The legality and impact of the Draft Policy for Rapid Deployment of Electronic Communication Networks and Facilities[1]

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Introduction

Honourable Judge President Mlambo, Prof Viljoen and members of the Gauteng Attorneys' Association – thank you very much for extending the invitation to me to address you this afternoon about the legality and impact of the Draft Policy for Rapid Deployment of Electronic Communication Networks and Facilities ('Draft Policy').

Legality

On 22 July 2020 the Minister of Communications and Digital Technologies published the Draft Policy and invited comments. Once finalised this Draft Policy will form an integral cog in the regulatory framework for the rapid deployment of information and communication technology in South Africa. Chapter 4 of the Electronic Communication Act 36 of 2005 ('ECA'), but in particular section 22 of the ECA, sets the statutory agenda in this context. In this regard, section 22(1) of the ECA affords a network service licensee three important rights – entry and inspection, construction and maintenance, alteration and removal. At the policy level this Draft Policy flows from the paragraph 9.3 of the National Integrated ICT Policy White Paper that was published in 2016. Section 21(1) of the ECA empowers the Minister to develop a policy for the rapid deployment of ICTs while section 21(2)(b) of the ECA empowers Icasa to prescribe regulations that establish procedures and processes for resolving disputes that may arise between a landowner and an electronic communications network service licensee. There appears to be very little doubt about the legality of the Draft Policy in the sense that it has duly authorised – in terms of who published it, what its purpose is and that the listed prescribed procedures have been followed. Despite its apparent lawfulness, the Draft Policy includes some aspects that raises serious concerns that deserve closer engagement in terms of its impact.

[1] Presented at the 3rd Annual General Meeting of the Gauteng Attorney's Association on Thursday, 15 October 2020 via Zoom.

Impact

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The first of which appears in paragraph 2.3 of the Draft Policy where it 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*. The electronic communications networks or facilities that are constructed are classified as auxiliary things to the principal thing which is a house or other structure. The exception created in the ERA and the NWA effectively means that these auxiliary things may: 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, and only be acted upon with the written consent of the licensee. In my view, an amendment of the ECA would be need to persist with this paragraph.

Access fees

Second, 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 ICTs. The conflation causes confusion and, I suspect, attracted the brunt of comments on the policy and policy direction. All statutory provisions that afford an organ of state or another authorised person a right of entry and inspection onto or over private property as a servitude is done without the imposition of a fee. 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 Draft Policy all form part of public law limitations that are placed on ownership. The real distinction and problem, which the Draft Policy fails to articulate, lies with access to public land where electronic communication networks licensees need to obtain wayleaves from local authorities. I readily concede that there is an actual cost (in the form of application fees) and operational cost (in terms of delays) to these applications. However, the Draft Policy is vague and inaccurate about this.

Deprivations and compensation

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 of the Republic of South Africa, 1996. 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 and satisfy the substantive considerations of an inquiry into the regulation. This accords with the majority judgment of *Link Africa.* However, the majority of the court was correct in pointing out that this general rule may still depend on the extent of the deprivation. To that end if may be useful for the Draft Policy to:

- draw a distinction between minor/insignificant intrusions and large/significant intrusions;
- carefully define which kinds of electronic communication facilities or networks would fall into which category of intrusions; and
- which of these kinds of intrusions will attract compensation; and
- which factors or costs will be considered to calculate just and equitable compensation to the owners. Here the Minister should 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. This proposal is entirely reconcilable with chapter 9.3.5.9 of the White Paper which deals with the environmental, health, safety, security and social impact of the rapid deployment of ICTs.

I hasten to add that the servitudes envisioned by section 22(1) of the ECA are non-consensual servitudes because they are imposed by statute (*ex lege*) and must be distinguished from consensual servitudes that are created through agreement (*ex consensu*). These servitudes are therefore similar to ways of necessity (*via ex necessitate*) that are imposed on an owner by court order. In that context *Van Rensburg v Coetzee* is authority for the payment of compensation to the owner to save the deprivation caused by the non-consensual servitude from amounting to an arbitrary deprivation. It is important to stress this point – the compensation here functions as an equalisation payment in that the State remedies the

disproportionate disadvantage that is laid at the door of a few owners for the public purpose of the rapid deployment of ICTs. The compensation is NOT compensation for an expropriation within the meaning of sections 25(2) and (3) of the Constitution.

But for the need to draw a distinction between minor/insignificant and large/significant intrusions and clarify which factors will be compensable, the rapid deployment practice may be susceptible to a real challenge to its substantive arbitrariness. The operators appear set to lease premises for the deployment of its electronic communication networks and facilities. This much is evident from the facts of another recent Constitutional Court judgment – *Telkom SA City of Cape Town*. This practice does not appear to align with one of the challenges and corresponding objectives and goals of the White Paper – namely, to reduce the duplication of infrastructure with a negative impact on the environment. While applicable to all of the priority network and facility installations identified in the White Paper, this appears to be most acute for the installation of masts and towers. It appears entirely illogical and economically inefficient to lease a property for the installation of a mast or tower in an effort to reduce the duplication of infrastructure for any period less than 10 years. In which case such lease would have to registered against the title deed of that property as long lease thereby incurring additional costs and cause delays. Additionally, this practice, in my view, significantly changes the analysis into the substantive arbitrariness of the rapid deployment in terms of the disproportionate impact that it has on the owner.

Absence of expropriation

Fourth, it is curious that the Draft Policy 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 Draft Policy 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 purpose of and enhance the justification for the rapid deployment.

Damage and civiliter exercise of statutory servitudes

While I'm confident that the legal practitioners in Gauteng and the courts under the leadership of Judge President Mlambo will be able to navigate these problems with the Draft Policy with much trouble, I would be remiss if I did not take this opportunity to encourage you to not forget about the common law of servitudes. As much as section 22(1) of the ECA calibrates the relationship between the servitude holder and the owners of land through the secondary principle of effective use, section 22(2) of the ECA's command to have due regard to applicable law calibrates this relationship further in terms of the tertiary principle of *civiliter* exercise of these non-consensual statutory servitudes. As much as the Constitutional Court must be lauded for employing this principle in *Motswagae* and *Link Africa* there has been an alarming move towards explaining the meaning of this principle in simpler terms – from exercising the servitude *civiliter modo*, to exercising it in a "civilised manner" and currently to exercising it with "reasonableness and due caution". While I wholeheartedly support the use of plain language, the colloquial use of the term has resulted in it losing much of its meaning. Prof Scott first sounded the alarm about this in his *THRHR* article where he authoritatively translated the principle originally found in *D* 8.1.9 as "provided that he exercises the servitude with due regard for the other party" and that it means a servitude should be exercised in a way that does not impose an unreasonable burden on the servient owner". The focus being on the owner and its rights and NOT the holder of the servitude. This interpretation is echoed in the late Prof van der Walt's *The Law of Servitudes* and the latest edition of *Silberberg and Schoeman's The Law of Property* that was published last year.

My plea this afternoon has a three-part purpose.

- First, in paragraph 2.4 the Draft Policy states that owners must exercise "due care and diligence" to avoid causing damage to ICTs. The Draft Policy abuses the *civiliter* exercise of a servitude to inaccurately assign an obligation to the owners to not damage the ICT installations. In order to caution against causing damage the Draft

Policy should rather focus on the principle of effective use which is used to calibrate the relationship between the holder of a servitude and an owner. The Draft Policy 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 Draft Policy.

- Second, the *civiliter* exercise of a servitude features in paragraph 9.3.5.1 of the White Paper and seeks to limit its operation to a mere procedural control in the form of imposition notice requirements and allowing periods for objection to the roll out of ICTs. Unfortunately, the Constitutional Court perpetuated this proceduralisation of the principle in *Link Africa*.
- Third, we must appreciate that the challenges to the rapid deployment of ICTs in South Africa has only just begun. On my reading of the White Paper and the Draft Policy our courts have only been tasked to determine disputes as it pertains to two small aspects of a nine-pronged approach to interventions identified in chapter 9.3.5 of the White Paper.

Conclusion

My plea this afternoon is simple, as the legal challenges to the rapid deployment of ICTs unfold in the years to come, the *civiliter* exercise of the non-consensual servitudes in section 22(1) of the ECA, properly understood, has the potential for a deeper and more nuanced calibration of the relationship between the holder of these servitudes and the owners. Additionally, calibrating this relationship first through the prism of the *civiliter* exercise of the servitude will open up creative interpretive potential and reduce the need for a contextual reliance on abstract and distant arguments based on the various parts of the Constitution as a first port of call. To that extent we must heed the calls of former Chief Justice Mahomed to only allow the good parts of our common law into post-apartheid South Africa and of former Deputy Chief Justice Moseneke to development the common law. The *civiliter* exercise of servitudes is such a part of our law and should be development in the ICT context. The principle was used in *Link Africa*, it should have been used in *Telkom* recently and must be used in future.