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Civiliter exercise of a statutory servitude: Reflections on *Link Africa* and *Telkom*

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ABSTRACT: The Constitutional Court has twice been called upon to interpret s 22(1) of the Electronic Communications Act 36 of 2005. In both *Link Africa* and *Telkom SA,* the respective local authorities contended that the licensees needed their prior consent for the deployment of the ICT infrastructure. Conversely, Link Africa and Telkom SA SOC Limited contended that the non-consensual statutory servitudes afforded them unhindered powers for the rapid deployment of ICT network infrastructure. However, s 22(2) of the Act demands that the non-consensual servitudes must be exercised *civiliter modo*. In *Link Africa* the majority of the Court employed the *civiliter* principle in its colloquial form to calibrate the servitutal relationship. In *Telkom SA* the Court calibrated the servitutal relationship without employing this principle at all. My hypothesis is that by eliding the *civiliter* principle altogether in *Telkom SA* and by engaging it only in its colloquial form in *Link Africa*, the Court collapsed the calibration of the servitutal relationship between the licensee and local authority into an adversarial inquiry about their respective rights. Without filtering these rights through the *civiliter* principle the Court infused an unhealthy paleness into the servitutal relationship that will not be able to withstand the pressure as the push for the rapid deployment of ICT network infrastructure intensifies in coming years. While laudable, the reasoning of the Court in both *Link Africa* and *Telkom SA* is disjointed because it does not rely directly on the peremptory property law principles of the common law of servitudes to calibrate the servitutal relationship between licensees and local authorities.

KEYWORDS: *civiliter modo*, Electronic Communications Act, National Integrated ICT Policy White Paper, non-consensual servitudes, rapid deployment.

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I INTRODUCTION

The National Planning Commission's *National Development Plan 2030: Our Future – Make it Work* ('*NDP*') sketches a path to inclusive and sustainable growth in South Africa through large-scale investment in economic infrastructure in various sectors.[1] In the information and communication technology ('ICT') sector, the *NDP* envisages that the existing infrastructure can be enhanced by using a structured investment approach[2] that will focus on programmes that contribute to the realisation of regional integration in an immediate and practical way.[3] Despite a good core network and sound regulatory framework, South Africa has been slipping down the global benchmark rankings that measure the cost, quality and speed of broadband connectivity,[4] and is now trailing other developing countries.[5] The policy vision is to transform South Africa into an information society and reposition the labour market as a knowledge economy over the medium and long term with a focus on demand-side factors.[6] However, over the short term, this vision depends on supply-side factors – like regulatory reforms and enhancing the existing ICT network infrastructure.[7]

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1 National Planning Commission *National Development Plan 2030: Our Future – Make it Work* (n.d.) ('*NDP*') at 137, available at https://www.gov.za/documents/national-development-plan-2030-our-future-make-it-work.

2 Department of Communications *South Africa Connect: Creating Opportunities, Ensuring Inclusion* (20 November 2013) at 52–54. See S Burger 'Big potential for SA to use ICT Investments to Stimulate Growth' *Engineering News* (20 May 2016), available at https://www.engineeringnews.co.za/article/sa-can-benefit-most-from-ict-investments-among-developing-countries-2016-05-20/rep_id:4136.

3 *NDP* (note 1 above) at 138.

4 South African Institute for International Affairs *Policy Briefing 197* (June 2020), available at https://saiia.org.za/research/africas-ict-infrastructure-its-present-and-prospects/; J Vermeulen 'South African Broadband Prices Versus the World' *Mybroadband* (21 January 2020), available at https://mybroadband.co.za/news/fibre/335820-south-african-broadband-prices-versus-the-world.html; Anonymous 'South Africa has the most expensive home fibre prices in the world – survey' *IOL* (10 December 2019), available at https://www.iol.co.za/personal-finance/guides/south-africa-has-the-most-expensive-home-fibre-prices-in-the-world-survey-38980337; and A Moyo 'How SA's Broadband Speeds Compare to the Rest of the World' *ITWeb* (11 July 2018), available at https://www.itweb.co.za/content/KA3Ww7dl33Q7rydZ.

5 *City of Tshwane Metropolitan Municipality City v Link Africa (Pty) Ltd & Others* [2015] ZACC 29, 2015 (6) SA 440 (CC) ('*Link Africa*') at paras 1, 177.

6 *NDP* (note 1 above) at 172 and *South Africa Connect* (note 2 above) at 45–50. These factors include e-literacy, education and training, rebates and incentives, and structural reforms across all government departments. In *Link Africa* (ibid), Cameron J and Froneman J observed that the problems with broadband in South Africa 'stifle intellectual growth and inquiry, and compromise economic development and efficiency' (para 113). The Justices noted that the ECA's purpose 'is to bring the modern world closer and more productively to us all through the medium of communication' (para 131). The Justices were persuaded by the submissions of the Minister that in the long term this access 'offers realistic promise of increases in economic output, new jobs, educational opportunities, enhanced public service delivery and rural development' (para 178). See also *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd & Others* [2014] ZAGPPHC 166, [2014] All 559 (GP) at para 3.5 and M Gavaza 'Connecting Rural SA to Mobile Internet Remains a Sticky Issue' *Business Day* (4 November 2020).

7 *NDP* (note 1 above) at 176–177 and *South Africa Connect* (note 2 above) at 26–29. See, for example, C Lewis C 'SA's ICT sector urgently needs a backbone' *Business Day Live* (6 July 2021), available at https://www.businesslive.co.za/bd/opinion/2021-07-06-sas-ict-sector-urgently-needs-a-backbone/; and T Creamer 'Credible Pipeline of Projects Seen as Key to Achieving R1-Trillion Infrastructure Goal' *Engineering News* (3 November 2020), available at https://www.engineeringnews.co.za/article/credible-pipeline-of-projects-seen-as-key-to-achieving-r1-trillion-infrastructure-goal-2020-11-03.

The Electronic Communications Act 36 of 2005 ('ECA') establishes a regulatory framework for the provision of electronic communication in the public interest by promoting – among other things – the convergence of various information technology sectors; universal access and connectivity; fair and non-discriminatory electronic communication networks and services.[8] The ECA empowers the Minister of Communications and Digital Technologies to develop a policy for the rapid deployment and provisioning of electronic communications facilities.[9] This policy is contained in the *National Integrated ICT Policy White Paper*[10] ('*White Paper*') and describes 'rapid deployment' as the process whereby electronic communications network service licensees[11] ('licensees') obtain access to property in terms of wayleaves and servitudes[12] to roll out electronic communications networks[13] and electronic communications facilities.[14] The deployment of the following networks and facilities is identified as a priority: (a) underground fibre optic cables and ducts; (b) fibre optic cables and ducts on private land and in business parks;[15] (c) aerial fibre on poles; (d) access to high sites; and (e) access to land or other property for the erection of masts and towers.[16]

To this end, s 22(1) of the ECA affords a licensee three important rights.[17] First, a licensee has the right to enter any land, railway or waterway.[18] Second, a licensee has the right to construct and maintain an electronic communications network or facility on any land, railway or waterway.[19] Last, a licensee has the right to alter an electronic communications network

[8] Section 2(a), (c), (g) and (m) of the ECA and *Link Africa* (note 5 above) at paras 121, 175 and 176.

[9] Section 21(1) of the ECA and *Telkom SA SOC Limited v City of Cape Town & Another* [2020] ZACC 15, 2021 (1) SA 1 (CC) at paras 5, 22–24.

[10] GN 1212 in *GG* 40325 (3 October 2016).

[11] Section 1 of the ECA defines 'electronic communications network service licensee' as 'a person to whom an electronic communications network service licence has been granted in terms of section 5(2) or 5(4) [of the ECA].'

[12] *White Paper* (note 10 above) at 95; and *Link Africa* (note 5 above) at para 104.

[13] Section 1 of the ECA defines 'electronic communications network' as 'any system of electronic communications facilities (excluding subscriber equipment), including without limitation – (a) satellite systems; (b) fixed systems (circuit- and packet-switched); (c) mobile systems; (d) fibre optic cables (undersea and land-based); (e) electricity cable systems (to the extent used for electronic communications services); and (f) other transmission systems, used for conveyance of electronic communications.'

[14] Section 1 of the ECA defines 'electronic communications facility' as including 'any – (a) wire, including wiring in multi-tenant buildings; (b) cable (including undersea and land-based fibre optic cables); (c) antenna; (d) mast; (e) satellite transponder; (f) circuit; (g) cable landing station; (h) international gateway; (i) earth station; (j) radio apparatus; (k) exchange buildings; (l) data centres; and (m) carrier neutral hotels, or other thing, which can be used for, or in connection with, electronic communications, including, where applicable –(i) collocation space; (ii) monitoring equipment; (iii) space on or within poles, ducts, cable trays, manholes, hand holds and conduits; and (iv) associated support systems, sub-systems and services, ancillary to such electronic communications facilities or otherwise necessary for controlling connectivity of the various electronic communications facilities for proper functionality, control, integration and utilisation of such electronic communications facilities.'

[15] *Link Africa* (note 5 above) at para 171.

[16] *White Paper* (note 10 above) at 96.

[17] In *Telkom SA Ltd v MEC for Agricultural and Environmental Affairs, KwaZulu-Natal* [2002] ZASCA 96, 2003 (4) SA 23 (SCA), JA Howie highlights that the predecessors of this provision can be found in s 70 of the Telecommunications Act 103 of 1996, s 36 of the Post Office Amendment Act 85 of 1991, s 78 of the Post Office Amendment Act 113 of 1976, s 4 of the Post Office Amendment Act 80 of 1965, s 80 of the Post Office Act 44 of 1958 and s 82 of the Post Office Administration and Shipping Combinations Discouragement Act 10 of 1911.

[18] Section 22(1)(a) of the ECA.

[19] Section 22(1)(b) of the ECA.

or facility by attaching wires or struts to any building or structure, or by removing such network or facility.[20] In practical terms, these non-consensual statutory servitudes – which are sometimes also referred to as public servitudes[21] with a nature akin to personal servitudes[22] – will form an integral part of the strategy to realise the rapid deployment of ICT infrastructure in South Africa. However, these non-consensual servitudes have in certain locations caused conflict between licensees and local authorities over the construction and maintenance of the electronic communications network.[23] In the recent past, the Constitutional Court has twice been called upon to interpret s 22(1) of the ECA. In both *Tshwane City v Link Africa*[24] ('*Link Africa*') and *Telkom SA SOC Limited v City of Cape Town and Another*[25] ('*Telkom SA*') the respective local authorities contended that the licensees needed their prior consent for the deployment of the ICT infrastructure.[26] Conversely, both Link Africa and Telkom SA SOC Limited contended that the non-consensual statutory servitudes afforded them unhindered powers for the rapid deployment of ICT network infrastructure.[27]

Section 22(2) of the ECA appears to be crucial in mediating between the opposing contentions of local authorities and licensees. It states that in exercising the non-consensual servitudes in s 22(1) of the ECA, 'due regard must be had to applicable law and the environmental policy of the Republic.' Simply put, s 22(2) of the ECA demands that the non-consensual servitudes must be exercised *civiliter modo*, which means that the rights must be exercised respectfully and with due caution. In *Link Africa* the majority of the Court employed the *civiliter* principle in its colloquial form to calibrate the servitutal relationship between the licensee (i.e. the servitude holder) and the property owner, in this case the local authority. In *Telkom SA* the Court calibrated the servitutal relationship without employing this principle at all. My hypothesis is that by eliding the *civiliter* principle altogether in *Telkom SA* and by engaging it only in its colloquial form in *Link Africa*, the Court collapsed the calibration of the servitutal relationship between the licensee and local authority into an adversarial inquiry about their respective rights. Without filtering these rights through the *civiliter* principle the Court infused a paleness into the servitutal relationship that will not be able to withstand the pressure as the push for the rapid deployment of ICT network infrastructure intensifies in coming years.

In part 2 of this article, I will delineate the peremptory property law principles that must be used to interpret all servitudes. I contextualise the non-consensual statutory servitudes flowing from the ECA in terms of these principles and critically analyse both *Link Africa* and *Telkom SA* in part 3. I conclude the article by emphasising how the peremptory property law principles – especially the *civiliter* principle – can make the calibration of the servitutal relationship more nuanced.[28]

[20] Section 22(1)(c) of the ECA.

[21] AJ Van der Walt *The Law of Servitudes* (2016) at 529–539.

[22] *Link Africa* (note 5 above) at para 140, and ibid at 455–464.

[23] *Dark Fibre Africa (Pty) Ltd v Cape Town City* [2017] ZAWCHC 151, 2018 (4) SA 185 (WCC); *Msunduzi Municipality v Dark Fibre Africa* [2014] ZASCA 165; and *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* [2012] ZASCA 138 2012), 2013 (1) All SA 60 (SCA).

[24] *Link Africa* (note 5 above).

[25] *Telkom SA SOC Limited v City of Cape Town & Another* [2020] ZACC 15, 2021 (1) SA 1 (CC) ('*Telkom SA*').

[26] *Link Africa* (note 5 above) at para 17 and ibid at para 10.

[27] *Link Africa* (note 5 above) at para 125 and ibid at para 17.

[28] AJ Van der Walt *Property and Constitution* (2012) at 24 observes that it is 'the job of academic lawyers … to help figure out how legislation could be introduced, amended and *interpreted* and how the common law or customary law could be developed so as to promote the spirit, purport and objects of the Bill of Rights.' (Emphasis added)

II CALIBRATION OF THE SERVITUTAL RELATIONSHIP

The relationship between a servitude holder and the servient owner or local authority is intricate.[29] Servitudes potentially cause conflict because they involve situations where multiple people simultaneously exercise partially intersecting use rights in the same property.[30] The resulting tension flows from the fact that the servient owner may only continue to use and enjoy his or her property in the residual space that is left unburdened by the licensee exercising its rights in terms of the servitude. While Van der Walt concedes that this 'surface tension' is perhaps more apparent than real,[31] he argues that this tension focuses our attention on a deeper and more problematic tension that exists between the servient owner's freedom to create servitudes consensually and the peremptory property principles that regulate the proliferation of limited real rights.[32] The existence of this deeper tension explains why it is impossible to resolve all conflicts that arise from servitudes by referring exclusively (or, at least, mostly) to the servitude-creating agreement when there are peremptory property principles that limit the burdens that owners can create consensually. This is compounded by the fact that not all servitudes are created by agreement, which means that a primary reliance on an interpretation-based resolution of any resulting conflict will be inappropriate in those instances where the servitudes were created in terms of legislation or the common law.[33] Even a purely interpretation-based approach to resolving the tension between a licensee and a servient owner or local authority will still be problematic because it would not fully account for the different legal statuses of non-consensual servitudes that are created in terms of legislation which 'ha(s) a public-interest aspect that extends beyond private interests.'[34] The relationship between a licensee and a servient owner or local authority must therefore 'be explained in a way that accounts for the role that peremptory and default property principles play in the creation, shaping and adjudication of servitude rights.'[35]

The first peremptory principle used to calibrate the relationship between the licensee and the servient owner or local authority is the rebuttable presumption[36] that ownership is free from servitudes (*in favorem libertatis*).[37] According to Van der Walt, this principle takes the following forms:[38] first, the presumption that land is free from servitudes and the corresponding burden is on the claimant to prove that he or she holds the particular servitude;[39] secondly, if the existence of a servitude can be proved by the claimant, the principle demands a restrictive interpretation

[29] G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The Law of Property* (6th Ed, 2019) at 379.

[30] Van der Walt (note 21 above) at 187.

[31] Ibid.

[32] Ibid at 188.

[33] Ibid at 188. This approach is articulated in *Link Africa* (note 24 above) at paras 114–116.

[34] Ibid at 189.

[35] Ibid.

[36] *Northview Properties (Pty) Ltd v Lurie* 1951 (3) SA 688 (A) at 696A; *Ley v Ley's Executors & Others* [1951] 3 All SA 226 (A); CG Van der Merwe *Sakereg* (2nd Ed, 1989) at 464; CG Van der Merwe CG Servitudes' in WA Joubert WA *Lawsa* vol 24 (2nd Ed, 2010) at para 543.

[37] Voet 8 2 2 cited in *Kruger v Joles Eiendom (Pty) Ltd* [2008] ZASCA 138, [2009] 1 All SA 553 (SCA) at para 8.

[38] Van der Walt (note 21 above) at 193.

[39] In *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 at 16 the court stated that: 'Whether a contractual right amounts in any given case to a servitude – whether it is real or only personal – depends upon the intention of the parties to be gathered from the terms of the contract construed in the light of the relevant circumstances. In case of doubt the presumption will always be against a servitude, the *onus* is on the person

of the servitude-creating agreement or grant 'so as to impose the least cumbersome burden on the servient property';[40] and thirdly, if it is unclear whether the servitude is praedial or personal, the principle will favour the creation of a personal servitude rather than a praedial servitude because the former imposes a lesser burden.[41] Van der Walt notes that the operation of the *in favorem libertatis* principle appears to shift the focus away from peremptory property principles in those instances where the terms of the servitude-creating agreement or grant are clear and unambiguous.[42] In these instances, where the terms are clear and unambiguous, the terms of the servitude-creating agreement or grant must be afforded their normal grammatical meaning (the so-called 'golden rule').[43] This is the case even if it brings about a result that appears to 'impose a heavy burden on the servient land'.[44] Special care must, however, be taken in those instances where the terms of the servitude-creating agreement are clear and unambiguous, but it was drafted in such wide terms that it may result in the imposition of an unreasonable or unfair burden on the servient owner. In those instances where the servitude-creating agreement or grant's terms are 'general, wide and permissive', the *in favorem libertatis* principle must take precedence over the golden rule.[45] The implication is that the golden rule will only take precedence over the *in favorem libertatis* principle if the wording of the servitude-creating agreement or grant is not only clear and unambiguous, but also 'precise and specific in identifying and describing exactly the burden to be placed on the servient land.'[46] However, it is possible to depart from the grammatical meaning of the servitude-creating agreement or grant if the interpretation results in an absurdity or apparent conflict with the intention of the parties. The relationship between the licensee and the servient owner or local authority must then be determined with reference to extraneous evidence or contextual factors.[47]

The second peremptory principle used to calibrate the relationship between the servient owner or local authority and the licensee is the principle of effective use. In terms of this principle, a licensee's interests enjoy preference over the interests of the servient owner or local authority[48] to the extent that this pertains to the entitlements clearly conferred by the

affirming the existence of one to prove it.' This was confirmed in *Lorentz v Melle & Others* 1978 (3) SA 1044 (T) at 1050F–G.

40 *Pieterse v Du Plessis* [1972] 1 All SA 20 (A) at 599G; *Kruger* (note 37 above) at para 8. See Van der Merwe (1989) (note 36 above) at 464; Van der Merwe (2010) (note 36 above) at para 543; Van der Walt (note 21 above) at 193. See further s 75(1) of the Deeds Registries Act 47 of 1937 and JC Sonnekus & JL Neels *Sakereg Vonnisbundel* (2nd Ed, 1994) at 613.

41 *Resnekov v Cohen* 2012 (1) SA 314 (WCC), [2012] 1 All SA 680 (WCC). See also Van der Merwe (1989) (note 36 above) at 464 and Van der Merwe (2010) (note 36 above) at para 543.

42 Van der Walt (note 21 above) at 195–196.

43 *Le Roux NO v Burger* [2010] ZAWCHC 127 at para 13. For criticism of this rule, see TR Carney 'A Legal Fallacy? Testing the Ordinariness of "Ordinary Meaning"' (2020) 137 *South African Law Journal* 269 and AM Samaha AM 'If the Text is Clear – Lexical Ordering in Statutory Interpretation' (2018) 94 *Notre Dame Law Review* 155.

44 *Kruger* (note 37 above) at para 9; *Kruger v Downer* 1976 (3) SA 172 (W), [1976] 1 All SA 56 (W) at 59; *Van Rensburg v Taute* [1975] 1 All SA 425 (A) at 438; *Fourie v Marandellas Town Council* 1972 (2) SA 699 (R), [1972] 2 All SA 528 (R) at 530–531; Van der Walt (note 21 above) at 196.

45 Van der Walt (note 21 above) at 202.

46 Ibid at 203 and the sources that he cites in fn 36.

47 Ibid at 196.

48 Voet 8 4 16 cited in *Zeeman v De Wet NO & Others* [2012] JOL 29122 (SCA) at para 13. See Van der Merwe (1989) (note 36 above) at 464–465; Van der Merwe (2010) (note 36 above) at para 544; Van der Walt (note 21 above) at 224.

servitude-creating agreement or grant.[49] This implies that the licensee acquires – in addition to the servitude – all the entitlements without which the servitude cannot be exercised. These ancillary entitlements are sometimes referred to as baseline entitlements.[50] These baseline entitlements may, however, only be exercised subject to the proviso that the servitude holder does not burden the ownership of the servient property unduly.[51] The function of the principle is to ensure that the licensee is afforded full and normal use of the servitude. To the extent that the wording of the servitude-creating agreement or grant is clear and unambiguous, the *in favorem libertatis* principle cannot be relied on to limit the nature and scope of the entitlements that allow effective use[52] or the baseline entitlements 'that are necessary for the servitude to exist at all'.[53] The servitude holder and the servient owner are free to determine the nature, scope and impact that the particular servitude will have on the servient property through consensus. However, they are precluded from relying on the free will that consensus affords to evade or suspend the entitlements that would allow the servitude holder effective use of the servitude and any of the ancillary entitlements.[54] But for this prohibition, it would be possible for the licensee and servient owner or local authority to create a servitude through consensus that would in all likelihood be unable to provide the other property with any utility.[55] However, once the nature and scope of the entitlements have been determined, it is possible to refer to the servitude-creating agreement or grant to the extent that it amplifies, specifies or exceeds the baseline entitlements and entitlement to effective use.[56]

The third peremptory principle used to calibrate the relationship between the owner or local authority and the licensee is the *civiliter* principle.[57] Scott points out that the phrase *civiliter modo* is consistently used as a set of adverbs that qualify the conduct of the servitude holder.[58] A servitude holder who acts reasonably,[59] a foundational principle of the law of servitudes, would then be acting in a civilised ('*civiliter*') manner ('*modo*'). He observes further that the word *modo*, especially when used in conjunction with *dum*, means 'so long as' or 'provided that'.[60] The phrase – more fully *dum modo civiliter servitutem exerceat* – should therefore be translated

[49] *Cillie v Geldenhuys* 2009 (2) SA 235 (SCA), [2008] 3 All SA 507 (SCA).

[50] Van der Walt (note 21 above) at 227. See Van der Merwe (1989) (note 36 above) at 464–465 and HJ Delport and NJJ Olivier *Sakereg Vonnisbundel* (2nd Ed, 1985) at 624.

[51] Van der Walt (note 21 above) at 225.

[52] *Resnekov* (note 41 above); *De Kock v Hänel* 1999 (1) SA 994 (C); *Kruger* (note 44 above); *Van Rensburg* (note 44 above); *Kakamas Bestuursraad v Louw* [1960] 2 All SA 231 (A).

[53] Van der Walt (note 21 above) at 227.

[54] Ibid at 225.

[55] However, see *Kruger* (note 44 above) at 178H–179A.

[56] *Nolan v Barnard* 1908 TS 142 at 152; *Roeloffze NO v Bothma NO* [2006] JOL 18777 (C) at paras 31–32; *Johl v Nobre* [2012] JOL 28764 (WCC); *Zeeman* (note 48 above); Van der Walt (note 21 above) at 227.

[57] *D* 8 1 9.

[58] J Scott 'A growing trend in source application by our courts illustrated by a recent judgment on right of way' (2013) 76 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 239 at 242.

[59] See *De Kock* (note 52 above) at 1000B–D; *Berdur Properties (Pty) Ltd v 76 Commercial Road (Pty) Ltd* 1998 (4) SA 62 (D) at 68D–E; *Brink v Van Niekerk* 1986 (3) SA 428 (T); *Penny v Brentwood Gardens Body Corporate* 1983 (1) SA 487 (C) at 491B–D; *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A); *Van Schalkwyk v Esterhuizen* 1948 (1) SA 665 (C); *Cliffside Flats (Pty) Ltd v Bantry Rocks (Pty) Ltd* 1944 AD 106; *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 474; *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150; *Van Heerden v Coetzee* 1914 AD 167; and *Rubidge v McCabe and Sons* 1913 AD 433 at 441.

[60] Scott (note 58 above) at 243.

to mean 'provided that he exercises the servitude with due regard to the other party.'[61] Van der Walt concludes that it is 'probably better to refer to the *civiliter* exercise of a servitude' and to translate the phrase to mean that a licensee must exercise a servitude in such a way that it does not impose an unreasonable burden on the servient owner or local authority.[62] The purpose of the principle is to protect the owner or local authority against the negative effects that the exercise of the servitude could have on the ownership of the servient land.[63] 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 not 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.[64] Stated differently, the *civiliter* principle regulates the reasonable exercise of a servitude. This requires that a balance must be struck between the licensee's right to effective use and the residual rights of the servient owner or local authority to use its property to the extent that this does not interfere with the licensee's use.[65] However, this does not mean that the licensee may not exercise the servitude simply because it would burden or inconvenience the servient owner or local authority.[66] Van der Walt argues that a servient owner must accept the entitlements that are 'either required objectively for effective use of the servitude or that were clearly foreseen in the servitude grant'.[67] For purposes of non-consensual servitudes, the required balance must be determined with reference to considerations that are external to the agreement or grant.[68]

III EXERCISING STATUTORY SERVITUDES

A Introduction

The non-consensual servitudes afforded by the ECA must be understood within the context of the above-explained interpretive approach that is specific to the law of servitudes. Non-consensual servitudes create a complex relationship between the owners on whose property the infrastructure will be deployed; the local authorities in whose jurisdiction the deployment will have to be approved and facilitated; and licensees who will be responsible for the construction, alteration, maintenance and removal of networks and/or facilities. The

[61] VG Hiemstra & HL Gonin HL *Drietalige Regswoordeboek/Trilingual Legal Dictionary* (1992) *sv civiliter modo*.

[62] Van der Walt (note 21 above) at 247 and Muller et al (note 29 above) at 381.

[63] Ibid at 247.

[64] Ibid at 248.

[65] *Cillie* (note 49 above) at para 15. See also Van der Walt (note 21 above) at 249 and JC 'Erfdiensbaarhede en die Uitoefening daarvan *Civiliter Modo*' (2007) 70 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 351.

[66] In *Van Rensburg* (note 44 above) at 301H the court pointed out that in the application of the principle that a servitude agreement has to be interpreted strictly and in a manner that is least burdensome to the owner of the servient tenement, it must be borne in mind that the nature and extent of the burden is determined according to the meaning which has to be accorded to that agreement. If the meaning thereof is unequivocal, a court is not entitled to depart from it in order to bring about a lesser burden. See also *Fourie* (note 44 above); *De Kock* (note 52 above) at 1000B–D; *Kruger* (note 37 above) at para 9; RRM Paisley and CG Van der Merwe 'From Here to Eternity: Does a Servitude Road Last Forever?' (2000) 11 *Stellenbosch Law Review* 452 at 477–478.

[67] Van der Walt (note 21 above) at 251. See *Fourie* (note 44 above) and *Brink v Van Niekerk* [1986] 1 All SA 485 (T) for examples of particularly burdensome exercises of a servitude that clearly exceed the bounds of the *civiliter* principle.

[68] This may include the installation of a security gate and access control measures: see *Roeloffze NO* (note 56 above) at paras 31–32; *Johl* (note 56 above); *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel and Spa v Hodgson & Another* [2012] ZAGPJCHC 86.

complexity manifests in the fact that the licensee's exercise of the non-consensual servitudes relegates the entitlements of the owners to a residual position and complicates local authorities' execution of their constitutional mandate. This surface tension is exacerbated by the fact that policy direction – as articulated in the *NDP*, *Connext SA* and the *White Paper* – all point at promoting competition between different licensees[69] and encouraging the sharing of infrastructure.[70] While this will result in fewer imposing infrastructures and a less congested built environment, it will increase the need for access to those properties where the infrastructure is deployed and will complicate the regulatory environment as competition heats up between licensees. The rapid deployment of this infrastructure will also increase the number of potential legislative and policy measures with which the public's interest will have to be reconciled.

Authorisations and wayleaves entitle licensees to exercise these servitudes and since the wording of s 22(1) of the ECA is clear and unambiguous, these rights should therefore be given their normal and grammatical meaning. The licensees must furthermore be afforded a clear preference over the entitlements of the owners to the extent that the preference pertains to their entitlements of entry, construction, maintenance, alteration and removal. Crucially, however, the inverse applies to any entitlements that are not clearly afforded by the ECA – such as where the infrastructure may be deployed and the normal operation of the principles of *inaedificatio*.[71] Yet, any alteration or removal may be necessitated by a misalignment or an uneven surface, or the commencement of building works by a local authority or a private person.[72] The non-consensual servitudes that the ECA affords licensees include three important ancillary rights or baseline entitlements to ensure effective use: (a) the right to construct and maintain pipes, tunnels or tubes under any street;[73] (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;[74] and (c) the right to fell or prune any tree or vegetation that obstructs or interferes with the operation and maintenance of an electronic communications network or facility.[75]

Because these non-consensual servitudes arise *ex lege*, they must furthermore be exercised in a way that imposes only burdens that are authorised and needed for effective use. This will

[69] *NDP* (note 1 above) at 138, 171 and 175; and *Connect SA* (note 2 above) at 4, 6, 16 and 20–22.

[70] *NDP* (note 1 above) at 177; *Connect SA* (note 2 above) at 5, 30, 32–34, 44 and 54; and the *White Paper* (note 10 above) 99 and 101.

[71] Paragraph 2.3 of the Draft Policy and Policy Direction on Rapid Deployment of Electronic Communications Networks and Facilities promulgated in terms of GN 800 in *GG* 43537 (22 July 2020) states that 'electronic communications network service licensees retain ownership of any electronic communications network or facility constructed.' While this right is similar to s 23(1) of the Electricity Regulation Act 4 of 2006 and s 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, and only be acted upon with the written consent of the licensee. See Muller et al (note 29 above) at 166–173.

[72] Section 25 of the ECA.

[73] 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 of the ECA.

[74] 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) of the ECA. This ancillary right must be read with ss 20 and 21 of the Fencing Act 31 of 1963.

[75] Section 27(1) of the ECA. See G Muller 'To fell or not to fell: The impact of NEMBA on the rights and obligations of a usufructuary' (2018) 81 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 529.

ensure that owners and local authorities have certain procedural protections (such as prior notice before entry, safety measures and traffic control for underground works, access control for gates) and substantive safeguards (such as engagement about the manner and placement of infrastructure, compensation for damage caused to property during alteration or removal, and environmental considerations when felling or pruning trees). Most significantly, in my view, is the fact that the *civiliter* principle demands non-consensual servitudes to be interpreted with reference to external considerations. Stated differently, the reasonableness with which the licensees exercise these servitudes will be calibrated with reference to the rights and interests of owners and local authorities as found in laws of general application and policy. This calibration of interests must happen within a particular contextual matrix such as those found in *Link Africa* and *Telkom SA*.

B *Link Africa*

In *Link Africa* the licensee sought permission and obtained the requisite wayleaves from the local authority[76] to install fibre optic cables by attaching them onto the existing sewage infrastructure in Waterkloof Glen.[77] However, the city adopted a new strategy for the roll out of broadband connectivity in its jurisdiction shortly after the respondent commenced with the first phase of deploying the fibre optic cables. In order to prevent the licensee from proceeding with the deployment, the local authority approached the Gauteng Division of the High Court, Pretoria with an application for the following relief:[78] (a) a declaration that the licensee needed the consent of the local authority before it could proceed with the deployment; (b) an interdict that would prevent the licensee from commencing with the second phase of its deployment and would direct it to remove the fibre optic cables that it had deployed in phase one; (c) a review of its own administrative action in awarding the wayleaves; and (d) a declaration that ss 22 and 24 of the ECA are unconstitutional and invalid to the extent that they force the local authority to accept services from the licensee contrary to s 217(1) of the Constitution. Avvakoumides AJ dismissed the application with costs in the court *a quo*[79] and, since both the high court and Supreme Court of Appeal refused leave to appeal that judgment,[80] the city launched an appeal directly to the Constitutional Court.[81]

Cameron J and Froneman J, who wrote the majority judgment,[82] disagreed[83] with the minority of the Court[84] that licensees required the consent of the local authority to enter the local authority's property[85] and that ss 22 and 24 of the ECA were unconstitutional for that

[76] *Link Africa* (note 5 above) at paras 7–9.
[77] Ibid at para 4.
[78] Ibid at paras 17–19.
[79] *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* [2014] ZAGPPHC 166 at para 54.
[80] *Link Africa* (note 5 above) at para 23.
[81] In terms of Rule 19 of the Constitutional Court Rules, 2003 which were promulgated under GN R1675 in *GG* 25726 (31 October 2003). See K Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman, M Bishop& J Brickhill (eds) *Constitutional Law of South Africa* (2nd Ed, Original Service, March 2007) at chapter 5-25–5-26 and I Currie & J De Waal *The Bill of Rights Handbook* (6th Ed, 2013) at 125–127.
[82] Khampepe J, Madlanga J, Molemela AJ and Theron AJ concurred in this judgment.
[83] *Link Africa* (note 5 above) at para 100.
[84] Jafta J and Tshiqi AJ penned the judgment and Moseneke DCJ and Nkabinde J concurred in this judgment.
[85] The reasoning of the minority can be found in *Link Africa* (note 5 above) at paras 42–51 and 83.

reason because it amounted to an arbitrary deprivation of property.[86] The majority reasoned that the minority's focus on the absolute nature of ownership had been flawed. The majority reasoned that not only was the minority's view antiquated,[87] it did not find support in the Court's own jurisprudence.[88] Instead the majority reasoned that '[a] more supple conception of ownership rights … shows a clear and inviting path to upholding the statute's validity' which would 'enable an important piece of legislation to do the work that Parliament, in the exercise of its rightful powers, designed for it.'[89] According to the majority, this finely drawn path[90] leads to and 'finds specific expression in the common law of servitudes.'[91] This path affirms the second subsidiarity principle[92] that the Court developed to determine the most appropriate source of law to govern a dispute in a single system of law.[93] This principle states that a litigant who avers that a right in the Bill of Rights has been infringed – in this case, s 25(1) of the Constitution – must rely on the legislation that was specifically enacted to protect that right – in this case, the ECA – and may not rely directly on the common law when bringing an action to protect the right.[94] However, the proviso to this principle that Van der Walt deduced on logical grounds allows a litigant to rely directly on the common law if the legislation does not,

[86] The reasoning of the minority can be found in *Link Africa* (note 24 above) at paras 58–64 and 90–91.

[87] *Link Africa* (note 5 above) at para 106. See AJ Van der Walt 'Bartolus se omskrywing van *dominium* en die interpretasie daarvan sedert die vyftiende eeu' (1986) 49 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 305 and DP Visser 'The "absoluteness" of ownership: The South African common law in perspective' 1985 *Acta Juridica* 39.

[88] *Link Africa* (note 5 above) at paras 108–109. See *Daniels v Scribante* [2017] ZACC 13, 2017 (4) SA 341 (CC) at paras 133–137; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23, 2015 (6) SA 125 (CC) at para 48; *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9, 2013 (4) SA 1 (CC); *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* [2010] ZACC 20, 2011 (1) SA 293 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* [2009] ZACC 24, 2009 (6) SA 291 (CC); *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC) at para 23; and *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5, 2002 (4) SA 768 (CC) at paras 49, 52. See also FI Michelman & EJ Marais 'A Constitutional Vision for Property: *Shoprite Checkers* and Beyond' in G Muller, R Brits, BV Slade & J Van Wyk (eds) *Transformative Property Law – Festschrift in Honour of AJ Van der Walt* (2018) at 121; AJ Van der Walt & P Dhliwayo 'The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis' (2017) 134 *South African Law Journal* 34; EJ Marais 'Expanding the Contours of the Constitutional Property Concept' 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 576; AJ Van der Walt 'Section 25 Vortices' 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 412 (part 1) and at 597 (part 2); IM Rautenbach 'Dealing with the Social Dimensions of the Right to Property in the South African Bill of Rights' 2015 *Tydskrif vir die Suid-Afrikaanse Reg* 822; AJ Van der Walt *Property in the Margins* (2009) at 29–34; AJ Van der Walt 'Transformative Constitutionalism and the Development of South African Property Law (Part 2)' (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 1; AJ Van der Walt 'Resisting Orthodoxy – Again: Thoughts on the Development of Post-Apartheid South African Law' (2002) 17 *South African Public Law* 258; and AJ Van der Walt 'Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law' (1995) 11 *South African Journal on Human Rights* 169.

[89] *Link Africa* (note 5 above) at para 106.

[90] Ibid at para 134. See *Stadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A) at 784F–H; *Casserley v Stubbs* 1916 TPD 310 at 312; and *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823.

[91] Ibid at para 109.

[92] First described as such in AJ Van der Walt 'Normative Pluralism and Anarchy: Reflections on the 2007 Term' (2008) 1 *Constitutional Court Review* 77.

[93] *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC) at para 44.

[94] Ibid at paras 103–105.

or was not intended to, cover the field. The proviso applies insofar as the common law is not, or cannot be developed through interpretation to be, in conflict with the provision in the Bill of Rights or the legislative scheme.[95] The majority reasoned that, since the ECA was enacted for a specific purpose and does not cover the field of servitudes in its entirety, it appears wholly appropriate to draw on the equitable principles of the common law to animate the ECA's regulatory framework.[96]

In holding that the wording of s 22(1) of the ECA had to be afforded its ordinary and straightforward meaning[97] the majority affirmed the application of the golden rule to servitudes that are couched in clear and unambiguous terms. Significantly, the majority also found that the wording of s 22(1) of the ECA is broad and, by correctly holding that this does not afford licensees unhindered rights,[98] affirmed the fact that servitudes which are framed in wide and permissive terms must be interpreted restrictively following the *in favorem libertatis* principle. Yet, this restricted interpretation of the licensee's rights cannot detract from the fact that licensees are afforded ancillary rights that enjoy priority over the interests of owners to the extent that these baseline entitlements are clearly conferred.[99] In *Link Africa* the licensee deployed the fibre optic cables by attaching them to the existing underground sewage infrastructure of the local authority as s 24(1)(a) of the ECA clearly permits.

The majority, however, cautioned that s 22(1) of the ECA alone 'does not determine how the licensee may exercise' the non-consensual statutory servitude.[100] It is for this reason that the legislature included the instruction to licensees in s 22(2) of the ECA that 'in taking any action' in terms of the non-consensual servitude, it must 'have due regard … to the applicable law and the environmental policy of the Republic.'[101] This, the majority held, required the licensee in common law terms to exercise the non-consensual servitude *civiliter modo*.[102] In *Motswagae v Rustenburg Local Municipality (Lawyers for Human Rights* as *amicus curiae*) the Constitutional Court translated this term into simpler language and found that it demanded a servitude be exercised 'respectfully and with due caution.'[103] The majority in *Link Africa* reasoned that this precluded a licensee from exercising the servitude unabashedly[104] by 'just barging in, brazenly disregarding municipal protections and duties and works.'[105] The practical meaning of this would be 'bound up in the facts' of the particular case.[106] In this regard, the majority of the Court correctly held that the ECA skilfully harmonises[107] the licensee's full and normal use with the interests of the local authority. This is done through the procedural protections (the duty to give notice and to consult) and substantive safeguards (the selection of the site, supervisory oversight and the obligation to pay compensation for damage caused) in

[95] Ibid at paras 115–116.
[96] *Link Africa* (note 5 above) at paras 110, 133, 139.
[97] Ibid at para 117.
[98] Ibid at para 125.
[99] Ibid at para 111, 142.
[100] Ibid at para 127.
[101] Ibid at para 127.
[102] Ibid at para 142.
[103] [2013] ZACC 1, 2013 (2) SA 613 (CC) at para 14.
[104] *Link Africa* (note 5 above) at para 153.
[105] Ibid at para 142.
[106] Ibid at para 143.
[107] Ibid at para 129.

ss 24(1)–(3) of the ECA.[108] This affirms the fact that the *civiliter* principle fulfils a protective function that not only prevents a gratuitous exercise of the non-consensual servitude, but also guards against the potential negative effects that may flow from exercising that servitude.[109] With this approach the majority confirmed the presumption that legislation does not alter the common law more than what is necessary.[110] In the context of the ECA, no amendment of the common law of servitudes is required because the suite of peremptory property law principles that are used to interpret servitudes and which are triggered by s 22(2) of the ECA ensures that an appropriate balance is struck between the rights of a licensee, an owner and the local authority. The majority therefore held that the effect of ss 22(1) and 24 of the ECA does not amount to an arbitrary deprivation of property[111] and dismissed the application.[112]

C *Telkom SA*

In *Telkom SA* the applicant[113] erected a freestanding base telecommunication station – colloquially referred to as a mast – on private property in Heathfield. This formed part of the applicant's plan to extend the coverage of its mobile network in Cape Town. The plan comprised the development of 135 sites for the deployment of masts and rooftop base telecommunication stations. The applicant erected a mast on the property of the late Mr Kalu in contravention of the city's Telecommunication Mast Infrastructure Policy ('Policy') and Municipal Planning By-Law ('By-Law') which precluded such development on property zoned as 'single residential zone 1.'[114] This was done while its application to have the erf rezoned to 'utility'[115] was still pending approval before the city.[116] Irked by the applicant's action the city imposed an administrative penalty[117] and suspended the processing of the application to

[108] Ibid at para 152.

[109] Ibid at para 105

[110] Ibid at para 153.

[111] Ibid at paras 154, 174,181.

[112] Ibid at para 191.

[113] D Moseneke *All Rise* (2020) 20 and D Moseneke *My Own Liberator* (2016) 323–328 recounts the founding and early history of Telkom.

[114] The preamble to Part 1 of Chapter 5 in Schedule 3 of the City of Cape Town's Municipal Planning By-Law describes this zoning as: 'The single residential zonings are designed to provide locations for predominantly single-family dwelling houses in low- to medium-density neighbourhoods, with a safe and pleasant living environment. There are controlled opportunities for home employment, additional dwellings and low intensity mixed-use development on a single residential property. In recognition of the different socio-economic circumstances of the city there are two single residential zonings, one for conventional housing and one for incremental housing (where upgrading of informal settlements is encouraged).' Item 21(c) in Schedule 3 of the City of Cape Town's Municipal Planning By-Law specifically state that consent uses include 'utility service' and 'rooftop base telecommunication station'. See, in general, J Van Wyk *Planning Law* (3rd Ed, 2020) at 237–238.

[115] The preamble to Part 1 of Chapter 11 in Schedule 3 of the City of Cape Town's Municipal Planning By-Law describes this zoning as providing 'for utility services such as electrical substations and water reservoirs, which may be supplied by a municipal, government or private agency; and makes provision for government or authority uses, such as prisons and military bases, that are not covered by another use or zoning category.' Item 80(a) of Schedule 3 of the City of Cape Town's Municipal Planning By-Law state that the 'primary uses are utility service, authority use, *rooftop base telecommunication station and freestanding base telecommunication station*.' (Emphasis added) See, in general, Van Wyk (note 113 above) at 235–236 ('government purpose').

[116] *Telkom SA* (note 25 above) at paras 4–7.

[117] In terms of s 129(1A) of City of Cape Town's Municipal Planning By-Law.

rezone the property.[118] This decision occasioned Telkom to launch a retaliatory application in the Western Cape Division of the High Court, Cape Town in which it challenged the constitutional validity of both the By-Law and Policy.[119] Both the high court[120] (per Andrews AJ) and the Supreme Court of Appeal[121] (per Wallis JA) dismissed the application. It is against these orders that Telkom appealed to the Constitutional Court.

Jafta J, writing for a unanimous court,[122] endorsed Wallis JA's exposition[123] of the jurisprudence on the legislative competence of local authorities as it pertains to municipal planning.[124] He dismissed Telkom's contention that municipal planning did not encompass the rapid deployment of telecommunication infrastructure[125] as being diametrically opposed to the synthesised jurisprudence of both the Supreme Court of Appeal and the Constitutional Court on municipal planning. He summarised this position as follows:

> Our jurisprudence shows that it is municipalities alone which may exercise the power to zone and subdivide land. And the exercise of that power is insulated from interference by other spheres, even on appeal. The notion that these spheres could disregard municipal zoning schemes or bylaws giving effect to municipal planning and use land as they wish, would amount to a serious breach of the Constitution.[126]

Jafta J then shifted his focus to consider the question of whether the non-consensual statutory servitude must be exercised in accordance with the city's By-Law and Policy.[127] Section 156(3) of the Constitution stands central to the determination of this question and states that 'a by-law that conflicts with national or provincial legislation is invalid.' However, this condemnation is rendered subject to s 151(1) of the Constitution, which states that the ability and rights of a local authority 'to exercise its powers or perform its functions'[128] may not be compromised by national or provincial government. He reasoned that, in applying these provisions to the facts of the dispute,

> [t]he fact that telecommunications infrastructure is established on land creates an overlap between the functional areas of municipal planning and telecommunications which are located in different spheres of government. In accordance with our jurisprudence, the fact that Telkom is licensed to offer telecommunications services does not, without more, entitle it to exercise the rights in section 22(1) of the Act to the total disregard of municipal planning and zoning powers. The Act itself stipulates that the exercise of those rights is subject to compliance with applicable law which includes the impugned bylaw.[129]

[118] *Telkom SA* (note 25 above) at para 8.
[119] Ibid at para 9.
[120] Ibid at paras 10 and 11 and *Telkom SA SOC Ltd v City of Cape Town* [2018] ZAWCHC 53 at para 55.
[121] Ibid at paras 12–18 and *Telkom SA SOC Ltd v City of Cape Town* 2020 (1) SA 514 (SCA) at para 55.
[122] Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Theron J, Victor AJ and Mathopho AJ.
[123] *Telkom SA SOC* (note 121 above) at paras 16–29.
[124] *Telkom SA* (note 25 above) at paras 23 and 30. See, in general, V Bronstein 'Legislative Competence' in Woolman (note 81 above) at chapter 15-3 and 15-7–15-13.
[125] Ibid at para 21.
[126] Ibid at para 29.
[127] Ibid at paras 2 and 32.
[128] Contained in ss 152 and 156 of the Constitution. See N Steytler & J De Visser 'Local Government' in Woolman (note 81 above) at chapter 22-42–22-63.
[129] *Telkom SA* (note 25 above) at para 37.

Based on this, Jafta J was able to conclude that no real conflict existed between the city's powers or functions and the licensee's non-consensual servitude that flows from national legislation.[130] He therefore refused leave to appeal the judgment of the Supreme Court of Appeal[131] and confirmed the order that the high court granted.[132]

D Reflection

While an otherwise admirable effort, the majority's disjointed reasoning in *Link Africa* inarticulately utilised the peremptory property law principles to interpret the non-consensual servitude. Despite this, the persuasive force of the majority's reasoning as it pertains to the effective use of the non-consensual servitude could only be enhanced with reference to external considerations that did not exist when the judgment was handed down. The Court held that the local authority was in no way prejudiced[133] by the licensee's practice of attaching the fibre optic cables to the existing sewage infrastructure because 'the technology avoids the disruption and high costs associated with traditional road-digging.'[134] The *White Paper* lists the duplication of infrastructure as one of the salient challenges to the rapid deployment of ICT networks and facilities. This challenge is articulated in the following terms:

> Currently roads, new buildings and other infrastructure projects are not required to take into account ICT infrastructure in their planning. As a result, although it may be more efficient to, for example, lay fibre when the road is being developed, this is not done. The result is an uncoordinated and inefficient approach to ICT infrastructure deployment, additional costs and delays in the deployment process. *It also results in environmental degradation through either infrastructure duplication, or by repeatedly conducting processes with potential negative environmental impacts, such as digging and trenching.*[135]

The Department of Communications and Digital Technologies therefore developed the principle that all networks and facilities must be deployed in an environmentally friendly manner in order to avoid the duplication of infrastructure wherever this is possible.[136] This principle was crystallised into the following objectives: (a) to promote competition in the provision of high quality, innovative and affordable services by avoiding the needless duplication of infrastructure; (b) to reduce or eliminate inconvenience to the public and unnecessary damage to 'aesthetics or amenity, to land, property, existing premises and infrastructure'; and (c) to promote the shared use of common publicly-owned facilities 'to reduce deployment times and increase efficiency.'[137] These issues are a prime example of the kinds of external considerations that a court could use to strengthen its reasoning on the full and normal use of the ancillary or baseline entitlements found in s 24 of the ECA.

Additionally, in holding that the non-consensual servitude does not amount to an arbitrary deprivation of property, the majority's reasoning that this depends on the extent of

[130] Ibid at paras 33 and 36.
[131] See Hofmeyr (note 81 above) at chapter 5-24–5-25.
[132] *Telkom SA* (note 25 above) at para 46.
[133] *Link Africa* (note 5 above) at para 172.
[134] Ibid at para 170.
[135] *White Paper* (note 10 above) at 97 (emphasis added).
[136] Ibid at 100.
[137] Ibid at 99.

the intrusion[138] cannot be faulted. For the most part, the installation of facilities – like fibre optic cables – constitutes small and insignificant intrusions onto private property. There are enough mechanisms and justifications in place in the laws of general application – in this case the ECA and the common law of servitudes – that authorise these intrusions to preclude a conclusion that the non-consensual servitude is either procedurally[139] or substantively[140] arbitrary. However, other facilities – like masts or exchange buildings – will constitute large and significant intrusions which would require more comprehensive mechanisms and substantial justifications to escape the conclusion that they are arbitrary. In this context, the majority's reference to ways of necessity[141] and the relocation of defined servitudes of way as a result of changed circumstances[142] is misplaced. The majority's reasoning is that compensation for large and significant intrusions caused by the non-consensual servitudes flowing from the ECA could be justified with reference to the compensation that must be paid for ways of necessity or the relocation of defined rights of way.[143] In advancing this reasoning the majority made the same logical error that Jansen JA made in *Van Rensburg v Coetzee* when he erroneously equated the creation of a permanent way of necessity with a *sui generis* kind of expropriation that demands compensation.[144] The creation of a permanent right of way of necessity by operation of law cannot be expropriatory in nature because there is no common-law authority for expropriation in South African law.[145] Van der Walt suggests that a better explanation for the duty to compensate could be that the compensation is 'intended to alleviate the burden that is imposed unilaterally on the servient owner by operation of law' and as such saves the *ex lege* creation of the servitude from being an arbitrary deprivation of property for purposes of s 25(1) of the Constitution.[146] While for purposes of *Linvestment CC*

[138] *Link Africa* (note 24 above) at paras 166 and 167. Compare this to *Loretto v Teleprompter Manhanttan CATV Corp* 458 US 419 (1982) and *Nollan v California Coastal Commission* 483 US 825 (1987) where the court held that public access servitudes were conceptually severed from the property and reasoned that a permanent physical invasion amounted to a per se taking in the United States. See MJ Radin 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *Columbia Law Review* 1667–1696 and R Epstein *Takings: Private Property and the Law of Eminent Domain* (1985).

[139] Thereby giving effect to s 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000. See Muller et al (note 29 above) at 110–111 and 631; G Quinot & E Van der Sijde 'Reflections on the single system of law principle with reference to the regulation of property and the right to just administrative action' in Muller et al (note 87 above) at 447; AJ Van der Walt 'Procedurally arbitrary deprivation of property' (2012) 23 *Stellenbosch Law Review* 88 and AJ Van der Walt *Constitutional Property Law* (3rd Ed, 2011) at 264–270.

[140] *FNB* (note 88 above) at para 100. See Muller et al (note 29 above) at 631–637; Van der Walt (note 138 above) at 245–264.

[141] *Link Africa* (note 5 above) at paras 148–149 referring to *Van Rensburg v Coetzee* 1979 4 SA 655 (A). Discussed in G Muller 'Using a Ddiagram as a Teaching and Learning Tool for Assessing the Law of Servitudes' (2019) 30 *Stellenbosch Law Review* 415 at 416–418.

[142] Ibid at paras 145–147 referring to *Linvestment CC v Hammersley* [2008] ZASCA 1, 2008 (3) SA 283 (SCA). See also *JJPC Brand Administrators v Lombard* [2019] ZASCA 55. S Van Staden *Ancillary rights in servitude law* (LLD dissertation, Stellenbosch University, 2015) 17 describes 'changed circumstances' as the subjective need of either the servient or dominant tenement owners to develop or exploit her land in a different way. Discussed in Muller (note 140 above) at 426–428. See further the Uniform Easement Relocation Act that was adopted in 2020 by the Uniform Law Commission in the United States of America.

[143] Ibid at para 152.

[144] *Van Rensburg* (note 141 above) at 676C–D.

[145] Van der Walt (note 21 above) at 360.

[146] Ibid at 360, 364–370. See AJ Van der Walt & TN Raphulu 'The right of way of necessity: A constitutional analysis' (2014) 77 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 468 and TN Raphulu *The Right of*

v Hammersley[147] the compensation was awarded for policy reasons to pay for all the attendant costs that the relocation would occasion. Furthermore, the ECA does not afford a licensee or the Independent Communications Authority of South Africa ('Icasa') the power to expropriate property or impose an obligation to pay compensation.[148] The better position would have been for the majority to refer to s 8(1) of the Expropriation Act 63 of 1975, which states that it is possible to acquire existing and new servitudes by way of expropriation as an alternative to expropriating the entire immovable property. The majority could also have supplemented this point with the fact that s 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 mentions 'Communication and information technology installations' and Schedule 3 specifically includes a strategic integrated project 'SIP 15: Expanding access to communication technology'. Moreover, the Minister of Public Works and Infrastructure recently promulgated additional strategic integrated projects[149] which include one on digital infrastructure.

Finally, the majority's reliance on the colloquial meaning of *civiliter modo* to connote the fact that a licensee must exercise the servitude 'respectfully and with due caution' fails to calibrate the servitutal relationship appropriately. While I should not be understood to be arguing against the use of plain language, my argument is simply that by relying on this convenient shorthand, the principle is divested of its nuance. In both *Link Africa* and *Telkom SA,* the Court's reasoning on the powers and duties of local authorities could have benefitted greatly from this nuance. The Court undoubtedly correctly held that these powers and duties form part of the 'applicable law' to which licensees must have due regard when exercising the non-consensual servitude.[150] Yet, it is unclear to me exactly how a licensee will demonstrate that it regarded those powers and duties with respect and due caution. The circumscribed factual matrix of *Telkom SA* presented the Court with an opportunity to complement *Link Africa* by employing the *civiliter* principle[151] to 'traverse new ground'.[152] When held to its full meaning, the powers and duties of local authorities delimit the contours within which the *civiliter* exercise of the non-consensual servitude must take place. It does this by ensuring that the burden imposed by the non-consensual servitude and ancillary entitlements are properly authorised without 'thwarting the purpose of the statute'[153] and does not amount to more than what is needed. The calibration of this part of the servitutal relationship must principally be done with reference to the Spatial Planning and Land Use Management Act

Way of Necessity: A Constitutional Analysis (unpublished LLM thesis, Stellenbosch University, 2013). See also K Bezuidenhout *Compensation for Excessive but Otherwise lawful Regulatory State Action* (unpublished LLD dissertation, Stellenbosch University, 2015) 129–209 for an exposition of equalisation payments in German law and the égalité principle in Belgian and Dutch law.

147 [2008] ZASCA 1; 2008 (3) SA 28.

148 Bezuidenhout (note 146 above). at 239–244.

149 GN 812 in *GG* 43547 (24 July 2020).

150 *Link Africa* (note 5 above) at paras 185–188 and *Telkom SA* (note 25 above) at para 34.

151 Had it not been for one passing reference to the *civiliter* principle by Wallis JA in *Telkom SA* (note 121 above) at para 41 this principle would have been absent from the series of judgments.

152 *Telkom SA* (note 25 above) at para 20.

153 *Link Africa* (note 5 above) at para 189 and *Telkom SA* (note 25 above) at para 40.

16 of 2013 ('SPLUMA') because it contains crucial provisions about cooperation[154] and efficient administrative processes.[155] Both these issues are highlighted as challenges[156] to and have been included as objectives[157] for the rapid deployment of ICT infrastructure. Conceived of in this way, the *civiliter* exercise of the non-consensual servitude enlarges the procedural protections and substantive safeguards for owners and local authorities alike. It is then rather simple to demonstrate that due regard was had to these procedural protections and substantive safeguards – like taking 'into account practical considerations about order and safety'[158] and 'the usual impact of the relevant infrastructure on the City and its environs; landscaping; and the protection of the heritage and the environment.'[159]

IV THE WAY FORWARD

The hope of development and need for social and economic inclusion will intensify the drive for the rapid deployment of infrastructure by way of servitudes – not just in ICT, but also in energy,[160] water,[161] and transport.[162] The ability of the judiciary to calibrate the servitutal relationship between licensees, owners and local authorities appropriately with reference to the peremptory property law principles in the common law of servitudes will be of paramount importance. The landmark judgments of the Constitutional Court in *Link Africa* and *Telkom SA* paved the way and prepared us well for the challenge that lies ahead. *Link Africa* and *Telkom SA* illustrate the importance of having a principled place to start when interpreting these non-consensual servitudes. In both cases this required an interpretation of the ECA and a distinct appreciation of its place within a single system of law. The non-consensual servitudes established in terms of s 22(1) of the ECA must be exercised with 'due regard … to applicable law and the environmental policy of the Republic' by licensees. In this article I have shown that the 'applicable law' referred to in s 22(2) of the ECA is the peremptory property law principles of the common law of servitudes. If these principles are applied sequentially, they ensure that the servitutal relationship is calibrated in a manner that respects and promotes the interests of licensees, owners and local authorities alike. Collectively these principles: (a) appreciate that overlapping rights cause deep tensions and that non-consensual servitudes must be interpreted with reference to external considerations; (b) afford non-consensual servitudes a restrictive interpretation that aligns with the *in favorem libertatis* principle and in so doing ensures that an irreconcilable conflict is avoided between the ECA and the common law of servitudes; (c) afford a preference to licensees as far as it pertains to the clearly afforded ancillary

[154] Sections 3(e), 7(d) and 7(e) of SPLUMA as read together with s 41 of the Constitution and the Intergovernmental Relations Framework Act 13 of 2005.

[155] Sections 3(a), 5(1)(c), 6(1), 7(c) and 8(2)(c) of SPLUMA.

[156] *White Paper* (note 10 above) at 97–98.

[157] Ibid at 99.

[158] *Link Africa* (note 5 above) at para 187.

[159] *Telkom SA* (note 25 above) at para 43 and *Telkom SA* (note 121 above) para 52. More comprehensively articulated and illustrated in the City of Cape Town's Telecommunication Mast Infrastructure Policy (2015) at 13–24.

[160] NDP (note 1 above) at 140–153 and s 22(1) of the Electricity Regulation Act 4 of 2006. See Muller et al (note 29 above) at 397.

[161] NDP (note 1 above) at 154–161 and ss 124–136 of the National Water Act 36 of 1998. See Muller et al (note 29 above) at 395–396.

[162] NDP (note 1 above) at 161–169 and Schedule 1 item 7(3) of the Legal Succession to the South African Transport Services Act 9 of 1989. See Muller et al (note 29 above) at 395.

rights or baseline entitlements; (d) ensure that the exercise of these non-consensual servitudes are animated through the *civiliter* principle – properly understood as exercising a servitude so that it does not impose an unreasonable burden on the servient owner; (e) rely on external considerations – found in policy and/or legislation – to facilitate a contextual delimitation of how these servitudes may be exercised by ensuring that they are properly authorised and do not amount to more than what is needed by licensees; (f) illustrate that the common law of servitudes is flexible and equitable enough to be interpreted in line with the ECA's regulatory framework; and (g) articulate the procedural protections and substantive safeguards that prevent these non-consensual servitudes from amounting to arbitrary deprivations of property in terms of s 25(1) of the Constitution.

However, *Link Africa* and *Telkom SA* have only considered two of the eight interventions – access to trenches[163] and elements of the approval of applications and permits[164] – which the Department of Communications and Digital Technologies has identified as forming part of its multi-pronged approach to the rapid-deployment of ICT infrastructure. The calibration of these servitutal relationships will only become more complex as issues of fair competition;[165] reasonable fees and charges for wayleaves;[166] access to high sites for radio-based systems;[167] the sharing of infrastructure;[168] deployment in new developments;[169] environmental, health, safety and security considerations;[170] and the deployment in emergency situations[171] arise.

Furthermore, the facts of both *Link Africa* and *Telkom SA* limit their precedential authority to the servitutal relationship between licensees and local authorities. As the drive for the rapid deployment of ICT infrastructure intensifies, the potential for conflict with owners will increase and the need to appropriately calibrate their servitutal relationship with licensees will become increasingly important.

[163] *White Paper* (note 10 above) at 106.

[164] Ibid at 102–105.

[165] Ibid at 102 together with the application of the Competition Act 89 of 1998.

[166] Ibid at 105.

[167] Ibid at 105–106.

[168] Ibid at 106. See AJ Van der Walt 'Sharing Servitudes' (2015) 4 *European Private Law Journal* 162; R Dyal-Chand 'Sharing the cathedral' (2013) 46 *Connecticut Law Rreview* 647 and G Alexander 'Governance property' (2012) 160 *University of Pennsylvania Law Review* 1853.

[169] Ibid at 107–109 together with the Sectional Titles Act 95 of 1986. See GJ Pienaar and JG Horn *Sectional Titles and other Fragmented Property Schemes* (2nd Ed, 2020) at 249–251 and Muller et al (note 29 above) at 394–395.

[170] Ibid at 109 read with s 33(2) of SPLUMA which suggest that the National Building Regulations and Building Standards Act 103 of 1977, the suite of statutes flowing from the National Environmental Management Act 107 of 1998, National Heritage Resources Act 25 of 1999 and the National Health Act 61 of 2003 may all play important roles in the appropriate calibration of the servitutal relationship as it pertains to how the non-consensual servitude may be exercised. See N Njilo 'Torching of Three Cellphone Towers "Linked to 5G and Covid Conspiracies"' *SowetanLive* (7 January 2021), available at https://www.sowetanlive.co.za/news/south-africa/2021-01-08-torching-of-cellphone-towers-linked-to-5g-and-covid-conspiracies/; J McKane 'South Africans Burn Down 5G towers Over COVID-19 fears' *MyBroadband* (7 January 2021), available at https://mybroadband.co.za/news/telecoms/381686-south-africans-burn-down-5g-towers-over-covid-19-fears.html; Anonymous 'Severe Damage & Vandalism Sees Dozens of MTN Base Stations Shut Down' *Connecting Africa* (16 August 2019), available at http://www.connectingafrica.com/document.asp?doc_id=753517

[171] Ibid at 109–110 together with s 22(2) of the Expropriation Bill B–2020. See further S Viljoen 'The temporary expropriation of a use right as interim measure in the South African housing context (part 1)' 2014 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 359–376 and S Viljoen 'The temporary expropriation of a use right as interim measure in the South African housing context (part 2)' 2014 *ournal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 520–535.

While laudable in many respects, the reasoning of the Constitutional Court in both *Link Africa* and *Telkom SA* is disjointed because it does not rely directly on the peremptory property law principles of the common law of servitudes to calibrate the servitutal relationship between licensees and local authorities. In my view, these principles provide the courts with a principled starting point to calibrate the servitutal relationship appropriately. These principles do not limit the powers of courts to engage in constitutional review, interpretation of legislation or the development of the common law.[172] In fact, the starting point provided by these principles opens interpretive space for the courts to explore the complexities of the servitutal relationship and calibrate it with the requisite nuance. The purpose of these principles is to avoid the establishment of fragmented, parallel property systems – under the ECA and under the common law of servitudes, respectively – and to ensure maximum coherence of both sources of law with the principle of a single system of law.[173]

[172] Van der Walt (note 28 above) at 37.
[173] Ibid at 67–68.