

# DISPUTE RESOLUTION ALERT

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ISSUE

## BREAKING NEWS

### ESTATES HAVE THE RIGHT TO CHOOSE THE BEST FIBRE NETWORK FOR THE JOB

Considering that fibre optic cables are able to carry much more data than copper cables, fibre-to-the-home has revolutionised consumers' experience by providing fast, reliable and affordable connectivity for multiple applications, including internet, media streaming, downloading, etc. As in the case of any product on the market, competition drives prices down and residents in a residential estate should be able to choose their preferred fibre network providers, in addition to their respective service providers.

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# ESTATES HAVE THE RIGHT TO CHOOSE THE BEST FIBRE NETWORK FOR THE JOB

*The Supreme Court of Appeal (SCA) had to consider whether a fibre network service provider could access the ducts constructed on and under a residential estate to deploy its fibre network, where an incumbent's existing cables were already present in the duct infrastructure.*

*The High Court held that the deployment by a competitor service provider of cables in the same infrastructure amounted to a deprivation of the incumbent's exclusive possession.*

Considering that fibre optic cables are able to carry much more data than copper cables, fibre-to-the-home has revolutionised consumers' experience by providing fast, reliable and affordable connectivity for multiple applications, including internet, media streaming, downloading, etc. As in the case of any product on the market, competition drives prices down and residents in a residential estate should be able to choose their preferred fibre network providers, in addition to their respective service providers.

In *Dennegeur Estate Home Owners Association and Vodacom (Pty) Ltd v Telkom SA SOC Ltd* (366/2018) [2019] ZASCA, the Supreme Court of Appeal (SCA) had to consider whether a fibre network service provider could access the ducts constructed on and under a residential estate to deploy its fibre network, where an incumbent's existing cables were already present in the duct infrastructure.

#### Background

About 18 years ago, Telkom installed copper cables for communication services into underground ducts and sleeves in the Dennegeur Residential Estate. Telkom utilised the copper cables to provide telephone and later ADSL services to the residents. It was common cause that the manholes and underground plastic sleeves (the duct infrastructure) belonged to the Home Owners Association of Dennegeur Estate (HOA). During 2016, the HOA entered into an agreement with Vodacom for Vodacom to install its optic fibre network in the estate to provide fibre-to-the-home connectivity to the residents. Vodacom deployed its fibre cables in the same ducts and sleeves, alongside Telkom's copper cables. The services provided by Telkom were not hindered in any manner.

Telkom approached the High Court, alleging that Vodacom had committed an act of spoliation by placing its cables into the existing ducts and Telkom claimed the return of its undisturbed possession of the infrastructure in terms of the *mandament van spolie*. Telkom relied on s22 of the Electronic Communications Act (ECA) and alleged that the section provided Telkom with the exclusive rights to the duct infrastructure, including the vacant, unused space within the ducts which Telkom may want to use in future to roll out its own optic fibre network.

#### High Court judgment

The High Court agreed with Telkom, in effect finding that whichever network service provider had deployed its cables in the manholes and duct infrastructure first, had exclusive possession of the infrastructure. The High Court held that the deployment by a competitor service provider of cables in the same infrastructure amounted to a deprivation of the incumbent's exclusive possession. The application for a spoliation order was accordingly granted and Vodacom was ordered to remove its fibre cables and restore the possession of the underground ducts, sleeves, manholes and copper cables to Telkom.

# ESTATES HAVE THE RIGHT TO CHOOSE THE BEST FIBRE NETWORK FOR THE JOB

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*The rights afforded by s22 of the ECA are in their nature servitural and quasi-possession of an asserted servitural right did enjoy protection under the mandament to the extent that it is evidenced by the actual or factual exercise of a professed right.*



The consequence of the High Court judgment was that an incumbent network service provider enjoyed a 'deemed interdict' against any other competitor wanting to deploy its fibre network in the existing infrastructure in an estate. Absent a facilities leasing agreement with the incumbent, any competitor who wished to deploy its own fibre network in an estate that already had copper or fibre, would be obliged to dig new trenches and lay new ducts, irrespective of whether the existing duct infrastructure could accommodate the competitor's fibre cables or not. The obvious result would be for residential estates to avoid the unnecessary disruption of construction in the estate, leaving consumers with no choice other than the incumbent network provider.

#### **Supreme Court of Appeal judgment**

The High Court's judgment was taken on appeal by Vodacom and the HOA. The appellants argued that there was no possession as required by the *mandament*, as Telkom's access was at the HOA's sufferance. There was also no deprivation of possession, as Telkom did not make use of those portions of the duct infrastructure where Vodacom inserted its cables and in any event, Vodacom's fibre cables did not interfere with Telkom's use of its copper cables.

The City of Cape Town, admitted as an *amicus curiae*, emphasised that the practical implications of the High Court judgment were that absent agreement with the incumbent, the HOA could only choose to use the services of a different network services provider at a significant cost, disruption and the damage of having its roads and gardens dug up again to

install new ducts and sleeves. The City of Cape Town argued that this would not be in the public's interest nor the interests of the City and all other municipalities in the country - whenever a service provider digs up a road to install a new underground infrastructure, it permanently sterilised valuable and limited underground space, preventing the municipality from using that portion of the road reserve to construct, expand, upgrade or maintain roadways, water, sewage, electricity and other essential municipal services.

The SCA upheld the appeal by Vodacom and the HOA. It found that although Telkom may have accessed the duct infrastructure and manholes for its own benefit, the indisputable facts established that the infrastructure formed an integral part of the immovable property which was owned, occupied and controlled by the HOA. Telkom was not in physical possession of the infrastructure of its cables.

The rights afforded by s22 of the ECA are in their nature servitural and quasi-possession of an asserted servitural right did enjoy protection under the *mandament* to the extent that it is evidenced by the actual or factual exercise of a professed right. Spoliation of a servitural right occurs where the quasi-possession of the alleged right, as evidenced by the actual exercise of the right, is disturbed. The SCA importantly held that:

*"notwithstanding installation by Vodacom of its optic fibre network in the same ducts as the cables, Telkom's actual use of the ducts, cables and its service to its customers remain undisturbed. It has not lost possession of anything."*

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*Having more options, also promotes healthy competition.*



Therefore, the extent to which Telkom in fact exercised a servitural right to the airspace in the ducts, prior to Vodacom deploying its fibre network, was limited to the space actually occupied by its copper cables in the duct infrastructure across the estate. A reservation of space for future use did not give quasi-possession to Telkom of the entire infrastructure and particularly, it was not in possession of unused vacant space in the ducts in which Vodacom installed its optic fibre cables.

The SCA concluded that Telkom did not possess the vacant space in the ducts and sleeves which was subsequently occupied by Vodacom and that Vodacom's optic fibre network did not disturb Telkom's use of the ducts and did not prevent Telkom's operation of its network. Accordingly, Vodacom's conduct was not an act of spoliation.

Although this matter deals with spoliation and the court refrained to deal with the rights of the network operators under s43, the importance of this judgment for the telecommunications industry and indirectly, for consumers, is clear: Regardless of there being an incumbent network provider, a residential estate may enter into an agreement with any preferred fibre network provider to deploy its fibre network in the duct infrastructure owned by the estate where there is sufficient space in the existing infrastructure to do so. By having more options consumers can decide, not only on the best internet service provider, but also on the best fibre network to serve their needs, without additional costs and construction disruption to estate residents. Having more options, also promotes healthy competition.

*Anja Hofmeyr and Ashleigh Gordon*

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## 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

**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

**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

**Mongezi Mpahlwa**  
Director  
T +27 (0)11 562 1476  
E mongezi.mpahlwa@cdhlegal.com

**Kgosi Nkaiseng**  
Director  
T +27 (0)11 562 1864  
E kgosi.nkaiseng@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.rhodie@cdhlegal.com

**Belinda Scriba**  
Director  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

**Tim Smit**  
Director  
T +27 (0)11 562 1085  
E tim.smit@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

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

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