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Faculty of Law
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The Acting Director-General
Department of Communications and Digital Technologies
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Dear Mr A Wiltz

Pursuant to paragraph 1.3 of *GN* 800 in *GG* 43537 of 22 July 2020 I hereby submit my written comments on the proposed policy and policy direction on the rapid deployment of electronic communications networks and facilities.

1. Rights and obligations
    a. In paragraph 2.1 the document creates the impression that the right of entry in section 22 of the Electronic Communications Act 36 of 2005 ('ECA') is only limited to land. However, section 22(1)(a) of the ECA specifically includes railways and waterways. The latter kinds of property should be included explicitly in the document not only in anticipation of potential conflict, but also in an effort to acknowledge the fact that the Independent Communications Authority of South Africa ('Icasa') will likely need to cooperate with the Passenger Rail Agency of South Africa[1] ('Prasa') or water management institutions[2] in the event that electronic communications networks or facilities are erected or installed on such property.

[1] In terms of Schedule 1 items 7(3) and 9(2) of the Legal Succession to he South African Transport Services Act 9 of 1989.
[2] In terms of section 135 of the National Water Act 36 of 1998.

b. In paragraph 2.2 the document again abbreviates the rights of electronic communications network service licensees by excluding the ancillary rights to section 22(1)(b) of the ECA. This right has three ancillary rights: (a) the right to construct and maintain pipes, tunnels or tubes under any street;[3] (b) the right to erect and maintain a gate in a fence that would otherwise preclude the licensee entry or inconvenience the licensee's right to enter;[4] and (c) the right to fell or prune any tree or vegetation that obstructs or interferes with the operation and maintenance of an electronic network communications network or facility.[5] These ancillary rights should be explicitly stated in the document.
c. In paragraph 2.3 the document states that "electronic communications network service licensees retain ownership of any electronic communications network or facility constructed." While this right is similar to section 23(1) of the Electricity Regulation Act 4 of 2006 and section 135(1)(a) of the National water Act 36 of 1998 it does not appear in the ECA itself and may therefore be viewed as an *ultra vires* appropriation of power. This is a significant deviation in that this "right" creates a statutory exception to application of the common law principles of *inaedificatio*. These auxiliary things may therefore: not be attached and sold in execution of debt or be subjected to any insolvency or liquidation proceedings, not be subjected to the landlord's tacit hypothec,[6] and only be acted upon with the written consent of the licensee.[7] In my view, an amendment of the ECA would be need to persist with this paragraph.
d. In paragraph 2.4 the document states that owners must exercise "due care and diligence" to avoid causing damage to an electronic communications network or facility. The expression "due care and diligence" is used as a shorthand to refer to the fact that the servitude holders – an organ of state or an electronic communications network service licensee – of personal servitudes, in this case a statutory servitude, must exercise a servitude *civiliter modo*. In terms of this principle, a servitude holder must exercise a servitude so that it does not impose an unreasonable burden on the servient

[3] Section 24(1)(a) of the ECA. A local authority has a similar power to install conduit pipe for underground cables from a point of connection on the street boundary to a building on a premises in terms of s 23.
[4] Section 26(1)(a) of the ECA. The licensee must also provide a set of duplicate keys to the owner or occupier of the land in terms of s 26(1)(*b*).
[5] Section 27(1) of the ECA. See also Muller G "To fell or not to fell: The impact of NEMBA on the rights and obligations of a usufructuary" (2018) 81 *Journal for Contemporary Roman-Dutch Law* 529–542.
[6] See Muller G, Brits R, Pienaar JM and Boggenpoel Z *Silberberg and Schoeman's The Law of Property* 6th ed (2019) chapter 18.5.
[7] See sections 23(2)(*a*)–(*c*) of the Electricity Regulation Act.

owner.[8] The paragraph therefor inaccurately assigns this obligation to the owners as a tertiary principle which calibrates the relationship between the holder of the servitude and the owner.[9] In order to caution against causing damage the document should rather focus on the secondary principle of effective use which is used to calibrate the relationship between the holder of a servitude and an owner. The document should therefore formulate the obligation to be cautious about effecting damage in terms of the principle of effective use and the owner not interfering or impairing the effective use of the servitude. However, the principle of *civiliter* exercise is used correctly in paragraph 2.5(c) of the document.

2. Co-operative governance
    a. In paragraphs 1.5 the document underlines the point that the policy and policy direction is subject to the regulatory environment of local governments. This point is echoed in paragraph 2.5(b) of the document albeit in the context of how electronic communications network service licensees must exercise their rights.
    b. Both abovementioned paragraphs link back to the point I made about the principle of exercising servitudes *civiliter modo*. The purpose of the principle is to protect the owner against the negative effects that the exercise of the servitude could have on the ownership of the servient land.[10] These negative effects typically manifest as unnecessary or unwarranted burdens on the servient land that are not necessary for the effective use of the servitude, or included (specifically or tacitly) in the agreement or grant. The function of the *civiliter* principle is to ensure that the servient property is not burdened by a gratuitous exercise of the servitude that has been created.[11] Stated differently, the *civiliter* principle regulates the reasonable exercise of a

[8] *D* 8.1.9 (*dum modo civiliter*). *Rubidge v McCabe & Sons* 1913 AD 433 at 441; *Van Heerden v Coetzee* 1914 AD 167; *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150; *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 474; *Cliffside Flats (Pty) Ltd v Bantry Rocks (Pty) Ltd* 1944 AD 106; *Van Schalkwyk v Esterhuizen* 1948 (1) SA 665 (C); *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A); *Penny v Brentwood Gardens Body Corporate* 1983 (1) SA 487 (C) at 491B–D; *Brink v Van Niekerk* 1986 (3) SA 428 (T) (discussed by Van der Merwe 1986 *Annual Survey* 249; Sonnekus and Neels 1987 *TSAR* 88 ff; Harker 1987 *SALJ* 44 ff); *Berdur Properties (Pty) Ltd v 76 Commercial Road (Pty) Ltd* 1998 (4) SA 62 (D) at 68D–E; *De Kock v Hänel* 1999 (1) SA 994 (C) at 1000B–D. See Scott J "A growing trend in source application by our courts illustrated by a recent judgment on the right of way" (2013) 76 *THRHR* 239–251 for criticism of the colloquial shorthand that is used to describe the principle as the exercise of the servitude in a 'civilised manner'.

[9] See Muller G, Brits R, Pienaar JM and Boggenpoel Z *Silberberg and Schoeman's The Law of Property* 6th ed (2019) 379–382.

[10] Van der Walt AJ *The Law of Servitudes* (2016) 247.

[11] *Ibid* at 248.

servitude. This requires that a balance must be struck between the servitude holder's right to effective use and the residual rights of the servient owner to use her property to the extent that this does not interfere with servitude holder's use.[12]

c. The applicability of this principle was noted in *Tshwane City v Link Africa* 2015 (11) BCLR 1265 (CC) and in *Telkom SA SOC Limited v City of Cape Town* [2019] 4 All SA 682 (SCA). The Constitutional Court should also have relied on this principle in *Telkom SA SOC Limited v City of Cape Town* [2020] ZACC 15 (25 June 2020) and developed on the tentative steps that it took in *Link Africa*.

d. To that end the existence of *inter alia* sections 41(1)(b), (g) and (h)(iv), read with section 152(1)(b) and Schedule 4B (municipal planning), of the Constitution of the Republic of South Africa, 1996 and the Spatial Planning and Land Use Management Act 16 of 2013 cannot be overemphasised.

3. In paragraphs 2.5(c) and 3.1(f) the document contains a serious typographical error. A firm distinction must be draw between causing "damage" to property and paying "damages" for the "damage" caused.

4. Access fees

   a. The formulation of paragraph 2.6 conflates two distinct issues – namely, the payment of a fee for the right of entry and the payment of compensation for the construction of an electronic communications network or facility. The conflation causes confusion and, I suspect, will attract the brunt of comments on the policy and policy direction.

   b. All statutory provisions that afford an organ of state or another authorised person a right of entry and inspection onto or over property as a servitude is done without the imposition of a fee.[13] Any objection to this position should be dismissed immediately since this is part and parcel of the inherently limited nature of ownership as affording the most complete real right to property "within the limits of the law." The statutory provisions mentioned in this document all form part of public law limitations that are placed on ownership. My recommendation would be do remove the part about the

[12] *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para. 15; Sonnekus "Erfdiensbaarhede en die uitoefening daarvan *civiliter modo*" 2007 *THRHR* 351–370; Van der Walt AJ *The Law of Servitudes* 249.

[13] See section 28(1) of the Sectional Titles Act 95 of 1986, schedule 1 items 7(3) and 9(2) of the Legal Succession to the South African Transport Service Act 36 of 1998, section 125(1) of the National Water Act 36 of 1998, section 22(2) of the Electricity Regulation Act 4 of 2006 and section 13(1) of the National Environmental Management: Integrated Coastal Management Act 24 of 2008.

deployment of electronic communications networks or facilities from paragraph 2.6 and include it in paragraph 2.7.

5. Deployment fees
    a. Compensation in the form of a fee for the deployment of electronic communications networks or facilities is an entirely different matter.
    b. All servitudes, as limited real rights, cause a diminution in the dominium of the owner and as such is a deprivation of property for purposes of section 25(1) of the Constitution. However, almost all of these servitudes do not amount to arbitrary deprivations which would fall foul of the Constitution since the regulatory framework creates procedures that must be followed[14] and satisfy the substantive considerations of an inquiry into the regulation.[15]
    c. The result is that minor or insignificant intrusions that small installations like telephone lines or fibre optic cables cause do not attract the need for compensation to save it from becoming an arbitrary deprivation. My recommendation would be to move the part about the deployment of electronic communications networks or facilities from paragraph 2.6 to paragraph 2.7 with the addition of a descriptive clause that identify and describe these installations as minor and insignificant which do not attract or require the payment of a fee as a form of compensation for the inconvenience caused by the intrusion.
    d. However, large and significant intrusions that the installation of sizeable and more noticeable electronic communications facilities, as defined in section 1 of the ECA, will require the payment of compensation to either save the deprivation from becoming arbitrary or following formal expropriation. I deal with each of these possibilities in turn.
        i. The servitudes envisioned by section 22 of the ECA are non-consensual servitudes because they are imposed by statute and must be distinguished from consensual servitudes that are created through agreement. These servitudes are therefore similar to ways of necessity (*via ex neccessitate*) that are imposed on an owner by court order. In that context *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) is authority for the payment of compensation to the owner to save the

[14] Thereby giving effect to section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000. See Van der Walt AJ "Procedurally arbitrary deprivation of property" (2012) 23 *Stell LR* 88–94 and Quinot G and Van der Sijde E "Reflections on the single system of law principle with reference to the regulation of property and the right to just administrative action" in Muller G, Brits R, Slade BV and Van Wyk J (eds) *Transformative Property Law – Festschrift in honour of AJ van der Walt* (2018) 447–468.
[15] *First National Bank of SA Ltd t/a Westbank v Commissioner of the South African Revenue Service; First National Bank of SA Ltd t/a Westbank v Minister of Finance* 2002 (4) SA 768 (CC) par 100.

deprivation caused by the non-consensual servitude from amounting to an arbitrary deprivation.[16] While I acknowledge that this is stated in paragraph 2.7 I would encourage the Minister of Communications and Digital Technologies to seriously consider expanding this paragraph with the inclusion of: (a) factors that will used to distinguish minor and insignificant installations from large and significant installations; and (b) a list of specific costs that will be compensable. For purposes of the latter I would implore the Minister to not only consider costs for physical intrusions but also include the costs for nuisances in the wide sense that may cause damage to the health and well-being of people that live in close proximity to these installations.

ii. It is curious that the document makes no mention of the possibility to utilise the expropriation powers of the state for the rapid deployment of electronic communications networks and facilities. It is curious because section 8(1) of the Expropriation Act 63 of 1975 states that it is possible to acquire existing and new servitudes by way of expropriation separate of expropriating the entire immovable property. It is further curious that the expropriatory powers of the state is not mentioned because section 5 of the Infrastructure Development Act 23 of 2014 specifically empowers the Presidential Infrastructure Coordination Commission to expropriate land for strategic integrated projects. To that end Schedule 1 of the Infrastructure Development Act specifically mention "Communication and information technology installations" and Schedule 3 specifically includes a strategic integrated project "SIP 15: Expanding access to communication technology". The Minister of Public Works also recently published *GN* 812 in *GG* 43547 on 24 July 2020 in which "Strategic Integrated Project No 22: Digital Infrastructure". All these possibilities should be included in the document not only to make provision for a comprehensive approach to the rapid deployment of electronic communication networks and facilities, but also to improve the articulation of the public interest in and enhance the justification for the rapid deployment.

[16] Van der Walt AJ *The Law of Servitudes* (2016) 360 and 364–370, Van der Walt AJ and Raphulu TN "The right of way of necessity: A constitutional analysis" 2014 (77) *THRHR* 468–484 and Raphulu TN *The right of way of necessity: A constitutional analysis* (unpublished LLM thesis, Stellenbosch University, 2013).

6. Compensation for damage caused
    a. In paragraph 2.9 the document contains a provision that would entitle the owner to claim compensation for damage caused by the electronic communications network service licensee that falls short of the *civiliter* exercise of the servitude. This is commendable and aligns with a similar provision in section 128(3)–(5) of the National Water Act 36 of 1998.
    b. However, my recommendation would be that this paragraph be included in a separate paragraph or sub-paragraph detailing all the considerations that will be taken into consideration for compensation as indicated in paragraph 5(d)(i)(b) of my letter.

7. Disputes and complaints
    a. In paragraph 2.12 the document incorrectly refers to section 17A of the Independent Communications Authority of South Africa Act 13 of 2000 where the reference should rather be to section 17C of the Act since this is consistent with the cross-reference to section 25(8) of the ECA.
    b. Paragraph 2.16 is redundant and/or tautologous and should be excluded to avoid confusion since this adds nothing to the policy or policy direction.

8. Regulations
    a. In paragraph 3.1(f) the document states that Icasa should prescribe regulations about access fees and the payment of damages.
    b. I indicated in paragraph 4 of my letter that the rights of entry and inspection are not compensable and should thus be deleted from the instruction to Icasa.
    c. I also indicated in paragraph 5 of my latter that compensation should be payable for large and significant installations and for expropriations. Since it is possible to conceptualise the factors for the latter with reference to section 25(3) of the Constitution in the absence of a more detailed Expropriation Act this should be excluded from the instructions to Icasa. However, for purposes of the former, as read with paragraph 6 of my letter, the instruction to Icasa to prescribe regulations about all instances of compensable costs must be welcomed.

Best

Gustav Muller

Digitally signed by Gustav Muller
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