

# SUMMARY OF THE JUDGMENT

## ACCESS TO ELECTRONIC COMMUNICATIONS NETWORKS UNDER YOUR PROPERTY

### Dennegeur Estate Home Owners Association and Another v Telkom SA SOC Ltd and Another (366/2018) [2019] ZASCA 37 (29 March 2019)

*If Telkom was the incumbent network service provider in respect of a development managed by a homeowners association, could it argue that it could prohibit other service providers from deploying alternative facilities, such as a fibre-optic cabling network, in the existing infrastructure in the estate, or must the newcomer dig additional trenches and lay new ducts to do so? The Supreme Court of Appeal held in this matter that Telkom did not possess the vacant space in the ducts and sleeves which was subsequently occupied by Vodacom and that Vodacom's installation of fibre-optic cabling in the existing ducts was therefore not an act of spoliation.*

The Judgment can be viewed [here](#).

### FACTS

Dennegeur is a private residential estate situated in Somerset West that was established in approximately 2000. At the time, Telkom undertook to provide telephone and ADSL internet services to the estate. For this purpose, the developer constructed underground infrastructure in the form of ducts, sleeves and manholes in order to give effect to this undertaking. Telkom thereafter installed its network into the infrastructure by placing copper cables in the ducts and sleeves across Dennegeur. The manholes and underground plastic sleeves (the duct infrastructure) belonged to the homeowners' association that was established for the Dennegeur Estate (the HOA).

In 2016 Vodacom, acting at the behest and on the request of the HOA, installed its fibre-optic cables into the same ducts and sleeves which housed Telkom's copper cables to provide fibre-to-the-home connectivity to the residents. The services provided by Telkom were not hindered in any manner. Telkom however claimed that it was, prior to the installation of the fibre-optic cables, in free and undisturbed possession, alternatively that it enjoyed quasi-possession of the infrastructure and that Vodacom had committed an act of spoliation by placing its fibre-optic cables into the ducts and sleeves. It therefore claimed the return of its undisturbed possession of the infrastructure in terms of the '*mandament van spolie*'. Telkom relied on section 22 of the Electronic Communications Act (ECA) and alleged that the section provided Telkom with the exclusive rights to the duct infrastructure, including the vacant, unused space within the ducts which Telkom may want to use in future to roll out its own fibre-optic network. Section 22 determines that:

*'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.'*

Telkom's claim was upheld in the High Court, Cape Town. That court held that the deployment by a competitor service provider of cables in the same infrastructure amounted to a deprivation of the incumbent's exclusive possession. The application for a spoliation order was accordingly granted and Vodacom was ordered to remove its fibre cables and restore undisturbed possession of the underground ducts, sleeves, manholes and copper cables to Telkom. The High Court refused an application for leave to appeal; however, the HOA and Vodacom appealed to the Supreme Court of Appeal, with special leave obtained from the latter court.

**HELD:**

- Telkom did not enjoy possession of the infrastructure or cables which formed part of Dennegeur and was owned, occupied and controlled by the HOA. Its rights are derived from the provisions of Section 22 of the ECA and these are servitude rights by nature. Servitudinal rights are incorporeal assets and not capable of physical possession.
- A party professing to be entitled to a servitudinal right does, however, enjoy the legal protection against spoliation to the extent that it in fact exercised the professed rights prior to the alleged act of spoliation.
- Telkom exercised its rights to the extent that it laid down copper cables in the ducts, sleeves and manholes. Vodacom's fibre-optic network did however not disturb Telkom's use of the ducts and did not prevent Telkom's operation of its network. Telkom accordingly did not possess the vacant space in the ducts and sleeves which was subsequently occupied by Vodacom and Vodacom's conduct was therefore not an act of spoliation.

The Supreme Court of Appeal accordingly upheld the appeal.

#### CONTACT US

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|----------------------------------|--------------------------------------|-------------------------------------|------------------------------------|
| ■ CAPE TOWN<br>Tel: 021 406 9100 | ■ SOMERSET MALL<br>Tel: 021 850 6400 | ■ TYGER VALLEY<br>Tel: 021 943 3800 | ■ FOURWAYS<br>Tel: 010 001 2632    |
| ■ CLAREMONT<br>Tel: 021 673 4700 | ■ STELLENBOSCH<br>Tel: 021 001 1170  | ■ MENLYN<br>Tel: 012 348 1682       | ■ CENTURION<br>Tel: 012 001 1546   |
| ■ FISH HOEK<br>Tel: 021 784 1580 | ■ BLOUBERG<br>Tel: 021 521 4000      | ■ ILLOVO<br>Tel: 011 219 6200       | ■ BEDFORDVIEW<br>Tel: 011 453 0577 |