

# TECHNOLOGY

## MEDIA AND TELECOMMUNICATIONS

### ALERT

5 November 2012

#### NOT IN MY BACKYARD

A recent decision by the Supreme Court of Appeal (SCA) in the matter of *Mobile Telephone Networks Limited (Pty) Ltd v SMI Trading CC [2012] ZASCA 138 SCA* on the powers of electronic communications network service licensees to enter private land to construct and maintain networks may well give private landowners, particularly those with large tracts of land, cause for concern.

The principal issue before the SCA in *MTN v SMI* was the interpretation of s22 of the Electronic Communications Act, No 36 of 2005 (Act). The section gives electronic communications network service licensees the right to enter private land to construct and maintain electronic communications networks but this right is, according to s22, subject to 'applicable law'. When the issue of what constitutes 'applicable law' was considered in the High Court (Court), the judge found that 'applicable law' included common law and, accordingly, private landowners could refuse to allow licensees onto their land notwithstanding the provisions of s22. On the facts before the Court, the judge found that MTN did not have the right to continue to occupy SMI Trading's land in the absence of a lease agreement and MTN was ordered to remove its base station.

MTN took the decision of the court *a quo* on appeal. The SCA found against MTN but for reasons different to those of the judge. The SCA held that 'applicable law' in s22 does not include common law to the extent that it would permit a landowner to refuse to allow an electronic communications network service licensee access to its land thus defeating the purpose of s22.

Significantly for private landowners, the SCA found that an electronic communications network service licensee could indeed enter private land for the purposes of constructing and

maintaining networks. The court was of the view that a decision by licensee to enter private land amounted to administrative action on the part of the licensee to which the provisions of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) would be applicable.

The SCA found against MTN because it was of the view that MTN had acted arbitrarily and that, in any event, MTN had not in fact made a 'decision' within the meaning of PAJA.

The implication of the SCA judgment is that a licensee may enter private land provided the licensee acts reasonably and not arbitrarily and provided that the decision to enter the land is taken in a procedurally fair manner which would include consulting with the landowner. Issues such as the compensation offered, the availability of other sites and the type of electronic communications infrastructure to be located on the land would be relevant to the reasonableness of the decision. Certainly, in the case of a mobile network operator's base station where there is more flexibility as to where that station can be located, a private landowner would be in a stronger position to resist the location of that network infrastructure on its land.

Section 21 of the Act allows for the development of so-called guidelines for the resolution of disputes between landowners and licensees. These guidelines have not been developed

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and even if these guidelines were in existence the legal force and effect of 'guidelines' is questionable. The recent draft amendments to the Act propose that ICASA develop regulations to deal with disputes between landowners and licensees but it will be some time before the amendments to the Act are effected and an even longer period of time before regulations will be passed if the amendment is carried.

For the foreseeable future, the only recourse available to landowners dissatisfied with a decision taken by licensee to enter upon its land will be to approach the Court to review and set aside the decision of the licensee concerned.

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## NEW DRAFT GENERAL LICENCE FEES REGULATIONS

The draft General Licence Fees Regulations that are set to repeal the 2009 General Licence Fees Regulations will, if passed, result in licensees with operating costs exceeding 50% of their annual turnover paying more in annual licence fees.

In terms of the existing Licence Fee Regulations, licensees pay 1.5% of total revenue generated from licensed activities less the total cost directly incurred in the provision of licensed services. In terms of the proposed new regulations, licensees will pay 0.75% of turnover. Whilst the percentage used to calculate annual licence fees has been reduced, ICASA proposes taking an unusual step of excluding costs from the calculation of annual licence fees.

ICASA's rationale for the proposed change is that, in its view, licensees are abusing the existing regulations and deducting 'all manner' of costs to pay the lowest licence fees possible.

A licensee whose direct costs represent 50% of annual turnover will not be affected by the regulations if passed in their current form. However, a licensee whose direct costs represent more than 50% of turnover will be paying more in annual licence fees if the new formulation is adopted. In fact, the situation may arise where a licensee that is operating at a loss will still be liable to pay annual licence fees. The new formulation is, in essence, a disincentive to invest in new telecommunications infrastructure and services.

Another issue of significance in the draft regulations is the changed treatment of licence fee exemptions. In terms of the existing regulations, community broadcasters, public broadcasters (ie the SABC) and licensees who are classified as small enterprises pursuant to the provisions of the National Small Enterprises Act are exempt indefinitely from the payment of annual licence fees. The draft regulations propose that the exemption should cease after three years of generating revenue. This will be of particular concern to the SABC, which has not paid licence fees for its public broadcasting service but should also be of concern to community broadcasters who operate on a not-for-profit basis who will nevertheless be held liable for licence fees.

ICASA has requested written representations from interested persons on the draft Licence Fee Regulations. These representations are due by no later than 5 December 2012.

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