



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 366/2018

In the matter between:

**DENNEGEUR ESTATE HOME OWNERS ASSOCIATION
VODACOM (PTY) LTD**

**FIRST APPELLANT
SECOND APPELLANT**

and

TELKOM SA SOC LTD

RESPONDENT

and

CITY OF CAPE TOWN

AMICUS CURIAE

Neutral citation: *Dennegeur Estate v Telkom* (366/2018) [2019] ZASCA 37 (29 March 2019)

Coram: Lewis ADP, Ponnann and Zondi JJA and Dlodlo and Eksteen AJJA

Heard: 18 March 2019

Delivered: 29 March 2019

Summary: Spoliation – Electronic Communications Act 36 of 2005 – installation by Telkom of copper cables in portion of underground plastic sleeves, the property of the land owner, does not amount to possession – installation by Vodacom of optic fibre

cables in the same sleeves did not disturb Telkom's use – does not amount to spoliation.

ORDER

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

1 The appeal is upheld.

2 The respondent is ordered to pay the appellants' costs, including the costs of two counsel and the costs of the amicus curiae.

3 The order of the court a quo is set aside and replaced with the following:

'The application is dismissed with costs, such costs to include the costs of two counsel where applicable.'

JUDGMENT

Eksteen AJA (Lewis ADP, Ponnann and Zondi JJA and Dlodlo AJA concurring):

[1] On 26 July 2017 the respondent, Telkom SA Soc Ltd (Telkom), obtained a spoliation order against the appellants to restore to it, ante omnia, the undisturbed possession of its underground ducts, sleeves, manhole covers (the infrastructure) and copper cables (the cables) within the Dennegeur Residential Estate (Dennegeur). The appellants appeal against this order with leave of this court, the judge a quo having refused leave. Subsequent to the granting of leave to appeal the City of Cape Town successfully applied to be admitted as amicus curiae in the appeal.

[2] Essentially, three issues arise for determination in the appeal. First, whether Telkom had possession for purposes of the mandament van spolie (the mandament) of the cables and infrastructure constructed on and under Dennegeur and which is the

property of the first appellant, Dennegeur Estate Home Owners Association (the HOA), alternatively, whether it enjoyed quasi possession of the right to the exclusive use thereof by virtue of the provisions of s 22 of the Electronic Communications Act 36 of 2005 (ECA); second, in the event that it is found that Telkom did enjoy possession or quasi possession as aforesaid, whether the second appellant, Vodacom (Pty) Ltd (Vodacom), committed an act of spoliation by installing its optic fibre cables in the same underground ducts and sleeves as that in which Telkom had installed the cables; and third, in the event that the first two issues are decided in Telkom's favour, whether Telkom had, by the delay in instituting proceedings, acquiesced in the conduct of Vodacom so as to preclude the relief which was granted. The facts giving rise to the dispute and the circumstances leading up to litigation are set out below.

[3] Dennegeur is a private security lifestyle residential estate situated in Somerset West and the HOA is the Home Owners Association of the estate. Dennegeur was established and developed over a period of time commencing approximately twenty years prior to the litigation. At the time the developers had requested Telkom to provide telecommunication services to Dennegeur. The infrastructure was built and installed by the developer at no cost to Telkom but in consultation with and under the auspices of Telkom. Telkom provided the plans indicating the positions of the required pipes and pipe junction boxes and specification drawings for the construction thereof. It appointed a contract representative to monitor and oversee the progress and to ensure compliance with the infrastructure plan and specifications. It is apparent from the correspondence exchanged with the developers at the time that Telkom envisaged that the infrastructure would be for its exclusive use.

[4] Upon completion of the infrastructure and during 2000 Telkom installed the cables in the infrastructure thereby creating a telecommunications network. Telkom has at all material times since the installation of the network enjoyed access to the network and maintained it. The manholes forming part of the infrastructure were kept closed by means of metal manhole covers which served to protect the network from disturbance, obstruction or impediments. The manhole covers could be opened by means of a T-

key. A T- key, it appears, is more of a tool than a key and is freely available in the market to any person seeking to open a manhole.

[5] Both Telkom and Vodacom are licensed electronic communications network service providers in terms of the ECA. Telkom has at all material times provided certain home owners in Dennegeur with an Asymmetric Digital Subscriber Line (ADSL) internet service. The service is provided by means of Telkom's network as described earlier. Telkom also provided similar services to a number of other private residential estates in the immediate vicinity of Dennegeur where similar infrastructure had been established.

[6] During approximately 2015 a number of home owners in Dennegeur expressed an interest in the installation of optic fibre high speed internet access and the HOA accordingly approached Telkom to provide such a service. In response, Telkom intimated its intention to roll out its optic fibre connectivity to four residential estates situated in proximity to one another simultaneously. The estates would be required to share the costs of building, and maintaining power to, an equipment room which would service all four estates. Moreover, Telkom required an initial start-up fee. In these circumstances the HOA entered into negotiations with the home owners associations of Somerset Heights, Meerhof and Boskloof, being the other three residential estates forming part of Telkom's intended roll out. They were, however, unable to reach agreement in respect of the fair allocation of the costs involved.

[7] The HOA then entered into negotiation with Vodacom to install an optic fibre network in the infrastructure at Dennegeur which, it is common cause, is the property of the HOA. Vodacom agreed to do so. Thus, when Telkom acknowledged, on 6 November 2015, that its initial suggestion to combine the four estates for economies of scale was not a good idea and offered to deliver optic fibre high speed internet access to Dennegeur during 2016, the offer was rejected.

[8] Vodacom proceeded early in 2016, at the instance of the HOA, to install its optic fibre network in the infrastructure on Dennegeur. On 18 February 2016, during the

process of installation, one of Telkom's cables was damaged thus affecting the connectivity to five of its customers and home owners at Dennegeur. The damaged cable was repaired by Telkom on 24 February 2016 and the service reinstated. On 2 March 2016 Telkom became aware that the HOA had granted permission to Vodacom to install its optic fibre network at Dennegeur. There is no evidence that Telkom lodged any formal protest either to the HOA or to Vodacom and Vodacom continued with its installation which was completed by early May 2016. The spoliation application was launched on 10 November 2016.

[9] Telkom's claim is founded on the mandament. The mandament is available where:

- '(a) a person has been deprived unlawfully of the whole or part of his or her possession of movables or immovables;
- (b) a joint possessor has been deprived of his or her co possession by his or her partner taking over exclusive control of the thing held in joint possession;
- (c) a person has been deprived unlawfully of his or her *quasi*-possession of a servitural right; or
- (d) a person has been deprived unlawfully of his or her *quasi*-possession of other incorporeal rights.¹

[10] In the case of movable or immovable property (as in paras (a) and (b) above) the remedy is available to a person who has been deprived of his or her actual physical possession or co-possession of the subject property. In order for such possession to be established two requirements have to be met:

- '(i) the person needs to be in effective physical control of the thing; and
- (ii) needs to have the intention to derive some benefit from the possession.²

[11] It is argued on behalf of Telkom that it was in actual physical possession of the infrastructure and the cables by virtue of the presence of the cables therein and the fact that it was entitled, whenever necessary, physically to access the infrastructure for repair, maintenance and upgrading purposes. The submission, in my view, is clearly

¹ See 27 *Lawsa* 2 ed para 94 and the authorities therein cited.

² See P J Badenhorst et al *Silberberg and Schoeman's: The Law of Property* 5 ed at 276.

untenable. It is true that the measure of physical control required to acquire possession of a thing may vary depending on numerous factors, such as the nature and purpose of the thing. In the present case, however, although Telkom may have accessed the infrastructure to its benefit, even to its exclusive benefit, the indisputable facts establish that the infrastructure forms an integral part of the immovable property which is owned, occupied and controlled by the HOA in a security estate. Telkom is required to seek consent to enter the property on each occasion that it seeks to attend to the infrastructure. The fact that manhole covers could only be opened with a T-key does not assist in circumstances where a T-key is freely available on the market to any person who might wish to open the manhole. Telkom was not in physical possession of the infrastructure or the cables.

[12] The right which Telkom asserts is derived from s 22 of the ECA. The section 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 and any waterway in the Republic;

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

(c) alter or remove its electronic communications network or electronic communications facilities and may for that purpose attach wires, stays or any other kind of support to any building or other structure.

(2) In taking any action in terms of subsection (1) due regard must be had to applicable law and the environmental policy of the Republic.'

[13] In *Link Africa*³ the Constitutional Court considered the effect of s 22 of the ECA. Cameron and Froneman JJ, writing for the majority, after examining the history of common-law servitudes in South Africa held:

'What s 22 does is wholly conformable with this long history. In effect, the statute creates what used to be called 'public servitudes'. . . . The statutory provisions provide powers and rights to electronic communications network service licensees (network licensees) that they must exercise for the benefit of the public in general. The right vests in the network licensees upon grant of licence.'⁴

[14] They proceeded to discuss the provisions of s 22 and the effect of servitudes in general, then concluded:

'This means:

(a) Network licensees may select the premises and access to them for the purposes of constructing, maintaining, altering, or removing their electronic communications network or facilities in taking action in terms of s 22(1);

(b) this selection must be done in a civil and reasonable manner. This would include giving reasonable notice to the owner of the property where they intend locating their works. The proposed access to the property must be determined in consultation with the owner;

(c) compensation in proportion to the advantage gained by the network licensees and the disadvantages suffered by the owner is payable in respect of the exercise of the public servitude s 22 (1) grants; and

(d) where disputes arise about the manner of exercising the rights under s 22(1) or the extent of the compensation payable, these must be determined by way of dispute resolution to the extent that it is possible, or by way of adjudication. Access to the property in the absence of resolution would be unlawful.'⁵

[15] The rights afforded by s 22 of the ECA are in their nature servituted. Telkom enjoyed the right to enter into the property of a land owner in order to construct, maintain, alter, or remove electronic communication networks or facilities in the manner described in *Link Africa*. Quasi-possession of an asserted servituted right enjoys

³ *Tshwane City v Link Africa & others* [2015] ZACC 29; 2015 (11) BCLR 1265 (CC); 2015 (6) SA 440 (CC). See also *Dark Fibre Africa v City of Cape Town* [2018] ZASCA 168.

⁴ Para 140.

⁵ Para 152.

protection under the mandament to the extent that it is evidenced by the actual or factual exercise of the professed right.⁶ 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 s 22 of the ECA. To that extent it enjoyed quasi-possession of the servitotal right under s 22.

[16] On behalf of Telkom it was argued, however, that s 22 gives Telkom the exclusive rights to the entire infrastructure, including the vacant unused space within the ducts which Telkom may in future put to use when it decides to roll out its optic fibre network. This, so it was argued, is so by virtue of the definition of 'electronic communications facility' and the provisions of s 43 of the ECA.⁷

[17] I do not think that it is necessary for purposes of the appeal to decide this issue. Whatever the range of rights which may be bestowed on Telkom by s 22 (read with the definition of 'electronic communications facility' and s 43), Telkom could only enjoy quasi-possession of such rights for purposes of the mandament to the extent that it actually exercised such rights in accordance with the professed servitude. In *Nienaber v Stuckey* 1946 AD 1049 Greenberg JA emphasised at 1053 that: '. . . a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored'.

[18] The extent to which Telkom in fact exercised a servitotal right to the airspace in the ducts under s 22 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

⁶ *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A).

⁷ Section 43 of the ECA stipulates that electronic communications network service licensees must, on request, lease electronic communication facilities to any other person licensed in terms of the ECA and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement. An 'electronic communications facility' is defined in s 1 of the ECA to include, where applicable, 'space on or within poles, ducts, cable trays, manholes, hand holds and conduits' and 'cables'.

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.

[19] This brings me to the issue of spoliation. Spoliation of a servitural right occurs where the quasi-possession of the alleged right, as evidenced by the actual exercise of the professed right prior to the offending act, is disturbed.⁸ In this case there was a brief interruption of Telkom's use when a cable was accidentally damaged in the course of Vodacom's installation of its optic fibre network. The damage was promptly repaired. This did not constitute an impediment to Telkom's continued exercise of its right to the use of the ducts for the accommodation of the cables and it had been fully restored long before to the launch of the application.

[20] Notwithstanding the installation by Vodacom of its optic fibre network in the same ducts as the cables, Telkom's actual use of the ducts, cables and its service to its customers remains undisturbed. It has not lost possession of anything. It remains entitled to enter into Dennegeur for the purposes set out in s 22 and its network remains fully functional as it was prior to Vodacom's conduct. There was accordingly no spoliation.

[21] By virtue of the conclusion at which I have arrived, it is not necessary to determine the third issue raised, namely Telkom's alleged acquiescence in the conduct of Vodacom.

[22] There remains the issue of costs. No reason has been advanced why the ordinary rule that costs should follow the result should not find application in the present matter. There is, however, the issue of the amicus curiae's costs.

[23] The amicus curiae has a significant interest in the application. In *Link Africa* the Constitutional Court held:

⁸ *Bon Quelle* fn 6; and 27 *Lawsa* 2 ed para 97.

'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. . . .

Reliable electronic communications go beyond just benefiting the commercial interest 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.⁹

[24] Municipalities have an important role to play in achieving this goal. Unnecessary installations of facilities on municipal roads would compromise and impede the constitutional functions of municipalities in relation to their roads. See *Dark Fibre Africa v City of Cape Town* [2018] ZASCA 168. They may detrimentally affect a range of matters which local government has the constitutional right and duty to administer, including 'building regulations', 'municipal planning', 'municipal roads', 'public space', 'traffic'.¹⁰ For these reasons I think that the City of Cape Town was justified in joining as an amicus curiae. Moreover, the arguments presented on behalf of the City of Cape Town were of great value in dealing with this case and I consider that they should also have their costs.¹¹

[25] In the result:

1 The appeal is upheld.

2 The respondent is ordered to pay the appellants' costs, including the costs of two counsel and the costs of the amicus curiae.

3 The order of the court a quo is set aside and replaced with the following:

'The application is dismissed with costs, such costs to include the costs of two counsel where applicable.'

⁹ *Link Africa* fn 3 paras 121-122.

¹⁰ Section 156(1) read with Part B of Schedule 4 and Part B of Schedule 5 to the Constitution. See also *Dark Fibre* fn 3.

¹¹ Compare *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); 2016 (3) SA 317 (SCA) para 111.

JW Eksteen

Acting Judge of Appeal

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