TECHNOLOGIES SOUTH AFRICA (PTY) LTD

Applicant

and

THE CITY OF TSHWANE

First Respondent

METROFIBRE NETWORK (PTY) LTD

Second Respondent

AFRITEL (PTY) LTD

Third Respondent

MINISTER OF TRANSPORT

Fourth Respondent

JUDGMENT

This matter has been heard in open court and otherwise disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

In June 2020 the City of Tshwane (CoT) granted a wayleave to the second respondent, Metrofibre Network (Pty) Ltd (Metrofibre) for conventional trenching in certain urban areas to the west of Pretoria. On 13 October 2020, the CoT implemented a new “Micro Trenching for Electronic Communication Network Fibre to Residential Properties in Tshwane” policy (the Micro Trenching Policy). On 5 February 2021 the CoT granted the applicant a wayleave for micro-trenching in the same areas as that of the wayleave granted to Metrofibre. The applicant now seeks a revision of the CoT’s failure to withdraw Metrofibre’s wayleave.

[2] Trenching operations for the installation of fibre networks in Tshwane relevant to this application:

- 2.1 There are two types of trenching used for the installation of fibre networks. The first is “conventional” trenching which comprises of the digging of sizeable trenches which causes huge disruption to existing road, pavement and ancillary infrastructure. The second is “micro-trenching” which, due to its limited extent, causes for less intervention in existing structures.
- 2.2 The benefits of micro-trenching and the need for fibre optic infrastructure are best summed up in the CoT’s own aforesaid policy document which, inter alia, records the following:

“One of the major challenges that urban municipalities face is the cutting of the existing roads and pavements to install utility lines such as waste water sewers, water mains, electrical cables and conducts. Once a cut is made, it should be backfilled with new, appropriate material, resulting in a patched surface on the pavement In the telecommunication industry, the number of internet users has grown considerably over the past 20 years. The internet has become an ubiquitous source of both information and entertainment, resulting in a major surge in bandwidth requirements. Since the data transmission capacity of fibre-optic cables is higher than that of the existing copper telecommunications infrastructure, the provision of fibre optic networks has become essential to appease users’ growing internet demands The Roads and Transport Department has determined that for specific applications, micro-trenching is an innovative deployment technique that is generally cheaper, less disruptive and quicker than conventional dig techniques and less disruptive of traffic and it requires less extensive restoration work. Hence the department decided to authorize micro trenching as an alternative to conventional trenching in residential streets for supplying fibre to residential properties and high-density residential developments”.

- 2.3 As already stated in the introduction, at the time that the above policy was implemented on 13 October 2020, Metrofibre had been the holder of a wayleave which authorized it to install fibre optic cables in the designated areas by way of conventional trenching. It continued to do so by way of its appointed contractor, the third respondent, Afritel. This wayleave expires on Saturday 26 June 2021. For this reason, the CoT addressed a letter to Metrofibre on 15 October 2020 in the following terms:

“All fibre-to-the-home wayleave applications that were not approved on 11 September 2020 must be changed to Micro Trench application. CoT Wayleave Service Coordinators will assist with the changes and try to make it as seamless as possible. Wayleave applications that were approved before 11 September 2020 can also be changed to Micro Trench application and you are strongly urged to consider it ...”.

- 2.4 On 5 February 2021 the CoT granted the applicant a wayleave for the installation of fibre optic cables by way of micro trenching in substantially the same areas as the wayleave granted to Metrofibre. The wayleave granted to the applicant expires on 28 February 2022.

[3] The current disputes

- 3.1 The above factual situation brought about by the CoT resulted in a position which has been summed up by counsel appearing for the applicant in written heads of argument as follows:

“The result of the above factual matrix is that as matters stand, there are two wayleaves for the same area, one held by the second respondent authorizing it to continue with the outdated conventional trenching methods in contravention of the Trenching Policing Framework and another wayleave issued to the applicant, authorizing it to do micro-trenching which methodology is consistent with the new Trenching Policy Framework”. The summary is correct, except that the use of the word “contravention” is perhaps putting it too strong, “contrary to” might be more appropriate. Although the policy expresses a preference for micro trenching, it does not create a prohibition of conventional trenching.

- 3.2 The further consequence of the above and the existing trenching policy, is the fact that there must only be one “trencher” per street. The clash of interests (if not actually a clash of trenching teams) was inevitable.
- 3.3 As a result of the above, the applicant and Metrofibre held a meeting with the CoT Wayleave Department on 24 March 2021 in an attempt to resolve the issue. An impasse was reached. Metrofibre refused to relinquish any of its acquired rights or to convert to a micro-trenching system. The applicant also complained, supported by photo evidence, about the damages caused by Metrofibre (or Afritel). The CoT remained supine and did not resolve either of the issues.
- 3.4 The meeting was followed up by a letter from the applicant, requesting the CoT to investigate the circumstances leading to the approval of Metrofibre’s wayleave.
- 3.5 On the papers before the court, CoT still did nothing. Although cited as principal respondent, it neither opposed the relief nor did it furnish the court with its views of the matter, be it by way of an affidavit or appearance in any manner.
- 3.6 So far the history and current situation.

[4] The relief sought by the applicant:

- 4.1 In its notice of motion, apart from issues relating to urgency and costs, the applicant claims the following relief:

“2. That the first respondent be and is hereby ordered and directed to review and cancel the Wayleave for conventional trenching awarded by it on the 17th of June 2020 to the Second

Defendant under Ref No WL 1920 – 0429 for being inconsistent with the First Respondent's Trenching Policy dated the 13th October 2020.

3. *That pending the cancellation of Wayleave Ref No WL 1920 – 0429 as prayed for above, the Second Respondent be and is hereby interdicted and restrained from continuing with illegal conventional trenching ...”.*

- 4.2 From the papers it is clear that the wayleave granted to Metrofibre was validly granted. At the time that it was granted, the new policy was not yet in existence. The allegations of possible impropriety expressed in correspondence which preceded the application were not pursued in litigation and neither was it relied on as grounds for review. The review sought in prayer 2 of the applicant's notice of motion against a validly granted wayleave can therefore not succeed.
- 4.3 The applicant's complaint is rather that, when the Trenching Policy was promulgated, it should not only have proclaimed that micro-trenching would be the preferred method, but that conventional trenching would be prohibited and outlawed. This was however not done. The issue is also not that simple as there may be circumstances where micro trenching would not be possible or appropriate and more conventional methods may be the only option. There was, however, no such challenge raised against the policy, not at the time, nor in the current relief sought.
- 4.4 Once the intended review envisaged in prayer 2 of the Notice of Motion falls away, so does the basis for claiming the interim relief sought in prayer 3. The interim relief was for an interdict pending the review and if the review cannot proceed, then so also can the interdict not be granted.

- 4.5 There is a further hurdle in the way of the interim interdict sought in prayer 3 and that is that there is alternate relief available for the applicant: the principle is that if one trencher has completed trenching works, those works should also be available for use by other service providers. This much is also expressly conceded by the respondents, in particular, the third respondent (in paragraph 30.1 of its answering affidavit).
- 4.6 As already indicated earlier, the current difficulties did not arise from the granting of wayleave for conventional trenching prior to the new Trenching Policy, but rather from the fact that the CoT permitted such trenching to continue after the promulgation of the policy. This problem was exacerbated by only requiring those wayleaves approved after a certain date (11 September 2020), to convert to micro trenching rather than requiring all existing wayleave holders to convert, thereby extending the benefits mentioned earlier across the board. The last straw was when a second, competing set of rights were afforded to the applicant, by granting it wayleave authority in the same areas as the authority already granted to Metrofibre. This non-sensical approach by the CoT has not been explained by anyone, least of all CoT, but does not lead to a basis upon which previous valid acts can be revoked by a court. Only the party granting the authorities, the CoT, can, in the context of the factual matrix pertaining to this case, do so.
- 4.7 By the same token, the attitude of Metrofibre and Afritel, namely that they have a valid wayleave and that this operates to the exclusion of everyone else, including the applicant, appears to be not only opportunistic, but also incorrect. The wayleave itself does not confer exclusivity. At best, it grants authority to permit certain works to be done in the road reserves and on CoT property. It is, in each instance, a right or authority, not an

exclusive use permit. Depending on the composition of a grid or network, the wayleave and the one-trencher principle can operate on a street-by-street or even block by block basis, or at best, it can extend to a neighborhood by neighborhood basis, but Metrofibre cannot claim exclusively over the whole of its wayleave area to the exclusion of the applicant, particularly in those streets, areas or blocks where it is not (yet) operating or wherein it will not operate within the end of the validity period of its wayleave in 7 week's time.

- 4.8 Counsel for both Metrofibre and Afritel relied heavily on the maxim of *qui prior est in tempore potior est iure* (which has loosely been translated as “first come, first served” or that the first right is the stronger right). There is, however nothing suggested in the wayleaves which makes the earlier granted wayleave in favour of Metrofibre a stronger right than the later wayleave granted to the applicant. They are simply overlapping wayleave authorizations granted to different holders employing different trenching methods. The only exclusion which follows, is the “one trencher per street” principle and it is in this manner, i.e dependent on the factual situation, where the “first come, first served” principle may come in. There was no evidence from any party as to how the actual approval of the networks or the allocation of streets and the like, operated in practice or were treated by the CoT.

- 4.9 Both sets of parties referred to principles applicable to contractual contexts and how the issue of competing performers of obligations are to be treated. In this regard, the applicant urged the court to apply “equitable” considerations (such as those discussed in contractual environments by the learned author Christie in The Law of Contract in South Africa, 5th ed at paragraph 525 – 526).

4.10 As already described in paragraph 4.6 above, this is strictly speaking not a contractual issue, it is an issue concerning the manner in which the CoT gave out authorizations to perform services in infrastructure areas under its control. It is to CoT that the parties must look for the management and control of the services performed by the parties in terms of those authorisations (wayleaves) and how the CoT enforces or applies its own Trenching Policy.

4.11 It follows that the review and interdictory relief which the applicant seeks, cannot be granted.

[5] Costs

5.1 Had the CoT participated in the litigation, I would have had no hesitation in ordering it to pay the costs of the litigation, resulting from the debacle it had created. CoT however, did not partake in the litigation as already explained earlier.

5.2 The result of a refusal of relief claimed by the applicant generally means that Metrofibre and Afritel will have been substantially successful. The general rule is that costs should follow the event.

5.3 I do find, however, that the two respondents' approach to the debacle created by the CoT was one pure self-interest. No particulars were furnished as to the extent of their activities, either geographically or in respect of the remaining period of validity of their wayleave. Apart from the generality expressed regarding use of their trenches when the issue of alternate remedies were argued from a legal perspective, no practical co-operation or substantive particulars was disclosed so that the applicant could determine the extent of possible beneficial use (or not) of existing trenching. Where allegations have been made regarding damage caused by

the two respondents and their conventional trenching method, these were either ignored or dealt with nonchalantly by averring that such damages are for the account of CoT and not the applicant.

5.4 In the exercise of the court's broad discretion regarding costs, I therefore intend ordering each party to pay its own costs.

[6] Order:

1. The application is dismissed.
2. Each party is ordered to pay its own costs.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 30 April 2021

Judgment delivered: 4 May 2021

APPEARANCES:

For the Applicant:

Adv I Mureriwa

Attorney for the Applicant:

SE Kanyoka Attorney, Pretoria

For the Second Respondent:

Adv G V R Fouché

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For the Third Respondent:

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