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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

THE CAPE TOWN HIGH COURT AFFIRMS THE RIGHT OF MUNICIPALITIES TO CLAIM COMPENSATION FROM TELCO'S WHO TRENCH ON THEIR LAND

The issue concerns the balance of rights between property owners (in that case, an organ of state) on the one hand and on the other, the rights of licensees to enter upon any land, (including street, road, footpath) to roll-out infrastructure to provide services.

Section 22 of the 2005 Electronic Communications Act (ECA) granted licensed electronic communications network providers (ECNS) rights to enter onto land to deploy their networks on land belonging to public or private owners. The ambit of that right was, however, never delineated clearly in regulations and, following protracted legal battles, resulted in a constitutional court ruling, in *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC) (the Link Africa judgment).

The most recent pronouncement on this continued area of contestation is a December 2017 High Court judgment in the Western Cape in Dark Fibre Africa (Pty) Ltd (DFA) v The City of Cape Town (7748/2017) [2017] ZAWCHC 151.

At its core, the issue concerns the balance of rights between property owners (in that case, an organ of state) on the one hand and on the other, the rights of licensees to enter upon any land, (including street, road, footpath) to roll-out infrastructure to provide services.

The Link Africa majority judgment found that s22 effectively created a public servitude in favour of ECNS licensees, meaning that a licensee can select and access land to construct, maintain, alter or remove networks or facilities, but must do so in a civil and reasonable manner, which includes consultation with and the provision of reasonable notice to the owner of the property. The judgment also requires the payment of proportionate compensation for the right, relative to the disadvantages suffered by the owner. However, a s22 right is not an unfettered one and access to the property in the absence of resolution of disputes is unlawful. As such licensees may not simply march onto property to build networks without engaging the landowner and arriving at a mutual agreement. In the context of public land, this interaction between the licensee, as the holder of the public servitude, and a municipality, as the landowner, usually culminates in the grant of a wayleave, or right of way, generally in exchange for payment.

The most recent pronouncement on this continued area of contestation is a December 2017 High Court judgment in the Western Cape in *Dark Fibre Africa (Pty) Ltd (DFA) v The City of Cape Town* (7748/2017) [2017] ZAWCHC 151. Here, DFA objected to the City of Cape Town's wayleave condition that it be required to pay a non-refundable trenching deposit for digging trenches into the City's road reserve instead of using less damaging means to lay cables underneath the City's roads, such as side drilling.

DFA contended that the "condition was not authorised by law because it purports to provide for 'pre-emptive damages"' and further served to thwart its rights under s22. In response, the City successfully contended that it was entitled to impose the condition in accordance with its "function and service of providing roads together with the administration thereof." The City argued, in substantiation of the condition, that the deposit would only be forfeited in the event of the licensee digging up the road reserve causing damage to the road infrastructure. In the City's view, therefore, the forfeited deposit represented "a part compensation to which [it was] entitled for the inherent degradation that roadway trenches cause to the structural integrity of its roads".

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CONTINUED

The ambit of s22, the extent of compensation to be paid, and the balancing of rights between landowners and licensees, unless clarified in detail through further legislation or regulation, will continue to be delineated over time in case law.

In finding in the City's favour, Davis J highlighted "the need to reconcile national with local legislation" and recognised "that a road authority like the City has a role to play in dealing with the implementation of a license under the ECA." The City was accordingly "entitled to reserve the right to impose a compensation charge for the use and occupation of its land . . . without statutory authority on the basis of [*Link Africa*]".

Undoubtedly and notwithstanding the *Link Africa* judgment, the ambit of s22, the extent of compensation to be paid, and the balancing of rights between landowners and licensees, unless clarified in detail through further legislation or regulation, will continue to be delineated over time in case law.

Tracy Cohen and Yana van Leeve

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SOME CLARITY ON WHAT CONSTITUTES A "CLASS" OF CREDITORS IN A SECTION 155 COMPROMISE

Section 155(8)(c) provides that a compromise will only become binding on all the creditors (or class of creditors) of the company on a date that the company files a copy of the court order sanctioning the compromise.

The Gauteng Division of the High Court recently delivered a judgment in the matter of *The Commissioner for the South African Revenue Service and Logikal Consulting (Pty) Ltd and Others*, Case No. 96768/2016, in which the court had to interpret, among other things, what comprises a "class" of creditors as contemplated in s155(2) of the Companies Act, No 71 of 2008.

The court held that merely because creditors are "preferent" does not mean that they fall under the same class as there are different rankings within preferent creditors.

In this case, SARS applied for a rescission of an order granted in its absence, for the sanctioning of an offer of compromise under s155(7). Section 155(8)(c) provides that a compromise will only become binding on all the creditors (or class of creditors) of the company on a date that the company files a copy of the court order sanctioning the compromise.

The intended compromise was between Logikal and its preferent creditors only, being SARS with a claim of approximately R6 million and five of Logikal's employees with an aggregate statutory claim for arrear salaries of approximately R27,000. The proposed compromise entailed no compromise at all for the employees' claims as they were to be paid their claims in full, however, SARS's claim would be compromised to 20c/rand of its claim. The compromise was accepted at a meeting convened for that purpose by the other preferent creditors at which SARS was not present and ultimately sanctioned without SARS's knowledge.

The grounds for SARS's application were, among other things, that as preferent creditor it did not belong to the same class as the employees with their preferent claims for arrear salaries and therefore their vote in favour of the compromise did not bind SARS, that SARS was not given proper notice of the meeting at which the compromise was voted upon and that SARS should have been but was not notified of the application for sanctioning.

In respect of the interpretation of what constituted a class of creditors in terms of s155(2), SARS's submission was that creditors whose rights are so dissimilar that it would be impossible for them to consult together with a view of common interest cannot form a class. The court held that merely because creditors are "preferent" does not mean that they fall under the same class as there are different rankings within preferent creditors. The court referred to s98A of the Insolvency Act, No 24 of 1936 which affords employees' preferent claims for salaries a higher ranking than SARS' preferent claim for unpaid tax. The court further held that since the employees' claims were not being compromised at all while the majority of SARS's claim was being compromised, it is difficult to see how all six parties could meaningfully consult together with a view to a common interest. Put differently, the distinction drawn between the two sets of claims meant that they were too different to form a class.

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SOME CLARITY ON WHAT CONSTITUTES A "CLASS" OF CREDITORS IN A SECTION 155 COMPROMISE

CONTINUED

The principles dealt with in this judgment are important and should be taken note of in ensuring that the statutory mechanism afforded by s155 is not abused by companies to water down creditors in SARS's position.

The court accordingly granted an order rescinding and setting aside the sanctioning order and declared that that the order was not binding on SARS.

The principles dealt with in this judgment are important and should be taken note of in ensuring that the statutory mechanism afforded by s155 is not abused by companies to water down creditors in SARS's position. Creditors should also beware of the class that they are placed in, especially where a compromise will have the effect of watering down a creditor's claim that is disproportionate to other claims in the same class.

Kgosi Nkaiseng and Lebohang Khoanyane

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.

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NEC4: TIME-BARRED FROM NOTIFYING OR REFERRING A DISPUTE?

Parties are now obliged to make a meaningful attempt to resolve any disputes arising between them on an internal basis prior to embarking on the formal adjudication process.

The recently launched NEC4 Engineering and Construction Contract has introduced substantial changes to its predecessor, the NEC3, including an entirely new set of provisions aimed at "Resolving and Avoiding Disputes", also called Option W, and comprising an amended Option W1 (applicable in South Africa) and W2 (not applicable in South Africa), and an entirely new Option W3 (the Dispute Avoidance Board option) which will be dealt with in a later Alert.

The time periods set out in the Dispute Reference Table identify different categories of dispute, which of the parties may refer each category of dispute, and by when such dispute may be referred to the Senior Representatives.

Under the amended Option W1, a further stage in the tiered dispute resolution process has been added and parties are now obliged to make a meaningful attempt to resolve any disputes arising between them on an internal basis prior to embarking on the formal adjudication process. This new preliminary procedure set out in part W1.1 (which operates according to its own time period provisions set out in a Dispute Reference Table) entails the referral of all disputes to 'Senior Representatives' of the parties, who are appointed in terms of the contract.

Clause W1.1(2), amongst other things, provides that:

> The Party referring a dispute notifies the Senior Representatives, the other Party and the Project Manager of the nature of the dispute it wishes to resolve. *Each Party submits to the other their statement of case within one week of notification...* (our emphasis)

The time periods set out in the Dispute Reference Table identify different categories of dispute, which of the parties may refer each category of dispute, and by when such dispute may be referred to the Senior Representatives.

W1.1(3) further provides that after receiving the statements of case, the Senior Representatives "attend as many meetings and use any procedure that they consider necessary to resolve the dispute over a period of *no more than three weeks...*" (our emphasis) and that "at the end of this period the Senior Representatives produce a list of issues agreed and issues not agreed" with the parties putting into effect the issues agreed. One should note that W1.1 of the Option contains no express time-barring provision.

Should any issues remain in dispute following this preliminary process, part W1.3 of the Option provides that a party disputing any such issue and wishing to embark on the second stage of the process may do so by issuing a notice of adjudication "within two weeks of the production of the (abovementioned) list... or when it should have been produced. The dispute is referred to the Adjudicator within one week of the notice of adjudication."

As the provision governing this second adjudication stage in the process, W1.3 sets out its own notification and referral periods, ostensibly separate from those set out in W1.1, and the Dispute Reference Table.

W1.3(2) furthermore, among other things, contains the following time-barring provision also to be found in NEC3:

> If a disputed matter is not notified and referred within *the times set out in the contract, neither party may subsequently refer it to the Adjudicator or the tribunal* (our emphasis)

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NEC4: TIME-BARRED FROM NOTIFYING OR REFERRING A DISPUTE?

CONTINUED

Parties to NEC4 Contracts subject to Option W1 are urged to ensure that all disputes are timeously notified and referred in strict compliance with the provisions of Option W1 as a whole.

As in NEC3, late notifications and referrals will run foul of time-barring provisions, defeating a claim in its infancy for failing to comply.

Unlike its predecessor in NEC 3, however, it is unclear which "times set out in the contract" require such strict observation. Does this provision specifically refer to the periods set out under W1.3? Or does it bear implications that go far wider and prescribe strict compliance with all of the time periods from W1.1 to W1.3?

The answer, at this stage, appears uncertain. Without the aid of the Adjudication Table set out in the NEC3 to anchor its meaning to a strict set of prescribed time periods, the scope of application of the NEC4 Clause W1.3 (2) remains unclear. On a strict interpretation of the wording of this provision, it is arguable that even a failure to strictly comply with the time periods contained in the less formal first stage of the process set out in W1.1 could be fatal for a party wishing to refer a dispute to adjudication.

Parties to NEC4 Contracts subject to Option W1 are urged to ensure that all disputes are timeously notified and referred in strict compliance with the provisions of Option W1 as a whole. Parties who find themselves lagging behind in timeously notifying and referring disputes may, further down the line, be faced with an argument that they are time-barred from doing so.

Joe Whittle, Shikara Singh and Reabetswe Mampane

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CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Tracy Cohen
Director
Business Development
T +27 (0)11 562 1617
E tracy.cohen@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Janet MacKenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Ashley Pillay
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Willem Janse van Rensburg
Executive Consultant
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR