COMPLAINTS AND COMPLIANCE COMMITTEE

DATE OF HEARING: 20 MAY 2022 **CASE NO: 412/2021**

TELKOM SA SOC LTD **COMPLAINANT**

V

METRO FIBRE NETWORX (PTY) LTD **RESPONDENT**

CCC MEMBERS:
Judge Thokozile Masipa – Chairperson
Councillor Yolisa Kedama - Member
Mr Monde Mbanga - Member
Mr Peter Hlapolosa - Member
Mr Thato Mahapa - Member
Mr Paris Mashile – Member
Ms Ngwako Molewa - Member

FROM THE OFFICE OF THE CCC:

Lindisa Mabulu - CCC Coordinator
Meera Lalla - CCC Assessor
Thamsanqa Mtolo - CCC Assessor
Xola Mantshintshi - CCC Assessor
Amukelani Vukeya – CCC Administrator

LEGAL REPRESENTATION FOR PARTIES

Complainant - BL Makola SC
Instructed by Maphanga Maseko and
Fahima Rahim (from TGR Attorneys)

Respondent - Adrian Botha SC
Instructed by Anton Kotze
(Makda Cull Kotze Inc.)

JUDGMENT

Judge Thokozile Masipa

INTRODUCTION

[1] At the outset, it is necessary to introduce all the role players in this matter. This is done for the sake of completeness, to put the roles of various players in perspective, how they relate to one another as well as their relevance, if any, in the adjudication of the dispute in this matter.

Dramatis Personae

[2] Telkom SA SOC Limited ("Telkom") is an electronic communications service ("ECS") and an electronic communications network service ("ECNS") licensee. It constructed, among others, ducts, manholes and related electronic communications network infrastructure ("Telkom's infrastructure") in the Cottage Creek and Stone Forrest housing complexes in Mooikloof Ridge, Pretoria ("the Estate"). Telkom is the Complainant in this matter.

[3] Metro Fibre Networx (Pty) Ltd ("MFN") is an electronic communications service ("ECS") and an electronic communications network service ("ECNS") licensee. It installed its fibre optic cabling in the underground infrastructure at the housing complexes. This was done without following the prescribed regulatory process as set out in section 43 of the ECA read with regulation 3 of the Electronic Communications Facilities Regulations ("Leasing Regulations").

MFN is the Respondent in this matter.

[4] The Housing Owners Associations ("HOAs") are governing bodies or Body Corporates of the Cottage Creek and Stone Forrest housing complexes. They are the owners of the property in the Estate. In addition, they are alleged to be owners of the underground infrastructure, installed at the instance of Telkom.

[5] According to MFN, ownership changed hands when the underground infrastructure "acceded" to the property owned by the HOAs. It is also alleged that they gave permission to MFN to install its fibre optic cabling into the underground infrastructure. The HOAs are not a party to the dispute that is before the CCC.

THE NATURE OF THE COMPLAINT

[6] The dispute before the CCC is not factual. The complaint concerns the Respondent's alleged failure to comply with section 43 (1) of the Electronic Communications Act 36 of 2005 ("ECA") read with Regulation 3 of the Electronic Communications Facilities Leasing Regulations ("Leasing Regulations").

[7] The basis of the complaint is that the *Respondent "unlawfully accessed Telkom's electronic communications facilities at Cottage Creek and Stone Forest Housing Complexes in Mooikloof Ridge Estate in Pretoria*" ("the Estates").

THE RELIEF SOUGHT

[8] Telkom sought the following relief:

1. A finding that the Respondent has failed to comply with section 43(1) of the ECA read with Regulation 3 of the Regulations;

2. The Respondent is directed to remove its fibre optic cables installed in Telkom's manholes, covers, ducts and/or pipes and in any of Telkom's electronic communications facilities in the Estates;

3. The removal should be done within 10 (ten) calendar days of the order sought above;

4. The CCC to make recommendations to ICASA to impose an appropriate administrative penalty on the Respondent for its unlawful conduct; and

5. Any other relief which the CCC thinks appropriate.

THE FACTS

The Background

[9] Circumstances which led to the present complaint, in the words of the Complainant, are set out hereunder.

[10] Telkom constructed, among others, ducts, manholes and related electronic communications network infrastructure in the Cottage Creek and Stone Forrest housing complexes in Mooikloof Ridge Estate, Pretoria (the "Estates"). [For convenience the infrastructure concerned shall be referred to as the "Telkom infrastructure" or "underground infrastructure"].

[11] The Telkom infrastructure falls within the definition of "electronic communications facilities" as defined in section 1 of the Electronic Communications Act of 2005 (ECA).

[12] In or about September and October 2020, Telkom conducted inspections in the Estates during which it found that the Respondent had installed its fibre optic cabling in the Telkom infrastructure at the Housing Complexes

without having followed the prescribed regulatory process as set out in section 43 of the ECA read with regulation 3 of the Facilities Leasing Regulations.

[13] Through its Openserve division, and in an attempt to resolve the matter, Telkom addressed a letter to MFN, stating among others, that MFN had unlawfully accessed the Telkom's infrastructure. In that letter, Telkom requested MFN to remove its fibre optic cables from such infrastructure within a period of 7 days from the date of the letter.

[14] MFN's response is captured in its letter dated 14 September 2020 and addressed to Openserve. The letter, marked "B", in part reads thus:

"We note that the Cottage Creek and Stone Forrest estates in Mooikloof are sectional title developments and that Metrofibre received written authorisation from the Body Corporates of the Cottage Creek and Stone Forrest Estates to install fibre infrastructure in these estates.

Subsequent to receipt of your letter, MetroFibre undertook a physical inspection of the ducts, manholes and fibre infrastructure in these complexes and did not find any labels, markings or the like indicating that any ducts, manholes or related infrastructure is the property of Telkom.

Since MetroFibre received approval from the relevant Body Corporates to install fibre infrastructure in the Stone Forrest and Cottage Creek estates, please provide proof that the relevant manholes, ducts and related infrastructure in these estates is the property of Telkom."

[15] Telkom responded in a letter dated 1 October 2020. The essence of the letter was that Telkom had undertaken its own inspection of the ducts, and/or manholes and/or related infrastructure at Cottage Creek and Stone

Forrest estates and was in a position to confirm that the infrastructure concerned was owned by Telkom.

"We can confirm that the material numbers on the manhole covers are Telkom's property. Further, Telkom's ducts were installed in the estates by M&T Developers, according to Telkom's specifications. The Homeowners Association is not in a position to provide consent to third parties to access Telkom's infrastructure.

In light of the above, kindly provide us with a written undertaking that MFN will remove any unlawfully installed fibre optic cables and any associated ducting or equipment from Telkom's infrastructure within the estates concerned on or before Monday, 5 October 2020, failing which Telkom will have no option but to take further legal action."

[16] Telkom's letter triggered yet a further response from MFN which insisted on proof that Telkom owned the infrastructure. The letter marked "D" and dated 5 October 2020, purports to offer an amicable resolution to the matter.

"We reiterate that we are amenable to resolving this matter amicably. Therefore, whilst we are waiting for proof of ownership from Telkom and engaging with the Body Corporates on the authorisations that we have received from them to install fibre cable infrastructure in these estates, we propose that we simultaneously engage in facilities leasing negotiations with Telkom, in order to resolve this matter in a timeous manner, should it be proven that Telkom owns the relevant ducts, manholes and related infrastructure."

[17] The letter then listed a number of people who would be involved in the proposed negotiations on behalf of MFN.

[18] In annexure "E" dated 12 October 2020, Telkom made one last attempt to explain its position. It reiterated that the Body Corporate or Homeowners Association had no authority to provide consent to third parties to access "Telkom's infrastructure."

[19] Regarding MFN's proposal concerning possible lease negotiations, Telkom was of the view that the proposed approach by MFN would not be in accordance with section 43 and the regulations. It wrote:

"…MFN must submit a written request to Telkom for accessing its infrastructure. The regulatory process for requests by licensees to lease facilities to other duly licensed operators is set out in section 43 of the ECA, read with regulation 3 of the Facilities Leasing Regulations of 2010 (the Regulations). A request for access to electronic communications facilities such as ducts must set out the requester's technical requirements and physical parameters. Kindly provide us with a proper facility leasing request which adheres to the requirements as set out in the Act and the Regulations, in order for us to properly consider and respond to your request."

[20] The letter then specified the information needed in a request for a lease.

[21] On 19 October 2020, MFN reiterated its position once more. In a letter marked "F". It conveyed to Telkom the following, ***inter alia:***

*"MFN avers that the Body Corporates are the owners of the infrastructure based on the accession thereof to immovable property owned by such Body Corporates, alternatively that no cession acceptance of any developer's contracts with Telkom - including any purported reservation of ownership of infrastructure - took place at any general meeting of the Body Corporate called to ratify such agreements at any time**.***

In the circumstances the Body Corporates have lawfully authorised MetroFibre to reticulate its ducts, cabling, and equipment in the Body Corporates' infrastructure and to provide services to meet the demands of the residents of the estates. MFN has also attended to the rehabilitation of said infrastructure so as to allow reticulation to proceed.

A facilities leasing request under Chapter 8 of the ECA must be addressed to the ECNS licensee which is the owner of, or which otherwise controls an electronic communications facility. It is MetroFibre's position that Telkom is not the owner of the infrastructure in question and that a facilities leasing request would therefore be misplaced."

[22] After this flurry of correspondence failed to produce the desired results, and, having received the above parting shot from MFN, Telkom lodged the present complaint.

MFN'S POSITION

[23] As can be seen from the correspondence above, MFN admitted that it accessed the underground infrastructure at the Estates for purposes of installing its fibre optic cabling. It also admitted that it did so without following the prescribed procedure set out in the ECA. It, however, put in issue the ownership of the Telkom's infrastructure. In addition, MFN's position was that in the present case section 43 of the ECA was not applicable.

[24] According to MFN, the underground infrastructure became part of the land owned by the HOA by reason of accession. Consequently, the underground infrastructure was now owned by the HOAs. It was for this reason that MFN sought and obtained the necessary permission from the HOAs, and it was on the basis of such permission that it accessed the underground

infrastructure. This then made a leasing agreement with Telkom unnecessary; it was argued.

[25] This matter first came before the CCC in November 2021. On that occasion MFN argued a jurisdictional point in ***limine.*** That point was dismissed, and the decision conveyed to the parties soon thereafter.

THE HEARING

Proceedings on the merits

THE COMPLAINT

[26] Telkom's complaint is framed in its letter of complaint thus:

> *"Telkom has constructed, among others, ducts, manholes and related electronic communications network infrastructure …. in the Cottage Creek and Stone Forrest housing complexes in Mooikloof Ridge estate Pretoria… The Telkom infrastructure falls within the definition "electronic communications facilities" as defined in section 1 of the Electronic Communications Act…*
>
> *Telkom has installed its own cabling in the Telkom infrastructure in order to provide electronic communications services to residents of the Housing Complexes.*
>
> *MFN has installed its fibre optic cabling in the Telkom infrastructure at the Housing Complexes without following the prescribed regulatory process as set out in section 43 of the ECA read with regulation 3 of the Facilities Leasing Regulations.*

The conditions of MFN's ECS and ECNS licenses require it to adhere to all applicable statutory provisions as set out below. The failure by MFN to request access to the electronic communications facilities of another licensee in circumstances such as this, [is] in breach of its licence conditions."

[27] Telkom's complaint, therefore, is simply that MFN has installed its fibre optic cabling in the Telkom infrastructure. And that it has done so without following the prescribed procedure in terms of section 43 of the ECA read with regulation 3 of the Electronic Communications Facilities Leasing Agreement.

[28] According to Telkom, it did not have to prove that it is the owner of the underground infrastructure. What it did was to show that it constructed ducts, manholes and related electronic communications network infrastructure at the Cottage Creek and Stone Forrest housing complexes in Mooikloof Ridge estate in Pretoria.

[29] Evidence placed by Telkom before the CCC was to the effect that Telkom bought the materials which were handed over to M&T Developers for construction and installation. The developer then installed the infrastructure, on behalf of Openserve, according to Telkom's specifications. This evidence was not contradicted and there was no reason not to accept it.

[30] Telkom then signed an agreement with the developer to the effect that it, Telkom, reserved ownership of the finished product. There was, however, evidence that the HOAs did not endorse this agreement as per undertaking by the developer. Consequently, there was a debate on the effect of this failure by the HOAs. [I interpose to state that because of the approach that the CCC has taken on this matter, it shall not be necessary to discuss this issue].

[31] It was on the basis of this construction and/or installation of the Telkom infrastructure that Telkom submitted that MFN ought to have followed the regulatory process prescribed in section 43 of the ECA read with regulation 3 of the Electronic Communications Leasing Regulations before installing its fibre optic cabling in the said infrastructure.

THE DEFENCE BY MFN

[32] MFN's defence was short and to the point and in accord with what was in its papers. MFN argued that it had the right to gain access to the infrastructure concerned and to install its fibre optic cabling, after it had obtained permission to do so from the respective HOAs. For that reason, it did not need to follow the prescribed procedures as set out in section 43 of the ECA.

[33] The view of MFN was that Telkom did not own the electronic communications facilities. According to MFN, the owners of the infrastructure are the respective HOAs of the housing complexes.

[34] The basis of this contention was that what Telkom referred to as "its infrastructure" acceded to the land which is owned by the respective HOAs. Accordingly, Telkom could no longer lay claim on it. This was because ownership changed hands when the infrastructure acceded to the land, it was argued.

[35] In support of its contention that it was entitled to access the electronic communications facilities concerned, MFN annexed a document titled "Grants of Rights Agreement" from the HOAs. This document allegedly gave the MFN permission to access the facilities in the Estates. **(I shall revert to this in due course).**

INSPECTION IN LOCO

[36] On 9 June 2022, the CCC, accompanied by officials from ICASA, and the legal teams of both Telkom and MFN, went on an inspection in loco. The main purpose of this exercise was to enable members of the CCC to observe real evidence and make sense of the oral evidence that had been led at the hearing.

[37] The CCC extends its gratitude to counsel and their teams for their assistance. The proceedings of the inspection in loco were recorded and transcribed for the benefit of the CCC and the parties involved.

[38] The transcript was circulated to everyone concerned for comments. It appears that there is nothing contentious and that the parties are in agreement with what transpired during the ***inspection in loco***. For that reason, only details of the proceedings that are strictly necessary shall be discussed.

[39] Several manholes and their contents outside the Estates as well as within the Cottage Creek and Stone Forrest housing complexes were unlocked/opened and inspected. Because of the nature of the complaint, our focus will only be on the infrastructure within the housing complexes.

[40] A cursory glance at the manhole lids gave the impression that the infrastructure was secure. That impression turned out to be misplaced as Deon Jordaan from Telkom explained to the group that a manhole cover that he had just removed from a manhole had been "vandalised". This compromised security, making it easy to open the manhole without a key, he stated.

[41] This statement emphasised the importance of the objects of the ECA and the regulations in regulating the electronic communications industry in the

public interest. In addition, it called to mind the assertion by MFN that during its inspections of the infrastructure in the housing complexes it found no labels or marks identifying the infrastructure as Telkom. Either because of vandalism or because of the passage of time, not many identification marks were clearly visible on the lids or on any other surface.

[42] There were, however, exceptions. On one of the lids, Mr Jordaan could make out that the manufacturer was Skymos but the manufacturing date was faded. However, the material had the Openserve ownership mark on it. This was a *"sideways phone with push buttons with the term Telkom in the centre of it".* There was also a material number or catalogue number assigned to a specific product such as a duct. From the number, one could trace cost, supplier and even the manufacturer's part number, it was explained.

[43] A number of micro cables and two copper cables in a black colour, was shown to the group. There was also a street distribution box where all copper cables are kept. From there the cables would go into the complex. Also observed were 110mm ducts which were partially buried in the ground so a clear description could not be given. [I pause to state that this is the movable property that allegedly acceded to the immovable property owned by the Homeowners Association].

[44] During the course of the inspection in loco, the rationale for Telkom working hand in hand with the developer became clearer**.** It was explained that initially, Telkom and the developer each managed their projects separately in the same development. That approach became costly as it exposed Telkom's equipment to damage by workmen busy with the various developer's projects.

[45] Amongst other things, Mr Jordaan explained that providing the developer with material to build and to install the infrastructure became the ideal

solution to ensuring that Telkom's property would not be destroyed during the development. This was because handing Telkom's project to the developer meant that the developer now had "all the control in his hands".

[46] The group also observed that there were different sizes of manholes. The difference between a duct and a micro duct as well as their respective roles was explained. [I interpose to state that an observation by the untrained eye of a lay man, would make it difficult to tell if a specific manhole had been used to capacity, let alone determine whether sharing the facilities would be technically and economically feasible. This brought home the importance of the ICASA Act as well as the pivotal role played by the Authority in ensuring that there is order in the electronic communications industry].

THE DISPUTE

[47] During the course of the ***inspection in loco,*** it was reiterated, on behalf of MFN, that MFN was not disputing the version of Telkom concerning the role it had played in the construction and installation of the underground infrastructure.

[48] It bears repetition that there was evidence that Telkom bought the material which it handed over to the developer so as to construct and install the underground infrastructure. The electronic communications facilities were built and installed according to Telkom's specifications. In addition, Telkom entered into an agreement with the developer wherein it sought to reserve ownership of the infrastructure. This is the version that MFN did not and could not dispute.

[49] MFN's position was that regardless of the role that Telkom may have played in the building or installation of the infrastructure, Telkom was not the owner as the electronic communications facilities had acceded to the land

owned by the HOAs. For that reason, ownership of the infrastructure vested in the HOAs by virtue of the principle of accession.

[50] With regard to the reservation of ownership by Telkom, MFN questioned the validity of the agreement on the basis that the HOAs had not endorsed the agreement at its AGM in terms of the agreement. Telkom's claim over the infrastructure could therefore, not succeed, it was submitted.

THE ISSUE

[51] The crisp and only issue then became whether, in the light of the facts of this matter, section 43 of the ECA was applicable. While the basis of the complaint by Telkom was precisely that MFN had failed to comply with section 43 read with regulation 3 of the Leasing Regulations, MFN's defence was that in the present case section 43 was not applicable for the following reasons:

51.1 Telkom was not the owner of the infrastructure.

51.2 The owners, that is, the HOAs of the housing complexes, had granted MFN the requisite authority to gain access to the infrastructure.

[52] In its argument MFN sought to explain further why section 43 was not applicable in the present case.

52.1. The purpose of section 43 of the ECA is to place an obligation on electronic communications network service licensees who owns (or perhaps have some other right) to electronic communications facilities to lease them to any other person licensed in terms of this Act on request.

52.2. According to MFN, the emphasis is, therefore, upon the obligation of Telkom to make "its" facilities available for leasing by others.

52.3. This is also made clear in the Leasing Regulations. In terms of the Regulations the reference to "Electronic Communications Facilities Provider"

*"means an ECNS licensee who is requested to lease "**its**" electronic communications facilities in terms of section 43(1) of the Act".*

52.4. The word "its" demonstrates *"that the Chairperson of the Independent Communications Authority of South Africa ("ICASA") in promulgating the Leasing Regulations clearly had in mind that section 43 of the ECA obviously implies that one can only lease something to someone else if you have ownership or some other right, such as a lease, over the facilities."*

[53] Counsel for MFN argued that if Telkom had no ownership or other right and was not even in possession of the facilities its permission to lease the facilities can never be required.

[54] For this submission, counsel relied on the judgment of **Dennegeur Estate Homeowners Association and Another v Telkom SA SOC Ltd 2019 (4) SA 451 (SCA)**. At para 11, the court stated that the fact that Telkom may have cables in the underground infrastructure does not give it any right to such infrastructure (even possessory rights) since: - *"the infrastructure forms an integral part of the immovable property which is owned, occupied and controlled by the HOA in a security estate*". Counsel for MFN argued that in the present case, Telkom was not in possession of the infrastructure let alone have ownership of it.

[55] In my view, the reliance by MFN on the case of *Dennegeur* is misplaced. I say this because that case can clearly be distinguished on the facts from the present case. In *Dennegeur* the court had to determine whether an act of spoliation had taken place against Telkom. In spoliation proceedings a person wishing to bring a spoliation application against another must allege and prove two elements namely—

1. The applicant will have to allege and prove that he had undisturbed and peaceful possession of the good(s);

2. The applicant must allege and prove unlawful deprivation of possession by the Respondent. Hence the requirement that to succeed, the applicant must have been in possession of the goods.

[56] In the present case, possession is not a prerequisite before the CCC can reach a decision on whether there has been any non-compliance with section 43.

[57] Another concern by MFN had to do with what it considered as an attempt by Telkom to "stifle competition". Making submissions re the broader purpose and context of the ECA counsel for MFN quoted an extract from **Tshwane City v Link Africa and Others 2015 (6) SA 440 (CC).**

"[120] The primary object of the Act is to regulate electronic communications in the public interest. Section 2 sets out its ancillary objects. These include open, fair and non-discriminatory access to broadcasting services and communications networks so as to encourage investment and innovation in the communications sector. The purposes of the Act encourage the realisation of fundamental rights, in particular the right to equality, education, access to information and freedom of trade, occupation and profession."

"[121] Fast and reliable electronic communications services have the potential to improve the quality of life of all people in South Africa. They do so through increasing the availability of text, audio and other media at schools, universities and colleges and boosting business and employment opportunities. Anyone who has seen a teenager using a mobile phone or other electronic device to access the internet for homework, research or inquiry will understand the statute's objectives".

"[122] Reliable electronic communications go beyond just benefitting the commercial interests of licensees to the detriment of ownership of property. The statute is designed to avoid this no-winner conflict. What it seeks is to bring our country to the edge of social and economic development for rural and urban residents in a world in which technology is so obviously linked to progress".

"[123] The spirit and purport of the Bill of Rights command that the Act must be interpreted to promote access to fundamental rights rather than to hinder it. That is clearly our duty here."

[58] It was argued on behalf of MFN that while the purpose of the Act was clearly about ensuring access to facilities, even to competitors, Telkom wanted to construe the Act to benefit its own commercial interests.

[59] The CCC is keenly aware of the purpose of the Act. While competition in the communications sector is important it cannot be viewed in isolation. This is because there are other equally important considerations such as that competition must take place in an orderly fashion. (my emphasis). This is precisely why the Act was introduced in the first place, to ensure that competitors cooperated and worked harmoniously for the benefit of the public.

[60] In any event our task as the CCC is to focus on the complaint before us, which is an allegation that MFN failed to comply with section 43 of the ECA. This is where we should direct our attention. For that reason, we proceed to closely examine the applicable law.

THE LEGISLATIVE FRAMEWORK

[61] Section 4(1) of the ICASA Act provides that ICASA must exercise the powers and perform the duties conferred and imposed upon it by the ICASA Act and the underlying statutes and any other applicable law. The underlying statutes include the Electronic Communications Act 36 of 2005 ("the ECA").

[62] Chapter 8 of the ECA deals with Electronic Communications Facilities Leasing and sets out obligations to lease electronic communications facilities.

Section 43(1) provides:

"Subject to section 44(5) and (6), an electronic communications network service 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 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 economically feasible; and

(b) will promote the efficient use of electronic communications networks and services."

[63] It is so, as counsel for MFN correctly submitted, that the facility provider has an obligation to lease electronic communications facilities to the facility seeker on request. However, certain things must happen before the obligation can be triggered.

[64] Firstly, **there must be a request for a lease**. In other words, the obligation arises only after a request has been made. Secondly, **the request must be reasonable**. The highlighted portions serve to illustrate that the submission to the effect that Telkom is trying to preserve its own commercial interests at the expense of the public, cannot be true. The complaint is not that Telkom refused to lease the facilities. Rather, it is that MFN failed to make the request. And it is on this point that, as the CCC, we have to make our finding.

[65] MFN did not deny that it failed to make a request. Its case was that it didn't have to, for two reasons:

65.1 Telkom was not the owner of the facilities.

65.2 Owners of the facilities, the HOAs in the housing complexes, had given them permission to access the facilities.

THE APPLICABILITY OF SECTION 43

[66] The crucial question is whether ownership of the electronic communication facilities is relevant in the determination of whether section 43 of the ECA is applicable.

[67] The answer is to be found in the wording of the section itself.
Section 43 (1) places an obligation on **an electronic communications network service licensee** (and not on an owner), to: -

"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."

[68] While section 43 is silent on the ownership of the facilities, the Regulations make use of the word "its" to qualify the facilities sought to be leased. This may have led to the mistaken interpretation that the facilities provider must be the owner of the facilities.

[69] That interpretation is mistaken because the word "its" may or may not denote ownership. What it does denote is some kind of entitlement over the facilities. For that reason, it may not even be necessary to determine who owns the infrastructure. For purposes of completeness, however, it seems proper to discuss both scenarios namely—

(1) where ownership of the infrastructure is not a requirement, and

(2) where ownership is a requirement.

FIRST APPROACH - Ownership of the underground infrastructure is irrelevant in the determination of whether section 43 is applicable.

[70] Ownership of the underground infrastructure is not a requirement for a licensee to lease out electronic communications facilities to another licensee. That much is clear from section 43 which is silent on the question of ownership.

[71] Telkom is an ECNS and an ECS licensee which alleged that the infrastructure was constructed and installed by a developer at its behest. Since that is not disputed, it should be accepted as adequate for purposes of this case.

[72] In our view, Telkom has proven that it has the required entitlement over the underground infrastructure. That is all that it was required to do. In addition, the underground infrastructure in the housing complexes, are "electronic communications facilities" as defined in the Act. Accordingly, section 43 is applicable.

[73] Lending credence to the above conclusion regarding the question of ownership is the decision of ICASA dated 13 April 2018, which was the subject of a review and ultimately upheld by the High Court in **Telkom v Vodacom and Others, case No: 38332/18.** There it stated:

"It is important to note that the obligation to lease electronic communications facilities in terms of section 43 of ECA is not limited to an owner of such facilities but is imposed on any electronic communication 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 to owners of the electronic communications facilities."

SECOND APPROACH - Ownership of the Underground Infrastructure is relevant to determine whether section 43 is applicable.

[74] The second approach is necessitated by MFN's submission that the underground infrastructure has acceded to the land and that ownership thereof is, as a result, vested in the HOAs.

[75] We shall assume, without deciding, that the underground infrastructure has acceded to the land and that the HOAs have indeed become owners of thereof.

[76] The inevitable question then is:
Where immovable property has acceded to the land would section 43 still be applicable? Or would the infrastructure now be governed by a different law?

[77] A perusal of section 43 leaves one in no doubt that an exception could never have been contemplated by the Legislature. The reason for this conclusion is obvious.

[78] Section 2 of the ECA states that *"the primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest…"*

[79] In terms of this provision, the object of the ECA is to regulate electronic communications, irrespective of the location, within the Republic and in the public interest.

[80] In my view, whether the electronic communications facilities are located in a public or private land, as long as they are within the Republic, they would still be regulated by the ECA without exception.

[81] ICASA is the only entity authorised by the ECA and empowered to regulate the electronic communications industry. Such regulation is meant for the public interest and the "public" is everywhere. If the Legislature wanted to exclude a certain section of the public, it would have done so explicitly.

[82] There is a more compelling reason, in my view. In terms of the Act, ICASA is the only entity mentioned by name ("the Authority"), as the regulator of electronic communications in this country. Once more, if the Legislature had intended that there should be an alternative or co-regulator it would have spelled this out.

[83] Furthermore, it makes sense that ICASA, and it alone, should be tasked with regulating the industry. It has already been stated above that the object of the ECA is to "provide for the regulation of electronic communications in the Republic in the public interest."

[84] The Constitutional Court in **Link Africa** confirmed that electronic communications networks constructed and installed by ECNS Licensees are critical to achieving the objects of the ECA.

[85] The Legislative regime provides for an orderly and managed process for access to electronic communications facilities. This is imperative in light of the increasing rollout of networks in the fibre broadband access market. It aims to promote sustainable co-operation between Licensees within the electronic communications industry and avoid damage to the electronic communications networks constructed by ECNS Licensees to provide electronic communications.

[86] The industry is regulated so that there should be order (my emphasis) and that a situation where there is "a free for all" as the CCC previously noted, should be avoided. ICASA has, ***inter alia***, the expertise and the resources needed to regulate the industry efficiently and effectively.

[87] That is why where there is doubt or a dispute whether a request to lease electronic communications facilities is reasonable, ICASA steps in. It has the technical know-how to decide when sharing of facilities is technically and economically feasible; and the expertise to determine whether such sharing will promote the efficient use of electronic communication networks and services.

[88] No other entity, in terms of the ECA, has been empowered to regulate the industry alongside the Authority. And no other law was brought to our attention which might have superseded the ECA.

"MISTAKEN BUT BONA FIDE BELIEF:" IS MFN'S POSITION JUSTIFIED?

[89] It was MFN's submission that in the event it was found that section 43 was applicable, MFN pleaded that it suffered under the mistaken but ***bona fide*** belief that the HOAs had authority to grant it access to the underground infrastructure.

[90] That submission has no merit for reasons stated below.

[91] Chapter 4 of the ECA deals with Electronic Communications Networks and Electronic Communications Facilities.
In terms of section 20(2): -
"An electronic communications network service licensee must perform its obligations in terms of this Chapter and in accordance with the regulations prescribed by the Authority."

[92] The word "must" in section 20(2), leaves no room for any notion that there may be exceptions. An ECNS (and that includes Telkom and MFN)

"*is obliged to perform its obligations in terms of this Chapter and in accordance with the regulations prescribed by the Authority."*

[93] The section gives a clear indication of what is expected of an ECNS in the exercise of its rights and fulfilment of its obligations. No reasons were advanced why ignorance on the part of MFN in this regard should be excused. The defence, therefore, by MFN, that it was of a mistaken but ***bona fide*** belief that it did not have to follow the prescribed procedures set out in section 43 cannot succeed. Section 43 would equally apply even in a case where there was proof that the HOAs were owners of the underground infrastructure. The basis of this reasoning is set out hereunder.

THE POSITION OF THE HOAs

[94] Even though the HOAs are not parties to this dispute it is necessary to say something about their position. The aim of the discussion is not to make a determination whether the HOAs are owners of the underground infrastructure, but rather to emphasise a point why HOAs do not have authority to grant access to electronic communications facilities.

[95] The discussion above, relating to the applicability of section 43 demonstrates that an HOA cannot regulate electronic communications even if it were to be proved that it is the owner of such facilities. To find otherwise would clearly be inconsistent with the intention of the Legislature as it would allow the HOA to usurp the powers and functions of the Authority.

[96] There are reasons why an HOA cannot grant permission to anyone to gain access to electronic communications facilities. The first and obvious reason is that the Electronic Communications Act makes no mention of a Body Corporate. In terms of the ECA only the Authority is empowered to regulate the electronic communications industry in the public interest.

[97] Regulating the industry involves complex issues that require resources and expertise. The Authority has both the resources and the necessary expertise. This conclusion is supported by section 5 of the ICASA Act which deals with the Constitution of, and the rigorous process involved in the appointment of councillors to Council.

[98] Section 5(3)(b) provides that when viewed collectively councillors —

"(i) …

(ii) possess suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting, electronic communications and postal policy or operations, public policy development, electronic engineering, law, information technology, content in any form, consumer protection, education, economics, finance or any other relevant expertise or qualifications." (my emphasis)

[99] On the other hand, there is no evidence before the CCC to support any notion that a Body Corporate may be equipped to deal with issues concerning the electronic communications industry. In the absence of such evidence the inevitable conclusion is that the HOAs had no right or authority to grant permission to MFN or anyone to access the electronic communications facilities in the housing complexes. This would be the position even if it were to be found that the HOAs were owners of the facilities.

[100] The inevitable question is whether and/or how section 43 can be reconciled with the common law principle of accession.

CAN STATUTORY LAW AND COMMON LAW EXIST SIDE BY SIDE?

[101] The common law principle of accession is to the effect that a movable thing which becomes attached to another thing loses its independence and becomes a component of the principal thing to which it has become attached. When that happens, the owner of the principal thing or object becomes the owner of the accessory thing attached to the principal thing.

[102] The common law position in the present case then is that movable property, (such as ducts and other related electronic communications facilities), lose its independence when affixed to the land and becomes part of the land. In the present case, this would mean that ownership of the electronic communications facilities would then vest in the owner of the land. The question that follows is this: in the event it were to be proved that the HOAs are owners how would such facilities be regulated? And who would have the authority to regulate them? As alluded to earlier, the answer cannot be found outside the framework of the ECA.

[103] It is so that the principle of legality ensures that some of the common law rights are not casually obliterated. And the ECA does not purport to obliterate common law. It follows, therefore, that statutory law (in this instance, section 43) can co-exist with common law (accession) as shall shortly be demonstrated.

[104] Understanding the complex relationship between statutory law and common law in this case requires a study of and an understanding that provisions of an Act, (in the present case the ECA), are inextricably linked. To read each in isolation might distort the true position. Section 43 must be read with section 22 which deals with **"Entry upon and construction of lines across land and waterways."**

[105] Section 22 provides: -

"(1) An electronic 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;*(my emphasis).

*(b) **construct and maintain** an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic; and*

*(c) **alter or remove** its electronic 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."*

[106] Section 22, therefore, empowers an electronic communications network service licensee to:

106.1 enter upon **any land;**

106.2 construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic; and

106.3 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.

[107] The ambit of the phrase ***"any land"*** above includes even privately owned land such as the land owned by HOAs in the present matter. It is so that a landowner such as the HOA may own the property. However, the ownership

rights would be limited by the servitude enjoyed by another on his property.

[108] In the present case, Telkom as an ECNS licensee or ECS licensee, enjoys the servitudinal rights in terms of section 22 of the ECA. While the HOA may grant permission to anyone to gain entry into the housing complex, it has no power to grant access to the existing infrastructure. In terms of section 22, Telkom may "enter any land" and that includes land that may belong to the HOA.

[109] Section 22 of the ECA is to a large extent a re-enactment of provisions which have been in our statute books for many years. In fact, the history of such provisions is said to go back to 1911. These provisions were intended to confer "necessary powers" upon those installing communications and other network facilities for the public good. (See Telkom SA Ltd v MEC for Agricultural and Environmental Affairs, Kwa-Zulu Natal and Others 2003(4) SA 23 (SCA)).

[110] Provisions such as section 22 of the ECA have survived scrutiny for all these years because private law and public law recognise that the law may grant one person a right (a servitude) over the property of another entitling the recipient of that right to use and enjoy that other person's property or to prevent the owner of the property from exercising certain property rights associated with ownership.

[111] What section 22 does is to confer servitude rights over "any land" to electronic communications network service licensees, not only for their benefit but also for the benefit of the general public. In **Link Africa**, the Court recognised that almost *"every property in urban areas has servitudes registered over it for sewage, water reticulation, electricity supply and the provision of telephone services and that these servitudes are routinely registered as part of the process of opening a township register."*

[112] Insofar as MFN contended that it was entitled to do gain access to the infrastructure on the basis that the common principle of accession applies, it was wrong. I say this because the correct legal position advocating a harmonious relationship between common law and statutory law was set out in **Johannesburg Municipality v Cohen's Trustees** 1909 TS 811 at 823 where it was held that:

"In considering the question of the extent to which the common law is abrogated by statute, the rule which has been adopted by the English Courts is thus laid down by ***Byles J. in Reg. v Morris, I CCR 95:*** *"it is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law."*

[113] **In Dhanabakium v Subramanian And Another 1943 AD 160 at 167** the position was again restated as follows:

"It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the common law."

[114] And recently the position was once more restated in **Link Africa**, where the Court stated the following:

"[151] So we know that the common law and statutes must be read in harmony as far as reasonably possible. Section 22 grants public servitudes to network licensees. These must be exercised in compliance with common law principles. Because they are enforced general servitudes, not determined by agreement between network licensees and landowners, the cautionary inhibitions the common law imposes apply."

[115] In the present case, there is no reason to believe that ECA intended to alter the common law of accession. On the contrary, it seems to me on the reading of section 22, and 43 that the intention was not to alter the common law.

[116] To the extent that the electronic communications facilities may have, by virtue of the common law principle of accession, become part of the land owned by the HOAs, their rights in relation thereto have been limited by the general servitude created in favour of electronic communications network service licensees in terms of section 22 of the ECA.

[117] A licensee who requires access to and use of the electronic communications facilities constructed and installed at the instance of another licensee must enter into a leasing agreement with that other licensee. This must be done in the manner contemplated in section 43 of the ECA read with regulation 3 of the Facilities Leasing Regulations and not with the landowner to which the facilities are attached if such landowner is not a licensee. This is what the common law of servitude, read in harmony with sections 22 and 43 of the ECA and the Facilities Leasing Regulations requires.

CONCLUSION

[118] Ownership of the electronic communications facilities by a licensee is not a requirement in terms of section 43. In the present case, all that Telkom needed to do was to prove its entitlement over the electronic communications facilities. In our view, Telkom succeeded in that regard.

[119] MFN is both an ECS and an ECNS licensee. MFN is described in the Leasing Regulations as the "Facility Seeker". It was, therefore, obliged to follow the prescribed procedures as set out in section 43 of the ECA read with regulation 3 of the Leasing Regulations before gaining access to the

underground infrastructure. It did not. For that reason, it contravened the provisions of section 43 as alleged.

[120] The HOAs are Body Corporates with wide powers as decision making bodies. They can, for example, in terms of section 22 of the ECA, give permission to electronic communications network service licensees to enter private land, to construct, maintain electronic communications networks or facilities or remove them. That power does not extend to granting permission to anyone to access an underground infrastructure.

[121] On the contrary, if the HOAs were to be proven to be owners, their rights of ownership would be curtailed or limited by Telkom's servitudinal rights in terms of section 22 of the ECA. One of the reasons is because the power to regulate electronic communications rests with ICASA alone.

[122] As said earlier, there's a good reason for this. Only the Authority has the expertise, the resources and the know how to regulate the industry effectively and efficiently. While a licensee may refuse a request for a lease on the basis that the request is unreasonable, it is the Authority that has the last word on the matter. Only it can determine the reasonableness of the request.

Section 43(4) provides: -

"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 economically feasible; and

(b) will promote the efficient use of electronic communications networks and services."

[123] It can be seen, therefore, that regulation takes place in a prescribed and an orderly fashion, not through agreements with private entities or individuals, but through a lease agreement between licensees in terms of the Act and regulations, with the Authority as the overseer.

[124] The pivotal role played by the Authority does not end once the reasonableness of the request to lease the facilities has been determined. It is a long-term, on-going role that ensures that there is co-operation between the parties and stability in the industry.

[125] Where a licensee is unwilling or unable to negotiate an agreement or where it is dragging its feet in agreeing on terms and conditions of an electronic communications facilities leasing agreement, the Authority may step in to move the process forward. Where necessary, it may refer the matter to the Complaints and Compliance Committee for a resolution of a dispute.

[126] The above demonstrates that the Authority is in a unique position and is adequately equipped to provide security and integrity of network services.

[127] On the other hand, it has not been argued that the HOAs have such an advantage, in the form of resources or the necessary expertise. In the absence of such evidence, it would not make sense to even think that the HOAs can lawfully grant permission to anyone to access electronic communications facilities. In any event, a number of reasons have been advanced why it could never have been the intention of the Legislature that the HOAS should regulate access to electronic communications facilities on their land.

[128] It follows, therefore, that even if it were to be proven that the respective Homeowners Associations of the Estates owned the underground

infrastructure, that fact would not affect Telkom's entitlement over the infrastructure.

[129] Consequently, the HOAs had no right to grant access to the underground infrastructure. To find otherwise would be to emasculate the provisions of the ECA, particularly section 43 read with the Leasing Regulations. This is because *"access to electronic communications facilities"* is governed by the ECA and the Leasing Regulations.

FINDING

[130] Accordingly, the CCC makes the following finding:

> MFN is found to have contravened section 43 of the ECA read with regulation 3 of the Electronic Communications Leasing Regulations in that it gained access to Telkom's electronic communications facilities without following the prescribed procedures.

ORDER

[131] The CCC recommends that the following orders be issued by the Authority, namely—

(a) direct MFN 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 Cottage Creek and Stone Forrest housing complexes in Mooikloof Ridge, Pretoria;

(b) direct MFN to desist from continuing to install its optic fibre in Telkom's infrastructure within Cottage Creek and Stone Forrest housing complexes in Mooikloof Ridge, Pretoria;

(c) direct MFN to take the following remedial steps: -

(i) submit a request to Telkom to lease the electronic communications facilities in the housing complexes in terms of section 43 of the ECA within 30 (thirty) days from the date of issue of this Order; and

(ii) in the event MFN fails to take the remedial step as set out in (c)(i) above, direct MFN to remove its fibre optic cables from Telkom's manholes, covers, ducts and/or pipes and in any of Telkom's electronic communications facilities in the Cottage Creek and Stone Forrest housing complexes in Mooikloof Ridge, Pretoria within 14 (fourteen) days after expiry of the deadline mentioned in (c)(i) above.

TMMasipa

Date: 22 August 2022

Judge Thokozile Masipa

CCC Chairperson