IN THE COMPLAINTS AND COMPLIANCE COMMITTEE

Case No: 344/2019

In the matter between:

TELKOM SA SOC LTD Complainant

and

OCTOTEL (PTY) LTD Respondent

CCC MEMBERS

Judge Thokozile Masipa - Chairperson
Councillor Dimakatso Qocha - Member
Mr Peter Hlapolosa - Member
Mr Thato Mahapa - Member
Mr Paris Mashile - Member
Ms Ngwako Molewa - Member

OFFICE OF THE CCC

Lindisa Mabulu - CCC Coordinator
Meera Lalla - CCC Assessor
Amukelani Vukeya - CCC Administrator

LEGAL REPRESENTATION

Counsel for the Complainant
Mr Vincent Maleka SC
Ms Makhotso Lengane
Instructed by Werksmans Attorneys
Counsel for the Respondent
Mr Paul Farlam SC
Ms Janice Bleazard
Instructed by Friedlander Attorneys

JUDGMENT

JUDGE THOKOZILE MASIPA

INTRODUCTION

[1] The dispute in this matter concerns the ownership, control and /or possession of electronic communications facilities in three gated residential estates in the Western Cape, namely Kleinbron Park, Sandown and Dune Ridge Estate.

THE PARTIES

[2] The Complainant is Telkom SA SOC Limited (”Telkom”), an Internet Service Provider, situated at 61 Oak Avenue, Highveld, Technopark, Centurion.

[3] The Respondent is Octotel (Pty) Ltd (“Octotel”). Describing the business model of the Respondent, Mr Cunningham, the Chief Operating Officer, stated the following:

> *“Octotel is currently one of Cape Town’s largest “open access network” provider for fibre-based Internet connectivity. Octotel rolls out its fibre networking partnership with local Internet Service Providers (”ISP”). This means that Octotel provides the fibre infrastructure by laying and installing fibre optic cables in an area or community, and then rents its fibre lines to ISPs. This means that Octotel’s clients are ISPs, such as Mweb, Vodacom, Afrihost. These entities, in turn, conclude contracts*

with homeowners or businesses to provide Internet services using Octotel's fibre lines."

He, further, gave this analogy:

"Octotel provides the pipes but not the water."

[4] Both Telkom and Octotel are Electronic Communications Network Service ("ECNS") and Electronic Communications Service ("ECS") licensees, as defined in the Electronic Communications Act 36 of 2005 ("ECA"). Octotel is not an Internet service provider, but provides only the infrastructure that is required for the provision (by ISPs) of fibre optic internet services to end-users.

[5] Telkom and Octotel are competitors in this regard, among others, to the provision of fibre optic connectivity to consumers in South Africa. This requires that there be ongoing provision and use, among others, of both new and existing ducts, manholes and related infrastructure in which cables are installed for telecommunications purposes.

THE COMPLAINT

[6] Telkom's complaint is based on the alleged contravention, by Octotel, of Section 43 of the ECA, read with Regulation 3 of the Electronic Communications Facilities Leasing Regulations, 2010 ("the Regulations"). The said regulations require that operators follow a prescribed process for gaining access to electronic communications facilities. (Details of the alleged complaint are set out in the Historical Background below).

RELIEF SOUGHT

[7] Telkom sought the following relief:

> *"1 An order:*
>
> *1.1 Interdicting Octotel from acting in contravention of section 43 of the ECA, read with Regulation 3, in relation to any of Telkom's facilities within the Republic of South Africa;*
>
> *1.2 Interdicting Octotel from continuing to install its optic fibre in Telkom's infrastructure within Kleinbron Park, Brackenfell, Western Cape, Sandown Estates, Big Bay, Western Cape and Dune Ridge, Big Bay Boulevard, Bloubergstrand, Western Cape;*
>
> *1.3 Compelling Octotel to vacate its optic fibre from Telkom's infrastructure within each of the above-mentioned estates;*
>
> *1.4 Recommending to ICASA to impose an appropriate penalty on Octotel for its unlawful conduct; and*
>
> *1.5 Any other relief which the CCC deems appropriate."*

HISTORICAL BACKGROUND

[8] Circumstances which led to the present dispute before the CCC are summarized hereunder. But before I set them out, on behalf of the CCC, I would like to thank Counsel who appeared for the parties, for their well

thought-out and thought-provoking submissions and argument. Most importantly, they took the time to prepare heads of argument and supplementary/additional heads of argument. Their assistance to this Committee is highly appreciated.

[9] In its papers, Telkom states that it has, among others, ducts, manholes and related infrastructure in which it has installed its own cables for telecommunications purposes at three residential estates in the Western Cape. These are Kleinbron Park, Brackenfell, Sandown Estates, Big Bay and Dune Ridge, Big Bay Boulevard, Bloubergstrand, (”the affected estates”).

[10] On 25 March 2019, Telkom, through its Openserve division, addressed a letter to Octotel in which it stated, inter alia, that:

10.1. It had recently come to its attention that Octotel had unlawfully accessed its ducts, manholes and related infrastructure at the Dune Ridge Estate, without following the mandatory regulatory processes for such access as prescribed in terms of Section 43 of the ECA as it did not enter into an appropriate facilities leasing agreement with Telkom; and

10.2. Octotel must provide an unequivocal written undertaking that it would cease the operations and would immediately take steps to remove the fibre optic cables it had installed in the Telkom infrastructure at the said estate.

[11] In response, on 4 April 2019, Octotel's attorneys of record, admitted having accessed the existing infrastructure in Dune Ridge Estates but denied any wrongdoing. According to Octotel it obtained permission from the Home Owners Association which had the authority to grant such access. Furthermore, according to Octotel, the unanimous judgment of the Supreme Court of Appeal in the matter of ***Dennegeur Estate Home Owners Association and Another v Telkom SA SOC Ltd and Another*** **(366/2018) [2019] ZASCA 37; 2019 (4) SA 451 (SCA), handed down on 29 March 2019** confirmed that:

11.1. Neither Telkom nor Openserve were the owners or possessors of the ducts, manholes and related infrastructure installed in the said estate;

11.2. Neither Telkom nor Openserve were entitled to prevent Octotel from continuing to install its cabling and related equipment with the aforesaid ducts, manholes and related infrastructure; and

11.3. Octotel was accordingly entitled to proceed with the installation.

[12] Subsequently, Telkom conducted an inspection on 9 May 2019 and 12 May 2019 at the Kleinbron Park as well as Sandown Estate respectively, and established that in those estates as well, Octotel had installed fibre optic cables in Telkom's infrastructure.

THE EVIDENCE

Telkom's Claim

[13] Telkom called three witnesses, namely, Mr Andre Luc Delit, Mr Stefan Geldenhuys and Mr Frank Hagen. Octotel called Mr Scott Cunningham. In addition, the CCC had regard to the statements of the following witnesses: Ms Johannet Maritz for Telkom as well as the statements of Mr Yasaseen Ebrahim and Mr Franz Burger for Octotel. The hearing took four days during which a great deal of evidence was led. It shall, however, not be necessary to set out such evidence in detail. In my view, a summary of the crucial facts will suffice.

[14] The underground passive infrastructure was installed by developers of the three gated estates between 2004 and 2007. At the time Telkom interfaced with the developers to negotiate the installation of the underground passive infrastructure. In its negotiations, Telkom adopted one of the two approaches, namely:-

14.1. The Supply and Deliver Model

In terms of this model, Telkom purchased the components of the underground passive infrastructure, including the ducts, manholes and covers and thereafter supplied them to the developers to install them.

14.2. The Developer Installation Model

Under this model, the developer procured components of the underground passive infrastructure, at the developer's cost and thereafter installed them in and around the estates.

[15] Regardless of the model of installation adopted in each of the affected estates, the installation by the developer of the underground passive infrastructure was carried out in accordance with the plans and specifications approved by Telkom.

[16] During the installation of the underground passive infrastructure, Telkom's Internal Liaison Officer, ("the ILO"), would oversee the installation and inspect the works. Thereafter, if Telkom was satisfied with the finished product, it would certify it.

[17] Following the certification of the installation, the developer would hand over the underground passive infrastructure to Telkom. The latter would then proceed to install its copper cables in order to provide voice and data services to several residents at the affected estates. After Telkom had installed its copper cables it would record the underground passive infrastructure and the copper cables installed therein in its assets register by means of a software tool known as Netplan. On every occasion, Telkom would request that the underground passive infrastructure concerned would be for its exclusive use.

[18] During the course of 2019, it came to the attention of Telkom that a third party, Octotel, had gained access to the underground passive infrastructure in the

three estates without having approached Telkom or ICASA. Hence the lodging of the present complaint with the CCC. Further investigations, showed that Octotel had deliberately gained access to the passive infrastructure in Kleinbron Park and in Dune Ridge Estates on the basis that it had permission to do so from the Home Owners Associations concerned. It transpired, however, that although in Sandown Estate Octotel had dug its own trenches and installed its own ducts, as it did not want to use the existing infrastructure, its subcontractors had accessed the existing infrastructure in the last mile. (I shall come back to this later in the judgment).

The Facts - Ownership

[19] According to Octotel, the evidence had failed to establish that Telkom had ownership of the infrastructure or that it exercised any control or possession in the infrastructure in the affected estates as not all documentary evidence proving ownership had been submitted. In addition, the installation of the infrastructure in the Developer Installation Model, was done at no cost to Telkom. The argument was that it could not have been the intention of the legislature that rent should be paid to a licensee to lease infrastructure facilities that it had not paid for and that it did not maintain.

[20] Developing its submission further on ownership, Octotel stated that Telkom's failure to prove that it was the owner of the infrastructure was fatal to its case. Octotel's view was that documentary evidence was crucial more especially in the Developer Installation Model.

[21] Octotel submitted that while Telkom purported to reserve ownership of the pipes and *"associated infrastructure"* under the supply and deliver model, it didn't do so under the developer installation model. For its submission Octotel relied on the wording of Annexure ST1 to Geldenhuys' statement, which was an offer to developers in the supply and deliver model. It provided that *"ownership of the pipes and any associated infrastructure... will remain vested in Telkom."*

[22] Octotel argued that by contrast, no equivalent provision on ownership appears in Telkom's offer under the developer's installation model in Annexure ST2, ST3 and ST4. Instead Telkom sought to reserve for itself in that context the right of exclusive use which, so it was argued on behalf of Octotel, was a recognition that ownership lay not on Telkom, but elsewhere.

[23] The debate concerning the importance or even relevance of ownership of the passive infrastructure, in the present case, serves to illustrate the misinterpretation of section 43 of the ECA on the part of Octotel. In my view, as counsel for Telkom correctly submitted, the question of ownership in these proceedings was not relevant. That this is so, is clear from the provisions of section 43 of ECA in that the section does not expressly mention ownership. In addition, the SCA in ***Dennegeur*** recognized that the ducts are subject to the statutory servitude in section 22 of the ECA. The same was also recognized by ICASA in its report starting on page 84 of the papers. In its determination it noted:

"It is important to note that the obligation to lease electronic communications facilities in terms of section 43 of the ECA is not limited to an owner of such facilities, but is imposed on any electronic communications network service licensee. This view is mainly informed by the fact that section 43 makes no specific reference to ownership, thus the obligation to lease is not limited only to owners of electronic communications facilities." (Added emphasis). In addition, in Vodacom/Telkom the CCC accepted that ownership of the underground infrastructure facilities is not a prerequisite for a licensee to claim an entitlement to lease the facilities.

[24] In my view, therefore, the above serves to disprove the notion that the question of ownership is relevant. What is more, Octotel's contention to the contrary is clearly at odds with the true import of section 43.

[25] The submission on costs further overlooks the role played by Telkom in the installation of the passive infrastructure, which role, in my view, cannot be said to be insignificant. There was no evidence to the effect that the production of plans, specifications for the infrastructure, supervision of the works, approval and certification were done at the developer's cost. On the contrary, there was evidence that these were services supplied by Telkom at no cost to the developer.

[26] The second reason why this submission cannot be sustained is that for purposes of this judgment, it is not necessary to distinguish between the two models. I say this because in both models Telkom called the shots. The

installation of the passive underground infrastructure was done at the behest of Telkom, as it were.

[27] As stated earlier, in both installation models, the work was done in accordance with Telkom's plans and specifications that Telkom insisted on.

[28] In both models, Telkom's Internal Liaison Officer ("the ILO") played a crucial role as he would oversee the installation, ensure there was quality control and that there was no deviation from the plans and specifications.

[29] Once the work was done, Telkom tested it and, it was only when it was satisfied with the finished works, that Telkom would certify it.

[30] Explaining the logic of this arrangement Delit said the following:

> *."... the developer did the work on our behalf. The reason is that when a development takes place, they don't want multiple contractors on site. So, it is easier for them if they are installing normal ducting for electrical and water and everything. And the telecommunications at the same time. So, this is why we provide them with the materials that at no cost to them and they will install it because they have got the trenches open. And they have got the technology to do the work for us. So, they don't reimburse us. We just give them the material at no cost to them and they do the work for us."*

[31] This evidence was corroborated by that of Frank Hagan who, similarly, said the following under cross examination:

"…If a developer wanted to develop a new development, he could approach Telkom and tell Telkom about it, then they would negotiate. Sometimes we would do the planning or the engineering of the infrastructure for them. Otherwise, other times they would get their civil engineers to do the engineering, they would then present it to us. We would have a look at it, make any changes we thought would be necessary. Then they would ensure that their network was built or planned according to our specifications. We would then generally give the land developer the manhole covers and the ducts. They would then install it at their expense, and they would make sure that it was up to our standards and hand it over to us."

[32] This makes it clear that the installation of the underground passive infrastructure was done for Telkom and not for the developer. It can also be seen that convenience played a role in the arrangement. In the words of Delit, the trenches were already open and the developer was, at the time, busy with installations for electricity and water. It seems to me, therefore, that the costs as argued by Octotel paint only half the picture. I say this because there may be other variables involved such as the convenience to the developer as illustrated above.

[33] It is so, as counsel for Octotel submitted, that ultimately everything depended on what was agreed on during negotiations between the developer and Telkom. However, as mentioned earlier, the significant role played by Telkom in the establishment of the underground passive infrastructure, leaves no

room for doubt that Telkom established the right to control access to the infrastructure irrespective of the model adopted.

[34] In the case of Sandown, there seemed to be no dispute that Telkom owned the underground passive infrastructure. Also undisputed was that Octotel had gained access to this existing infrastructure in the last mile in five instances but this had been corrected by Octotel when this was brought to its attention.

Facts - Right to Control

[35] The question whether Telkom has the right to control access to the passive infrastructure, which is the subject of the complaint in this matter, has partly been dealt with above. I say this because the right to control access to the infrastructure and the role played by Telkom in the establishment of the infrastructure concerned are inextricably linked, in my view.

[36] In his submission counsel for Octotel sought to downplay and minimize Telkom's role in the installation of the infrastructure when he emphasized that the said installation was done at the cost of the developer and at no cost to Telkom. It is important to note that the costs in this regard relate only to the physical installation of the passive infrastructure. It does not take into account incidental costs of procuring plans and specifications, costs related to supervision of the installation, as well as the testing and certification of the finished works.

[37] Counsel for Octotel further argued that Telkom had not shown any right to control access to and the use of facilities in the three estates. In this regard, the following was submitted:

37.1. With the exception of a single manhole in Kleinbron Park, the existing manholes in the estates are unlocked and bear no Telkom markings or branding;

37.2. It was only in Kleinbron Park where it was shown that there is a green 110mm PVC duct marked with the branding identifying it as belonging to Telkom. However, it is impossible to see this without the excavation of the ducts, as they are buried more than a metre underground.

[38] In my view, the question of unlocked manholes and other related equipment not marked with the Telkom brand, may point to weak security and poor management rather than be an indication that Telkom does not have the right to control access to the underground passive infrastructure. I am not persuaded that this right is dependent on the ease or difficulty with which others can gain access to the infrastructure. In my view, that right is clearly manifested in the role that Telkom played in the establishment of the infrastructure concerned, as outlined above. For this reason, therefore, the submission on behalf of Octotel cannot be sustained.

[39] A further submission was that Telkom became only aware that a third party had gained access to the existing infrastructure more than a year after the alleged contraventions. This was a further indication that Telkom was not in control of the infrastructure concerned. Such lack of monitoring or lack of

awareness, on the part of Telkom, that its facilities were being used by a third party, was not consistent with a claim of control, so it was argued.

[40] I disagree. In my view, the above submission would be more appropriate in a case where possession was an issue. This is precisely what makes the present case distinguishable from the ***Dennegeur*** case. My view is that the lack of proper monitoring on the part of Telkom cannot be a means to gauge the existence or non-existence of the right to control access to the infrastructure.

Octotel's Reliance on the Judgment of SCA in *Dennegeur Estate Home Owners Association v Telkom SA SOC* Ltd 2019 JDR 0635 (SCA) 29 March 2019

[41] Octotel relied on the Dennegeur SCA matter for its submission that Telkom was not in possession of the infrastructure that was accessed by it. According to Octotel it was clear from that judgment that although Telkom had exercised its servitutal right under s22 of the ECA by installing its cables in the infrastructure, it did not follow that Telkom possessed all the vacant and unused space in the ducts and manholes.

[42] Telkom did not exercise physical control over the ducts and manholes in the estates necessary to establish physical possession. This was exercised by the Home Owners Association which controlled access to the infrastructure by controlling access to the estates, it was further submitted.

[43] Telkom submitted that the *Dennegeur* judgment was not applicable in the present case as the judgment there, was dealing with a limited issue of

spoliation. The *mandament van spolie* is an act of dispossession which is a common law issue which is unrelated to the regulation of ECNS facilities and networks in terms of section 43.

[44] Telkom, correctly, in my view, directed the CCC to two critical *dicta* in the judgment to illustrate the limited issue decided by the SCA:

> *"[15] The rights afforded by s22 of the ECA are in their nature servitutal. Telkom enjoyed the right to enter into the property of a land owner in order to construct, maintain, alter or remove electronic communications networks or facilities in the manner described in Link Africa. Quasi-possession of an asserted servitutal right enjoys protection under the mandament to the extent that it is evidenced by the actual or factual exercise of the professed right. There can be no doubt that, by installing the cables into the ducts forming part of the infrastructure in order to deliver its telephone and ADSL internet services Telkom, by its use of the cables and the space occupied by the cables, exercised the right which it enjoyed in terms of s22 of the ECA. To that extent it enjoyed quasi-possession of the servitutal right under s22.*
>
> *[18] The extent to which Telkom in fact exercised a servitutal right to the airspace in the ducts under s22 prior to the alleged act of spoliation was, in my view, limited to the use of the space actually occupied by the cables in the infrastructure across*

Dennegeur. A reservation of airspace for possible future use does not give quasi-possession thereof to Telkom. In these circumstances I consider that Telkom was not in quasi-possession of the entire infrastructure and particularly it was not in possession of unused vacant space in the ducts in which Vodacom installed its optic fibre cables."

[45] There is merit in this submission. First, the cause of action in ***Dennegeur*** was a claim of spoliation by Telkom against Vodacom and the Home Owners Association of Dennegeur. Telkom had alleged that Vodacom had committed an act of spoliation by placing its optic fibre into Telkom's ducts and sleeves.

[46] In ***Dennegeur***, the issue was *mandament van spolie.* To prove its claim in that matter, therefore, Telkom had to show that at the time of the act of spoliation, or at the time of dispossession by Vodacom, it, Telkom, was in possession of the infrastructure. Telkom had failed to prove that. Hence the findings of the SCA in that matter that Telkom was, at the time of the alleged dispossession, not in possession of the unoccupied portion of the ducts.

[47] In the present case, however, the question of possession was not an issue. The question before the CCC was whether section 43 of the ECA was applicable in a case where an ECNS shares existing infrastructure with another. (At this stage it is necessary to state that although at the heart of the complaint was the interpretation and the applicability of section 43 of the ECA, there was also a question whether section 22 and/or section 6 of the same Act

could be applicable in this matter). I shall deal with each of these in due course.

[48] The claim against Octotel was that it failed to follow regulatory procedures set out in section 43 of the ECA and the Regulations, when accessing existing underground passive infrastructure. In this case the applicable provisions of the ECA are to be found in section 43 and not in section 22 of the ECA. Having regard to the above, the two cases are clearly distinguishable, in my view.

The Facts - The Role of the Home Owners Association (HOA)

[49] In support of its case, Octotel relied on a letter of consent from the HOAs of Kleinbron Park and Dune Ridge Estate. (I pause here to state that while the letter of consent from the HOA of Kleinbron was part of the evidence before the CCC, the letter of consent from the HOA in Dune Ridge Estates could not be produced as it could not be found. In my view, there was no reason why this Committee could not accept the evidence of Mr Cunningham that such a letter had been furnished but had since gone missing). For the purposes of this judgment therefore, the CCC accepted that Octotel did obtain a letter of consent from the HOA of Dune Ridge Estates. Also accepted was that it was on this basis that Octotel gained access to the existing underground passive infrastructure.

[50] On Octotel's version, ownership of the underground passive infrastructure vested in the HOAs. For this assertion Octotel relied, once more, on the fact that Telkom did not bear the cost of constructing the facilities. The developer was the one responsible for the construction of the manholes and ducts.

Likewise, the developer (or its successor-in-title, the Home Owners Association or Body Corporate) bore the cost of maintaining these facilities. This was so, under both Telkom's supply and deliver model and the developer installation model. I have already outlined the role played by Telkom in establishing the underground passive infrastructure concerned. It will serve no purpose to repeat it here.

[51] It was submitted further, on behalf of Octotel, that on common law principles of accession, the effect of installing the manholes and ducts underground in the estates, with the intention that they should remain there indefinitely, is that they accede to the land and become the property of the landowner, (i.e., in this case, the Home Owners Associations). Having regard to the common law principles of accession, therefore, Octotel's conduct was lawful, it was argued.

[52] It is so that the land on which the underground passive infrastructure exists is currently controlled and owned by the HOA**.** However**,** the submission regarding common law principles of accession cannot be sustained for a number of reasons**.**

[53] Section 22 makes it quite clear that one can construct underground passive infrastructure on private land owned by another. And access to the underground passive infrastructure is currently a regulated activity. The applicable law is section 43 read with Regulation 3 of the Leasing Regulations. More importantly, the power to regulate rests with ICASA.

[54] If Octotel was correct, in its submission, the situation would create an anomaly. It would mean that ICASA has to abandon any regulatory powers it

has over the underground passive infrastructure because of the assertion of ownership by the Home Owners Association. As attractive as this proposition may be, to private land owners, this could not have been the intention of the Legislature. There was a reason for the departure from common law as reflected in section 43 of the ECA.

[55] This departure was necessary to provide for the promotion of fair competition in the ICT industry, equitable access to the industry and for the benefit of the public. To ensure that this purpose is fulfilled, the regulatory measures in terms of the ECA must prevail as they, *inter alia*, ensure that the sharing of the facilities is done in an orderly fashion. It is for ICASA to determine what airspace is available, whether sharing would be economically and technically feasible and to assist the parties, where necessary, to reach an agreement. To find otherwise, would be to allow "the free for all" situation that the CCC warned about in the Vodacom/Telkom matter.

[56] There is another reason why the Home Owners Association cannot be owners of the underground passive infrastructure. Telkom's evidence was that irrespective of the model used, after Telkom had tested and approved the infrastructure, the developer would hand it over to Telkom. Thereafter, Telkom would put in its copper cables and then record the infrastructure into its assets register by means of a tool called Netplan. The hand over took place long before residents moved into their homes and the Home Owners Association was formed.

[57] In my view, from this evidence it seems that whatever property was handed over to the HOA could not have included the underground passive infrastructure as this had already been handed over to Telkom years earlier. There is no evidence to suggest that Telkom may have lost the right to control access to the underground passive infrastructure at any time. The only evidence which can be relied on in this regard is the evidence given under oath as counsel for Octotel as well as members of the CCC had an opportunity to ask questions. In my view, that evidence was honest and can safely be relied on.

[58] A corroborating factor which casts doubt on the claim that the HOAs are the owners of the infrastructures is to be found in the conduct of the HOA in Dune Ridge Estate and the stance it adopted towards the dispute and the proceedings in this matter. One would have expected the HOA, as alleged owner of the infrastructure, to show an interest in the proceedings, but it showed none. More telling, in my view, was the fact that although the HOA of Dune Ridge Estate knew of the dispute and the proceedings before the CCC, it was not present or represented to protect its interests. This conduct militates against any suggestion that the HOA might be owner of the infrastructure which is the subject of these proceedings. This leads to an irresistible inference that even the HOA knows that it does not own the infrastructure.

[59] The above can further be seen in the evidence of Mr Cunningham, who stated that the HOA did not want to get involved. Under cross examination, explaining why Ms Roets of Dune Ridge had not submitted a statement to the CCC

confirming that the HOA had granted Octotel a letter of consent, Mr Cunningham said:

> *"… I'm 100% sure she hasn't provided you with a witness statement, the estate prefers not to get involved."*

This was repeated under cross examination when he said:

> *"… I went and met with them and just to understand from their perspective where they stand on it... You know they, they don't really wanna get involved in matters like this. They prefer to stay out of it and we've, we pretty much proceeded without involving them which is why we have not gone and got a statement from Ms Madelein Roets."*

The Sufficiency of the Evidence Tendered to Determine Who has the Right to Control Access to the Underground Passive Infrastructure

[60] Octotel's submission was that there was insufficient evidence to show that Telkom was the owner of the underground passive infrastructure or, that it exercised any control or possession over the infrastructure. The attitude of Octotel was that Telkom had failed to establish its claim as it had, amongst others, failed to produce all documentary evidence related to ownership. Once again it is important to re-iterate that ownership of the underground passive infrastructure is not relevant in the present case.

[61] For the sake of completion, however, subsequent the hearing, the CCC issued a directive to Telkom to file all outstanding documentation relating to the Estates.

[62] In response to the directive, Telkom filed further submissions after which it filed an affidavit with attachments marked “TA3” and “TA4” (“the maps”). The affidavit was dated 18 June 2021 and deposed to by Mr Siyabonga Mahlangu. I do not intend to dwell on any of the details provided except to state that in my view, for purposes of this judgment, none of the additional information is useful. It bears mention that Octotel has succinctly captured the essence thereof in its response.

[63] Octotel filed an affidavit by Mr Trevor Van Zyl, the Executive Officer of Octotel, and a confirmatory affidavit deposed to by Francois Botma, an engineer and director of Bosch Projects (Pty) Ltd. (The company is stated to be a consulting engineering firm which regularly liaises with the relevant local authorities in order to obtain approval for civil works and which accordingly regularly prepares and submits maps such as “TA3” and “TA4”). The affidavits are dated the 26 July 2021 and 27 July 2021 respectively. In Mr Van Zyl’s affidavit, Octotel sets out various reasons why it persists in its denial “that Telkom is the owner, or has any entitlement to the passive electronic communications facilities installed in the Estates”. The reasons are summarised hereunder:

63.1 The submissions do not constitute evidence as it was submitted by Telkom’s legal representatives and not a person with the requisite personal knowledge who positively could affirm that the content thereof is true.

63.2 The deponent to Telkom's affidavit, who describes himself as "Group Executive: Regulatory Affairs and Government Relations of the Complainant" similarly lacks the personal knowledge to be able to confirm the content of the submissions.

63.3 Octotel contends that neither the submissions nor the affidavit by Telkom should be regarded as evidence for reasons already stated above. Octotel contends further that even if the submissions and the affidavit concerned were to be accepted as evidence, they failed to support Telkom's claim that it is the owner of the underground passive infrastructure installed in the Estates, or that it has any right to prevent Octotel from using the facilities concerned.

[64] The deponent to the confirmatory affidavit, Francois Botma, is the Regional Director of Bosch Projects (Pty) Ltd, a company which, according to Van Zyl, regularly liaises with the relevant local authorities in order to obtain approval for civil works (and which accordingly regularly prepares and submits maps of the nature of "TA3" and "TA4"}.

Botma confirms this fact and states that the intention of the maps annexed to Telkom's affidavit was to show where the developers intended to make provision for telecommunications services. He explains, further, inter alia, that the maps would have been prepared by engineers on behalf of the developer to get approval from the City for the plans. The City would then review the map to ensure that there was no clash between the contemplated areas for installation of services by developers and the City's own provision of services.

[65] What stands out in both affidavits above is that the crux of Octotel's contention is that Telkom has not proved ownership of the passive electronic communications facilities or the entitlement to the said facilities. The question of the relevance of ownership of facilities in this case was extensively dealt with by both parties in their submissions at the hearing. Similarly, this judgment fully addressed the question. What remains is the equally important question whether the evidence tendered by Telkom is sufficient to support Telkom's claim. This is the concern raised once more by Octotel in its response to Telkom's additional information.

[66] To deal with this concern properly, it is necessary to summarise the evidence that is before the CCC, concerning the affected estates.

Kleinbron Park

[67] The evidence was that during inspection in Kleinbron Park, Luc Delit found green ducts clearly marked with the Telkom branding. Counsel for Octotel argued that this was not adequate to show that Telkom had either ownership of the infrastructure or that Telkom exercised control of or was in possession of the infrastructure. He submitted that without any documentary proof Telkom had not established its claim.

[68] I disagree. Where oral evidence is credible, clear, logical and convincing, there is no reason not to accept it as determinant of the issue. In this case the evidence of Delit was credible and cogent. Moreover it was not contradicted. Furthermore, there was uncontested evidence that Telkom's copper cables were found in the ducts. That should be sufficient to make a finding in favour of Telkom, in my view.

Dune Ridge Estate

[69] In Dune Ridge Estate the position is slightly different for two reasons, namely:-

69.1 No Telkom branding was found on the ducts; and

69.2 Cunningham from Octotel denied having seen any copper cables in the ducts.

[70] To gauge the veracity or otherwise of Cunningham's evidence above, it became necessary to simultaneously scrutinise contrary evidence by Luc Delit which shows clearly that Telkom had installed its copper cables in the ducts. The question then was when and how these copper cables were installed? It has to be borne in mind that there was uncontradicted evidence that Neotel, which was the only other service provider at the time, had no interest in providing services to residential estates. The most reasonable answer is that the installation could only have happened at the time and in the manner described by Telkom's witnesses. Cunningham's evidence, in the above regard, therefore, cannot carry any weight and is found to be unreliable.

[71] Luc Delit's evidence showed that as early as 2004, Telkom had provided copper services to several residences at Dune Ridge. Luc Delit gave this evidence with reference to the spreadsheet which showed that there still exist active services that Telkom still provide to a number of clients. He made it clear that Telkom provides those services through the use of its copper cables underground. The evidence was given under oath and was tested by both counsel for Octotel and by members of the CCC. The CCC was given no reason to doubt the veracity of this evidence. My observation was that Delit was a good witness whose evidence was solid and was not dented by

cross examination. I would have no hesitation in accepting his evidence as true and reliable. I say this for the following reasons:

71.1 There was undisputed evidence that the underground passive infrastructure was installed in the affected estates between 2004 and 2007 by developers at the instance of Telkom. At the time Telkom was one of the two players in the “fixed- line” communications industry. The other was Neotel. An unpleasant historical fact, but a fact, nonetheless. There has been no suggestion that the infrastructure belonged to or was at any stage under the control of Neotel. On the contrary there was evidence to the effect that Neotel had no interest in providing services to gated security developments.

71.2 A related fact to the above is that historically, Telkom, then, i.e. between 2004 and 2007, was a monopoly. As unpalatable as this fact is, it not only shows that Telkom used the opportunity to entrench its position in the market, but also serves to confirm the role played by Telkom in establishing the underground passive infrastructure in the affected estates. In my view the evidence has, even without documentary evidence, clearly established that Telkom has a right to control access to the infrastructure concerned, both in Kleinbron Park and in Dune Ridge Estate.

The Case of Sandown Estate

[73] It is common cause that in Sandown Estate, Octotel dug its own trenches and constructed its own underground passive infrastructure. Also common cause is that some parts of Octotel’s optic fibre cables ran through existing manholes and hand

holes in 5 instances out of 149. A further common cause fact was that this should not have happened as no permission for access to the infrastructure had been obtained. Moreover, this conduct was against Octotel's undertaking to the HOA of Sandown.

[74] It was Octotel's defence that this was a deviation from its standard procedure of installation, done by subcontractors of Octotel, without its knowledge or direction. The evidence was that as soon as Cunningham's attention was drawn to the presence of those cables in that part of the infrastructure, Octotel rectified the improper installation.

Octotel's view was that nothing more should be made of this error as it was made by subcontractors and was corrected immediately when Octotel became aware of it.

[75] Telkom disagreed. Counsel for Telkom submitted that Octotel should be held liable for non-compliance with its standard procedures as it had failed to supervise its subcontractors in accordance with its undertaking to the HOA. I agree. The fact that the subcontractors were responsible for the error, cannot serve as a defence. As a contracting party with Home Owners Association, Octotel had the responsibility to ensure that its subcontractors acted in accordance with the undertaking made to the HOA. It failed to fulfil its duty and can therefore, not escape liability.

[76] An additional reason the complaint regarding Sandown Estate could not be ignored was that it formed part of the alleged contravention of section 43 of the ECA. That part was not withdrawn and therefore deserved the full attention of the CCC. Like all the facts in this matter, it had to be placed in its proper perspective. There was evidence that Octotel took prompt action to remedy the error as soon as this was brought to its attention. In my view, that should serve as a mitigating factor.

[77] Corroborating evidence is useful whenever it is available. It's unavailability, however, is not necessarily fatal to a case. Bearing in mind that the nature and quality of the evidence is more important than its quantity, it seems to me that, on the facts of this case, even if Telkom failed to produce all documentary evidence, it succeeded in showing that it had the authority or the right to control access to the infrastructure in the affected estates.

THE LEGAL FRAMEWORK

The Provisions of Section 43 and its Applicability

[78] Section 43 of the ECA provides as follows:

> ***"43 Obligation to lease electronic communications facilities***
>
> *(1) Subject to section 44(5) and (6), an electronic communications network service licensee must, on request, lease electronic communications facilities to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.*
>
> *(2) Where the reasonableness of any request to lease electronic communications facilities is disputed, the party requesting to lease such electronic communications facilities may notify the*

Authority in accordance with the regulations prescribed in terms of section 44.

(3) The Authority must, within 14 days of receiving the request, or such longer period as is reasonably necessary in the circumstances, determine the reasonableness of the request.

(4) For purposes of subsection (1), a request is reasonable where the Authority determines that the requested lease of electronic communications facilities -

(a) is technically and financially feasible; and

(b) will promote the efficient use of electronic communication network and services."

[79] Telkom's complaint was that Octotel had contravened section 43 of the Electronic Communications Act 36 of 2005, ("the ECA"), read with regulation 3 of the Electronic Communications Facilities Leasing Regulations, 2010 ("the Leasing Regulations"), by failing to lease Electronic Communications Facilities ("ECF") from Telkom in three residential estates in the Western Cape.

[80] Telkom contended that Octotel was bound under section 43 of the ECA to lease the facilities from Telkom if it wished to use the same facilities.

[81] Octotel denied that it was obliged to lease the existing ECF in the Estates from Telkom on the basis that Telkom does not own the facilities and has no right to control access to them. It also disputed Telkom's interpretation of section 43. Octotel took the

position that section 43 does not oblige an ECNS licensee to approach another licensee to lease electronic communications facilities (as opposed to obliging an ECNS licensee to lease such facilities on being requested by another licensee to do so).

[82] In ***Telkom v Chairperson, Independent Communications Authority of South Africa and Others*** (38332/18) [2020] ZAGPPHC 443 (15 August 2020), Tuchten J described the meaning and effect of section 43 of the ECA. He stated, *inter alia*:

> *"[34] In the present case, s2 [of the ECA] provides the key to the purpose of the measure: to move away from the historically monopolist industry dominated by Telkom; to promote and facilitate the convergence of the technologies and services affected by the ECA; to promote access for all to the internet; to promote competition and open, fair and nondiscriminatory access to networks and electronic services within the industry; to ensure the provision of a variety of quality services which are responsive to the needs of the public at reasonable prices; and to promote the interests of consumers with regard to price, quality and variety of services*.
>
> *[35] … Section 43 provides for the promotion of fair competition, equitable access to the industry and the benefit of the public generally.*
>
> *…"*

[83] The use of 'the ordinary/plain meaning of the words' approach may lead to misinterpretation and, often, might defeat the purpose of the statute concerned. To interpret section 43 correctly, it is necessary to place it in perspective by considering text, purpose and context.

[84] This approach can be seen in **Hoban v ABSA Bank Ltd t/a United Bank and Others** [**1999**] **2 All SA 483** (**A**). There the court quoted **E Cameron in LAWSA, 27 at 207 para 229**, where the retired Justice of the Constitutional Court stated the following: *"... context does no more than reflect legislative meaning which in turn is capable of being expressed only through words in context."*

[85] Laws are never made in a vacuum. There is always a mischief that the Legislature seeks to address. As the CCC, we had to identify that mischief and construe the language of the statute against the background of the perceived mischief that the statute is trying to address. In addition, we had to be guided by common sense.

[86] The purpose of the ECA was succinctly addressed by Tuchten J as appears in paragraph [82] above. Our role as the CCC is to give effect to that purpose of the Legislature. The meaning we arrive at must align with that purpose. Bearing in mind that the draftsman cannot be expected to provide for every scenario possible, it is important to study the Act as a whole with the intention to place the provision concerned in perspective.

[87] It is so that, on the plain reading of section 43, the obligation is on the 'electronic communications facility provider' to lease the said facilities when approached by the 'facility seeker' with a request to do so unless it is not economically and/or technically

feasible to do so. But does this mean that the 'facility seeker' has no obligation at all? In my view, that could never have been the intention of the Legislature.

[88] The question that arises is what happens if and when the ECNS, which should be the 'facility seeker', decides to gain access to the existing underground passive infrastructure without following the prescribed regulatory procedure? Chaos would ensue in the form of something akin to a "free-for-all" already described by the CCC. To allow this to happen would, in my view, open the floodgates in that other potential facility seekers would follow suit. This would encourage lawlessness and such an environment would negatively impact the customer.

[89] At face value, it seems that the application of section 43 is triggered when a 'facility seeker' approaches a 'facility provider' with a request to lease the facilities. My view, however, is that the actual trigger for the application of section 43 is the decision, by an ECNS, (whether it chooses to call itself a 'facility seeker' or not), to gain access to the existing infrastructure. If it goes ahead and gains access to that infrastructure, without approaching whoever established the said infrastructure with a request to lease, then there has been a contravention. It is the decision to share the existing underground passive infrastructure that triggers the application of section 43. The reason for this is clear. Sharing of infrastructure is a regulated activity. The lease agreement is an instrument used to regulate the sharing of the facilities.

[90] The above interpretation finds support in section 43(5) which provides that a lease may be imposed on an unwilling party. Notably, the section does not identify a specific party. This, in my opinion, serves to show that a lease could be imposed on

either of the parties as long as there has been a decision to share and one party is unwilling to enter into negotiations.

[91] In this case, Octotel decided to share the existing infrastructure but chose to ignore the initial step of approaching the ECNS which established the existing infrastructure and instead approached the HOAs. Gaining access to the existing infrastructure without following the prescribed procedure is a clear contravention of Section 43 of the ECA read with Regulation 3 of the Electronic Communications Leasing Regulations. It seems to me that as part of the order, the CCC can recommend to the Authority that a lease agreement be imposed on Octotel.

The Relevance of Section 22 of the ECA

[92] Section 22 of the ECA provides:

> *"**Entry upon and construction of lines across land and waterways-***
>
> *(1) An electronic communications network service licensee may -*
>
> *(a) enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway or any waterway of the Republic."*

[93] It is clear from the phrase "any land" in the sub section above that the servitutal right granted to licensees in terms of section 22 applies in respect of both public and private land.

[94] In ***Tshwane City v Link and Others*** 2015 (6) SA 440 (CC) ("Link Africa") the Constitutional Court pronounced on the applicability of section 22 on privately owned land. In paragraph 166 the following was stated:

> "*What a network licensee does under section 22(1) on a private landowner's land may, of course, subtract from ordinary rights of ownership. The provision, after all, allows the licensee to enter land, hook up a cable network, and keep it in good shape. That entails a loss of pure ownership rights."*

[95] From the above, it is clear that section 22 of the ECA encompasses both public and privately owned land which would also include residential estates. This means a licensee such as Telkom or Octotel would be entitled to exercise its servitutal rights in respect of the land that forms part of a residential estate and falls under the jurisdiction or oversight of a HOA.

The Question Whether Section 6 of the ECA is Applicable

[96] A question arose whether section 6 of the ECA applied to the dispute presently before the CCC. Both counsel for Telkom and counsel for Octotel aptly addressed the question in their oral and their written submissions. They were *ad idem* that section 6 was not applicable to the present dispute.

[97] Telkom's complaint was premised on the allegation that the ducts, manholes and related infrastructure in which Telkom has installed its cables at the residential estates fall within the definition of "electronic communications facility."

[98] Section 1 of the ECA defines an “electronic communications network” as

> *“any system of electronic communications facilities (excluding subscriber equipment), including without limitation -*
>
> *(a) satellite systems;*
>
> *(b) fixed systems (circuit- and packet-switched);*
>
> *(c) mobile systems;*
>
> *(d) fibre optic cables (undersea and land-based);*
>
> *(e) electricity cable systems (to the extent used for electronic communications services);*
>
> *(f) other transmission systems, used for conveyance of electronic communication.”*

[99] Section 1 of the ECA defines PECN as an *“electronic communications network used primarily for providing electronic communications for the owners use.”*

[100] Even if it were to be assumed that the HOAs of the affected estates were owners of the underground passive infrastructure, the use of the infrastructure would not be for the benefit of the Home Owners Associations themselves as is envisaged by the definition of a PECN. The underground ducts are used to install copper and fibre optic cables to facilitate electronic communications between or among residents in the affected estates and outsiders. There seems to be no basis, therefore, on

which to find that the underground passive infrastructure is a PECN for purposes of the license exemption contemplated in section 6(2) of the ECA.

[101] In view of the above, and the fact that neither Telkom nor Octotel in this dispute relied on an exemption contemplated in section 6(1), it shall not be necessary to discuss this section in any further detail.

CONCLUSION

[102] Having regard to the totality of the evidence, I am persuaded that Telkom has established its claim that it has the right to control access to the existing underground passive infrastructure in the affected estates.

[103] The application of the correct legal framework dictates that Octotel was obliged to approach Telkom in terms of section 43 of the ECA with a request for the conclusion of a lease agreement. It did not do so, thereby contravening the provisions of section 43 of the ECA.

FINDING

[104] In my view, the conduct of Octotel is unlawful in that it did not comply with the provisions of section 43 of the ECA read with Regulation 3 of the Leasing Regulations.

ORDER

[105] The CCC recommends the following orders to be issued by ICASA, namely -

105.1 Direct Octotel to desist from any further contravention of section 43 of the ECA read with Regulation 3 of the Electronic Communications Facilities Leasing Regulations, in relation to any of Telkom's underground passive infrastructures within the affected estates;

105.2 Direct Octotel to desist, (where there is no agreement in place between it and Telkom), from continuing to install its optic fibre in Telkom's infrastructure within Kleinbron Park, Sandown Estates, and Dune Ridge in the Western Cape;

105.3 Direct Octotel to enter into negotiations with Telkom and conclude a lease agreement in relation to underground passive infrastructure in the affected estate;

105.4 In the event Octotel fails to comply with sub paragraph 105.3 above, direct Octotel to vacate its optic fibre from Telkom's infrastructure within each of the above estates within 14 days after Octotel has refused to enter into negotiations for a lease agreement.

105.5 Direct Octotel to pay as a fine the amount prescribed by the Authority in respect of its failure to comply with section 43 of ECA read with the Electronic Communications Facilities Leasing Regulations.

TM Masipa

Judge Thokozile Masipa
Chairperson of the CCC