THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 195/2018

In the matter between:

DARK FIBRE AFRICA (PTY) LTD
APPELLANT

and

CITY OF CAPE TOWN
RESPONDENT

Neutral citation: *Dark Fibre Africa v City of Cape Town* (195/2018) [2018] ZASCA 168 (30 November 2018)

Coram: Lewis, Cachalia, Seriti and Molemela JJA and Rogers AJA

Heard: 7 November 2018

Delivered: 30 November 2018

Summary: Section 22(1) of the Electronic Communications Act confers the power on a licensee under the Act to enter upon land and construct telecommunications networks for the benefit of the public. A licensee is, however, required to meet other requirements laid down by an owner of land, or a municipality in terms of bylaws or other regulatory laws. The right of a licensee is not unlimited and must be exercised having regard to all applicable laws.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Davis J sitting as court of first instance):

The appeal is dismissed with the costs of two counsel.

JUDGMENT

Lewis JA (Cachalia, Seriti, Molemela JJA and Rogers AJA concurring)

[1] This appeal turns on the legal implications of s 22 of the Electronic Communications Act 36 of 2005 (the ECA). The section gives to entities which have been licensed under the Act the power to enter upon land and construct electronic communications networks on privately or state owned property. The section has given rise to considerable litigation and there is some confusion as to how it is to be interpreted. This court has pronounced upon it (*Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA) and *Msunduzi Municipality v Dark Fibre Africa* [2014] ZASCA 165) and so has the Constitutional Court (*Tshwane City v Link Africa* 2015 ZACC 29; 2015 (6) SA 440 (CC)).

[2] Despite this, the parties in this appeal dispute the powers that the section confers on a licensee. Their dispute was determined by Davis J in the Western Cape Division of the High Court (referred to for convenience as the high court) to which Dark Fibre Africa (Pty) Ltd (Dark Fibre), the appellant, applied for an order that the City of Cape Town, the respondent, desist from imposing conditions on its use of public roads owned by the City. The high court found that the City was entitled to impose the conditions, all relating to the payment of moneys for working and trenching on municipal roads. Dark Fibre appeals with the leave of the high court.

[3] Section 22 of the ECA reads:

'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, and 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.' (My emphasis.)

The legal implications of s 22 of the ECA

[4] Dark Fibre maintains that it has statutory consent in terms of s 22(1) to lay fibre-optic cable throughout the City and that it accordingly does not need the City's consent to do so. In particular, the City may not prevent it from doing so and may not require that Dark Fibre make payments to it, either in the form of refundable or non-refundable deposits, nor constrain its activities in the exercise of its power. As it states, in its heads of argument before this court:

'A local authority like the City may <u>not</u> impose (through "wayleaves" or otherwise) a requirement on statutorily-authorized service providers to obtain prior consent to fulfill the compelling legal imperative of installing fibre-optic infrastructure.'

[5] The City has for some ten years been regulating the manner in which electronic licensees exercise their rights to lay fibre-optic cable. It does so by invoking the City of Cape Town By-Law Relating to Streets, Public Places and Prevention of Noise Nuisances 2007 (the Streets By-Law) and levying tariffs on licensees in terms of s 75A of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act).

[6] The City makes it clear, in its answering affidavit in Dark Fibre's application, that it is keen to co-operate with licensees in the provision of fibre-optic cable, and therefore in the provision of access to broadband, for the residents of Cape Town. At the same time it has exercised its constitutional and statutory rights in respect of municipal roads. It has done so within the framework of the Streets By-Law that requires persons who wish to dig trenches in and across roads and pavements (the road reserve) to obtain its consent and to do so in accordance with the City's requirements. These include the conditions that Dark Fibre now refuses to comply with: the payment of a deposit that may or may not be refundable, depending on whether Dark Fibre trenches across or along a street (there are in fact two conditions that deal with this deposit but I shall treat them as one); a reservation by which the City reserves the right to impose a tariff charge in respect of the use of City land for the installation of its network cables; and a condition that provides that should the services have to be relocated by Dark Fibre, then it will do so at no cost to the City.

[7] The City points out that since 2008, at a rate of more than 5 000 projects a year, it has approved some 50 000 projects for the installation of electronic communication facilities on its land. Dark Fibre has itself applied for consent to lay its cables on numerous occasions. And it has paid the deposits and tariffs required by the City. In 2012, the City introduced a standard process for the laying of fibre-optic cable, which required a licensee to apply to the City for a construction permit and meet the payment requirements imposed by the City. Dark Fibre complied with the procedure laid down.

[8] However, Dark Fibre informed the City on 30 May 2016 that it would refuse to accept the City's conditions, and in January 2017 it stated that the roadway trenching deposits paid by it previously would no longer be paid. Dark Fibre informed the City that it would commence construction in the Durbanville (Kraaifontein) area of Cape Town without abiding by the roadway trenching conditions. It wrote to the City stating that it proposed to commence construction in the area and invited the City to comment on the construction. But, it said, if it and the City could not reach consensus on practical issues within 30 days it would commence construction anyway.

[9] On 17 February 2017 the City granted a 'wayleave' (municipal permission to access land and work on it) and a work permit for Dark Fibre to undertake the proposed work in the Durbanville area. The City's standard conditions were included. Dark Fibre collected the documents from the City, but when completing them, it deleted the four conditions including the requirement that it pay roadway trenching deposits. It took the view, relying on the Constitutional Court decision in *Link Africa*, that 'commencement of construction is . . . not dependent on the issue of what is commonly referred to as a "wayleave" or in this case a "road permit"'. The City responded that it had never refused a wayleave to Dark Fibre but that s 22(2) of the Act provided that Dark Fibre had to comply with applicable laws. The City stated that it was merely requesting Dark Fibre to adhere to the City's conditions, which protect the public and the City from unsafe and damaging practices.

[10] Dark Fibre ignored written warnings from the City that starting works on the roads without complying with the City's conditions would amount to an unlawful breach of s 11(1) of the Streets By-Law. That section reads:

'Excavation in streets

(1) No person shall make or cause to be made an excavation or dig or cause to be dug a pit, trench or hole in a public road—
    (a) except with the written permission of the City; and
    (b) otherwise than in accordance with the requirements prescribed by the City.
    . . . .'

And so, without the written permission of the City, Dark Fibre started works in the Durbanville area. It ignored all requests to stop work and on 20 April 2017 a City official issued a stop-work instruction. Dark Fibre claims that City officials threatened to incarcerate its workers. The City denies this.

[11] Dark Fibre sought an interdict in the high court that would prevent the City from imposing the conditions that it routinely did for such works. The order sought would interdict the City from prescribing or imposing conditions, or interfering in any works carried out by Dark Fibre in constructing or maintaining any electronic communications network within the City's jurisdiction, except enforcement of its bylaws or policies relating to the preservation of the environment, traffic control, reinstatement of land where construction was done and the erection of barricades to ensure the safety of the public.

[12] The City responded in its answering affidavit, explaining why it was necessary for the City to regulate the matters targeted by the application. It asserted that Dark Fibre had a history in the City of not working to safe and adequate standards, and that its work had posed an unacceptable risk to public safety and to the integrity of the City's road infrastructure. It asserted that Dark Fibre used contractors who were unregistered, lacked the necessary qualifications and failed to comply with health, safety and traffic regulations. The City detailed the previous poor workmanship of Dark Fibre and the hazards caused by trenching in roads and pavements. The details are not germane to the appeal, save to state that cutting into a road or a pavement is inherently problematic. It reduces the longevity of the surface; if not properly done, it may cause the collapse of a road or pavement, and it leaves unsightly scars.

[13] Although Dark Fibre employs a professional consultant to oversee its work and ensure quality control, the consultant, the City alleged, seldom performed the necessary oversight, and had acknowledged that the work of Dark Fibre has at times been done in an inadequate manner. The City argues that Dark Fibre has not, in its papers, cited a single instance where it has performed the work of installing fibre-optic cable to the standards required by the City.

[14] The City points out that Dark Fibre has not challenged the constitutionality or validity of the Streets By-Law, nor has it challenged the City's tariffs or taken the City's budget on review. After the City's answering affidavit was filed, Dark Fibre amended the relief it sought by seeking to impugn only the four monetary conditions imposed by the City. On appeal, however, it argues that a local authority is not permitted to impose any conditions or pass any bylaw that authorizes the imposition of conditions on a licensee. It argues that the City 'cannot impose conditions which restrict the very action authorized by s 22(1) of the Act'. That raises the fundamental question at issue in this appeal: is a licensee's power to construct electronic communications networks unfettered, despite the express provision in s 22(2) of the Act that the licensee must have regard to applicable law?

[15] The conditions that the City imposes, and with which Dark Fibre refuses to comply, are that before starting work on any municipal road or pavement, the licensee must: (a) pay a refundable, or in certain circumstances non-refundable, deposit before the City will issue any wayleave or permit, together with a trench reinstatement deposit; (b) agree to the City's reservation of a right to impose a tariff charge in respect of the use of City land for the installation of an electronic communications structure; (c) undertake that should the structures it has installed have to be relocated at the City's instance, then the licensee will do the relocation at no cost to the City.

[16] Dark Fibre asserts that it is not bound to meet these conditions – that the statutory consent that it has as a licensee overrides the municipal bylaws and the tariffs imposed in terms of the Systems Act. It makes this assertion because of its understanding of the judgment of the Constitutional Court in *Link Africa*. Indeed, it argues that Davis J in the high court did not understand *Link Africa* and treated the essential question of the nature of a licensee's power as if it were 'res nova'. As I shall show, that was far from the case. It was Dark Fibre's gloss on *Link Africa* that showed misunderstanding. It is appropriate at this stage to deal with the authorities I referred to at the outset in this judgment.

[17] In *MTN* this court held that a licensee does not require a private owner's consent to occupy a base station on land that it had hired from the owner. Malan JA said (paras 14 and 15):

'The powers given by s 22 are . . . required to enable the providers of both fixed-line and wireless telecommunications operators to achieve their objectives . . . The reason for the powers given by s 22(1) would fall away if consent of the owner were to be a requirement. Section 22(1) specifically dispenses with the need to obtain the owner's consent. The words "with due regard" [in s 22(2)] generally mean "with proper consideration" and, in the context impose a duty on the licensee to consider and submit to the applicable law. This duty arises only when the licensee is engaged "in taking any action in terms of subsection (1)": the action referred to by s 22(1) is entering, constructing and maintaining, altering and removing. These actions are authorized. It is "in their taking" that due regard must be had to the applicable law. A fortiori the "applicable law" cannot limit the very action that is authorized by s 22(1).'

[18] Perhaps that statement lends itself to misinterpretation, for in *Msunduzi* this court was faced with a licensee that contended that it did not need the municipality's consent to trench on its roads. The municipality in question had flatly refused to grant the licensee wayleaves to do its work of laying fibre-optic cable. It had placed a moratorium on the grant of all wayleaves. Dambuza AJA held that the statement in *MTN* did not mean that licensees did not have to comply with applicable laws (paras 11 and 14). The municipality argued that the licensee had to comply with its bylaw regulating motor vehicles and road traffic, which required permission from the city engineer to dig on the roads and thoroughfares of Pietermaritzburg. Dambuza AJA said that the municipality's contention fell foul of the principle that applicable law may not be used '*to limit the very act authorized under s 22*' (my emphasis).

[19] That does not mean, however, that the power of the licensee is unlimited. For as Dambuza AJA went on to say 'a public authority would be entitled to challenge the manner in which a licensee takes the action contemplated under s 22' if it does not comply with applicable law. That was not, however, the issue with which the court was faced in *Msunduzi*. Dark Fibre in this matter contends that this court in *Msunduzi* held that a licensee did not need an owner's consent to enter upon land and dig up roads.

[20] That is not an interpretation that is consonant with what was said in *Msunduzi*, and if it was, then this court stated the proposition too widely. The City contends that if that was what was meant in *Msunduzi*, then it has not been confirmed by the Constitutional Court in *Link Africa* and is incorrect. The statements in *Msunduzi* must, however, be read in context: there the municipality had refused to even entertain applications for consent to start construction on municipal roads. The municipality's conduct, being a blank refusal, did not in truth constitute a decision taken in furtherance of its administration of municipal roads. The position in this matter is very different. The City has issued wayleaves and seeks only to regulate the manner in which Dark Fibre does its work, something that this court in *Msunduzi* said it was entitled to do. As I explain more fully below, the conditions that the City imposes fall comfortably within the proper administration of municipal roads pursuant to s 11(1) of the Streets By-Law.

[21] Davis J in the high court held that the judgments in *Link Africa* also arose in a different context. There the challenge was to the common law rights of a property owner confronted by what it termed a 'public servitude' created by s 22. The minority judgment in *Link Africa* considered that s 22(1) amounted to a deprivation of rights of the owner (Tshwane City) at common law, amounting to expropriation, and was thus unconstitutional.

[22] The majority judgment of Cameron and Froneman JJ, dealing with this conclusion, held that the real dispute before the Constitutional Court was not about entry on to property without consent, but about the common law rights of an owner in relation to a public servitude created by s 22. The servitude allowed the holder of the right (the licensee) to gain access to the property in so far as it was necessary for the exercise of the servitude, but that such access had to be constrained by the common law obligation to exercise a servitude '*civiliter modo*' – with due regard to the owner's property rights.

The majority stated (para 104):

'Servitudes conferred by statute have conveniently, and without any doctrinal problems, been referred to for many decades as public servitudes. Their existence is reflected in virtually every title deed in South Africa. Almost every property in urban areas has servitudes registered over it for sewage, water reticulation, electricity supply and the provision of telephone services. These servitudes are routinely registered as part of the process of opening a township register. The same is the case with rural properties. These may include road and rail reserves, powerline servitudes, rights of way, rights to convey water and various mining servitudes.'

[23] The majority judgment continued (para 127):

'The grant of the right under s 22(1) to a network licensee does not determine how that licensee may exercise it. For that, one has to go to s 22(2). And this explicitly requires that '*[i]n taking any action* in terms of subsection (1), due regard must be had to applicable law'.

The applicable law, it held, included the analogous principles and rules of the common law on servitudes.

[24] Referring to *Hollman & another v Estate Latre* 1970 (3) SA 638 (A), the court said that a servitude holder cannot 'come barging in, brazenly disregarding municipal protections and duties and works'. That would be 'alien to our conception of rights

over another's property. As stated in *Hollman*, exercise of a servitude is subject to the important condition that incidental rights must be 'exercised *civiliter*' (para 142). By *civiliter* the law means 'respectfully and with due caution' – *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) para 21.

[25] The majority concluded in *Link Africa* (para 152):

'(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 s 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 s 22(1) grants; and

(d) where disputes arise from the manner of exercising the rights under s 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*' (my emphasis, and footnotes omitted).

[26] The majority continued (para 155):

'While the legislation does not expressly include notice and compensation requirements in s 22(1), it is equally silent on disclaiming notice and compensation requirements. It is true that provisions expressly stating that compensation and notice are not required could have been included. But, instead, the legislation has s 22(2). Therefore common-law requirements of notice, consultation and compensation apply.'

[27] The majority went on to point out (para 185) that municipalities are in a distinctive position from private landowners. Applicable law, it said, refers to municipal laws 'that they 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 s 22(1) may be exercised.' *Link Africa* does not say that a municipality has no common law rights as a landowner. It may demand notice and compensation under the common law relating to servitudes, just as a private landowner may do. But the City in this matter does not locate its rights only in the common law. It acts as a local authority with the constitutional powers to enact and enforce legislation. It relies on the Streets By-Law and on the Systems Act to lay down tariffs.

[28] Dark Fibre does not submit that the City was not able to pass and enforce the Streets By-Law, or to impose tariffs. It does not challenge the legality or constitutionality of any of the municipal laws that the City relies on. But it argues that the Constitutional Court held that an owner may not do anything to thwart the exercise of its s 22(1) power. The municipalities that appeared in *Link Africa*, including Msunduzi, argued that a licensee cannot 'simply come into a municipality and without warning dig up a busy intersection, or lay cables along a busy pedestrian walk without consulting the local authority. . .' . The majority accepted the argument. It said (para 188)

'Section 151(4) of the Constitution provides that national or provincial government "may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions"'.

[29] But Dark Fibre relies on the following passage in the majority judgment in *Link Africa* (para 189) in support of its argument:

'These provisions [of the Constitution, regulating the powers and obligations of municipalities] 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.' (My emphasis.)

[30] So what, in the context, does 'thwart' mean? Dark Fibre argues that it means that the City cannot impose a requirement of a 'second' consent. It cannot therefore lay down conditions about payment. It cannot tell a licensee that it may not start construction unless it pays a deposit. In my view, the argument is based on a false premiss: that when the City requires notice and payment it is withholding consent to do that which s 22(1) authorizes. The thrust of the argument is that because a

licensee has a statutory power, a municipality or other owner cannot lay down conditions that limit that power.

[31] In this case, the City refuses to consent to digging up its roads unless certain conditions are met. That is impermissible on Dark Fibre's argument. But it fails to take into account that the City is not requiring consent to lay fibre-optic cables. It requires only that the City consents to the manner in which the digging up of the roads and pavements over which it has control, for the public benefit, is done. That is not withholding consent to – or thwarting – the licensee's exercise of its statutory power. As a fact, the installation of fibre-optic cabling in the City has not been 'thwarted' by its insistence on compliance with requirements imposed in terms of its Streets By-Law. On the contrary, such networks have been rolled out on an impressive scale.

[32] The general principle that applies where a number of different authorities are required to consent to an activity is to be found in *Maccsand (Pty) Ltd v City of Cape Town* [2012] ZACC; 2012 (4) SA 181 (CC). There the Constitutional Court was concerned with a company that had been granted a right to mine in terms of the Minerals and Petroleum Resources Development Act 28 of 2002 (the MPRDA). The MPRDA authorizes the holder of such a right to enter the land to which the right relates; bring on to it the equipment and materials that it needs to construct or lay down any surface, underground or undersea infrastructure required for the purposes of mining; and mine for its own account on or under the land. Like s 22 of the ECA, the powers conferred on the holder of a mining right by the MPRDA are in the public interest: the facilitation of exploitation of mineral resources to promote economic growth, employment and the social and economic welfare of all South Africans. Maccsand and the Minister for Mineral Resources argued that because it had various powers under the MPRDA, which is national legislation, Maccsand did not need to obtain the City's planning consent in terms of the Land Use Planning Ordinance 15 of 1985 (LUPO) then in force.

[33] This court (*Maccsand (Pty) Ltd v City of Cape Town* [2011] ZASCA 141; 2011 (6) SA 633 (SCA)) held that 'a successful applicant for a mining right or a mining permit will also have to comply with LUPO in the provinces in which it operates'.

The Constitutional Court upheld this finding. Jafta J, writing for a unanimous court, held (para 43):

'These laws, as the Supreme Court of Appeal observed, serve different purposes within the competence of the sphere charged with the responsibility to administer each law. While the MPRDA governs mining, LUPO regulates the use of land. An overlap between the two functions occurs due to the fact that mining is carried out on land. This overlap does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments.'

And (para 44):

'If it is accepted, as it should be, that LUPO regulates municipal land planning and that, as a matter of fact, it applies to the land that is the subject-matter of these proceedings, then it cannot be assumed that the mere granting of a mining right cancels out LUPO's application.'

And (para 48):

'The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed.'

[34] The *Maccsand* principle has most recently been relied on by the Constitutional Court in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* [2018] ZACC 41 para 106.

[35] The City argues that the *Maccsand* principle is applicable in so far as the licensee of a telecommunications network under the ECA is concerned. Although Dark Fibre is the holder of a licence, it may not exercise its rights without the authorization of the City to work on its property and comply with its requirements. This is not a 'second consent', or licence, under that Act. It is authorization to make use of its streets in the manner prescribed by its by-laws. It does not override the consent under the ECA. It is consent to dig on its roads, which is governed by by-laws applicable to everyone in the City's jurisdiction. That is precisely what the majority in *Link Africa* held in para 189, cited above.

[36] The same conclusion was drawn in *Telkom SA Soc Ltd v Kalu NO* [2018] ZAWCHC 53 where Andrews AJ said that *Link Africa* had been misinterpreted by Telkom. She said (para 48):

'Section 22 cannot operate in a vacuum. . .[I]t has to co-exist in a web of other laws including municipal by-laws. The Respondent's [City of Cape Town's] zoning requirements do not conflict with Section 22(1) because before a licensee may exercise its rights in terms of [s 22] the licensee must comply with all applicable law, including laws enacted by the municipality. . . .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, licence or other authorization required by any law from any authority.'

[37] To conclude on the issue of the legal implications of s 22(1) of the ECA: a licence granted to a licensee constitutes general authority to enter land and construct a network of fibre-optic cables or to perform any of the functions that it is licensed to do. It stands alongside any other authority that must be given, by an owner, or under a bylaw, to do the work in a way that is determined by a municipality or other landowner. Different, and separate, independent, consents required for different activities (environmental, zoning, municipal or other) must be obtained by a licensee or its operations will not be lawful. The right of a licensee under the ECA does not 'trump' other rights. It exists alongside other rights created by applicable law, and none overrides the other.

The power of the City to require deposits and levy tariffs

[38] The City contends that its functional areas, as set out in Schedule 5B to the Constitution, include municipal roads, public places, traffic and parking. It is obliged to administer these areas and to make by-laws for their effective control. It is under an obligation to ensure that roads within its jurisdiction are safe for public use. A sound road infrastructure is essential for the community that the City serves. It controls some 10 900 km of roads. The infrastructure is very costly and the City is obliged to ensure that roads under its management achieve their full life span, which would normally be about 50 years. It cannot afford to replace prematurely degraded roads.

[39] That is why s 11(1)(b) of the Streets By-Law prohibits the excavation of roads, and digging in them, trenching or making holes otherwise than in accordance with the City's requirements. The bylaw is essential to protect the road infrastructure and other services in the road reserve from degradation and damage. The evidence of the City, which was not contested, is that trenching is a hazardous activity that must

be controlled in so far as possible. Trenching damages the structural integrity of a road or pavement, reducing its lifespan. It also disrupts traffic, and can be dangerous, especially to pedestrians, if not done in accordance with the City's requirements. It increases the cost of maintenance of roads, which is borne by the City's ratepayers.

[40] Trenching is often not necessary. It is possible to use other methods of laying fibre-optic cable, such as directional drilling, which goes under a road surface and thus avoids breaking the road and reduces disruption to traffic. However, the City asserts, licensees often prefer to trench because trenchless methods are technically more demanding and require expensive equipment. Accordingly, the policy of the City is that a licensee may trench only where necessary. If a licensee proposes to trench it is required to provide a technical motivation to do so. Approval will be given by the City where it is necessary, but in general it imposes a charge to disincentivise licensees from trenching. A licensee is required to pay a deposit determined by the City, which will be refunded if the licensee does not in fact trench.

[41] The City cited examples of damage done to roads and road reserves by Dark Fibre amongst other licensees. In its answering affidavit to Dark Fibre's application to interdict the City from imposing various conditions, an official of the City said:

'Licensees who dig into road reserves without obtaining, and following, the City requirements of how and where to carry out the work, risk damaging other infrastructure and services which occupy the road reserve. These include water mains, electricity reticulation, stormwater drains, and the services of other telecommunication licensees. For example, DFA [Dark Fibre], digging and drilling in roads without the necessary authorization, has burst water mains disrupting supply to residents, disrupting traffic and causing the loss of more than a million litres of scarce water during the current severe drought.'

[42] To avoid the problems caused by trenching, the City has determined a tariff for trenching which includes a forfeitable deposit to be paid before a licensee starts work on any road. It has set different tariffs for different types of road, distinguishing, for example, between local roads and metro roads.

[43] Dark Fibre argues that the tariff is irrational since it is predetermined and bears no relation to the actual cost of repairing a road on which it has worked. It

contends that the tariffs are disproportionate to the damage anticipated, and that the City has no power (vires) to impose a tariff for damage caused to road structure. It contends that there is no legal basis for the requirements (the conditions) that the City imposes.

[44] The City as landowner may, at common law, determine the compensation it requires for the use of the land, and damage to it. *Link Africa* makes this clear – para 152(c). The City relies principally, however, on the powers afforded it by the Systems Act. Section 75A of that Act provides that

'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.'

Dark Fibre's contention is that the Streets By-Law requires that the City 'prescribe' its requirements. It relies on the minority judgment of Corbett JA in *Goldberg v Minister of Prisons 1979* (1) SA 14 (A) in which he held that 'prescribed' meant pre-ordained. The City, it argues, has not pre-ordained tariffs but has set them on an ad hoc basis. In my view, one cannot interpret the meaning of words in legislation without regard to context. In *Goldberg* the court was dealing with an Act that determined what political prisoners were permitted to read in prison. In this matter, we are dealing with requirements of a local authority laid down so that it can perform its municipal functions. One cannot look to the use of a word in one enactment to interpret what 'prescribed' means in another and different context. As Corbett JA subsequently said, in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 150D-F, a rule must be interpreted in its context.

[45] Davis J held in the high court that one of the City's municipal functions is to provide and maintain structurally sound municipal roads in a financially sustainable manner. The tariffs are charged in order to enable the City to carry out that function. He found that there was nothing in the wording of the Streets By-Law that indicated that a licensee under the ECA falls outside that function. Dark Fibre's argument that the City has no power to impose a tariff on a service provider, rather than on a user, is based on the premiss that a service provider does not use its services. But the provision of roads is itself a service to the public and licensees use the roads to carry

out their functions. The City undoubtedly has the power to prescribe a charge for the use of its roads and their maintenance after a licensee has worked on them. And in any event, and even if a service charge could not be imposed on a service provider such as Dark Fibre, s 75A is not confined to services provided by a municipality. It may also levy and recover fees, charges and tariffs in respect of any function it performs. The relevant function is that of providing municipal roads and regulating the activities of third parties such as Dark Fibre when their works disrupt or impair the City's roads.

[46] Dark Fibre challenges the validity of each of the conditions imposed by the City. The first two comprise a deposit to be paid before work commences – a roadway trenching tariff. The purpose of the deposit is to discourage (disincentivize) trenching across roads, for the reasons I have explained. If a licensee does not trench, the deposit is refundable. If it does trench, the deposit is used to provide payment of part of the cost of compensation to which the City is entitled because of the degradation of its roads. Although the deposit is provided for in two separate conditions, it is in fact one deposit, which is either refunded if the City confirms that no trenching has taken place, or kept by the City as part compensation where there has been trenching.

[47] One of Dark Fibre's arguments underlying its challenge to these two conditions is that the tariff prevents the expeditious construction of its network. It provides no evidence to support this challenge, and the City's uncontroverted evidence is that it grants wayleaves within a very short time after they have been applied for. The City is empowered by the Streets By-Law to lay down requirements in respect of licensees' use of its roads. It is empowered by s 75A of the Systems Act to charge a tariff for such use. It is also entitled, as landowner, to claim compensation: *Link Africa* para 152(c). There are various legal sources, therefore, empowering the City to charge and to require deposits that may or may not be refundable, depending on whether the licensee trenches on roads or pavements. The charge is in fact levied as a tariff under the Systems Act.

[48] Dark Fibre contends that a regulatory charge cannot be used as a disincentive to harmful conduct. But the Constitutional Court in *South African*

Reserve Bank v Shuttleworth 2015 (5) SA 146 (CC) held that such a charge – to discourage harmful conduct – is constitutionally permissible.

[49] A further challenge to the conditions regarding the payment of a deposit is that there is no proportionality between any benefit to Dark Fibre and the tariff. It does not substantiate this assertion with any evidence. The City, in response to this challenge, showed how the amount of the deposit is calculated. It is based on the cost of directional drilling (not trenching), which the City encourages, and the likely disadvantages of roadway trenching. It also takes into account the increased maintenance for roads and pavements.

[50] The City's allegations about the inherent problems of trenching, and what is needed to maintain roads and pavements after trenching, are not denied by Dark Fibre. Increased maintenance costs include resealing the joint between the pre-existing asphalt and that which has been reinstated; repair of cracks; repair of potholes caused; and accommodation of traffic flow during repairs. The City states that the amount of the deposit required is conservatively estimated (that is, is less than the likely additional cost the city will incur over the long term because of trenching) and does not compensate it for the effective sterilisation of the road reserve for a period.

[51] Dark Fibre has not denied these allegations and does not say what charge it considers to be proportionate. The City's version must be accepted on the *Plascon Evans* principle.

[52] The second condition relates to a 'trench reinstatement deposit'. The purpose of this deposit is to cover the potential costs to the City of rectifying substandard reinstatement works. Dark Fibre's argument, as I understand it, is that the City has adduced evidence of only 14 instances where it did not reinstate to the City's standard. However, the City pointed out that it had cited these instances as examples, and that Dark Fibre's work was consistently below standard. And since a licensee only forfeits the deposit where the licensee has failed to reinstate satisfactorily, it is of no moment how many instances of poor construction work there are. Dark Fibre's attack is essentially an attempt to review the manner in which the

City has exercised its power to impose requirements in terms of s 11(1) of the Streets By-Law. I do not consider that the requirement of a refundable deposit is irrational or unreasonable. Licensees are business entities seeking to make a profit. In doing so, they make use of facilities administered by the City for the benefit of its residents. There is no reason why the City, and in effect the ratepayers, should be content with attempting to recover, in arrears, the cost of making good unsatisfactory work done by licensees. The challenge to this condition must thus also fail.

[53] The third condition objected to is that the City reserves the right to impose a tariff charge in respect of use of City property for the installation of telecommunications infrastructure, or, put differently, the City reserves the right to levy a charge, or rental, for the land occupied by infrastructure. The City argues that in reserving the right to charge for the use of its property, it is exercising its common law right as owner. The objection is founded on the argument by Dark Fibre that the common law right was taken away from municipalities by *Link Africa*. As I have shown, the argument rests on a misinterpretation of *Link Africa*. But the majority judgment makes it clear, in my view (para 152 (c)), that owners of land subject to a public servitude are entitled to require compensation. It distinguishes municipalities only by stating that they have greater regulatory rights under the Constitution than other owners do. (There is no evidence that the City in practice exercises this reserved right.) There is accordingly no reason to review and set aside this condition.

[54] The fourth condition relates to relocation costs. It states that should the City require a licensee to relocate its services, then the licensee is obliged to do so at its own cost. Dark Fibre had in fact, in 2010, indemnified the City against the costs of relocation. In its founding affidavit, Dark Fibre relied on the provision of this indemnity in arguing that the conditions that the City sought to impose were invalid. In the circumstances it cannot now challenge the validity of the condition.

[55] Dark Fibre does not, on appeal, persist with its claim for interdictory relief and there is accordingly no reason to deal with it.

[56] I conclude that Davis J in the high court correctly interpreted *Link Africa* and *Maccsand*. Section 22 of the ECA does not override the requirements of other

statutes or bylaws. The rights conferred on a licensee under the ECA must be considered together with all other regulatory instruments, and, where they require consent for an activity, a licensee is bound by those requirements.

[57] The appeal is dismissed with the costs of two counsel.

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C H Lewis

Judge of Appeal

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