

IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 6859/2014

DATE: 2014-05-14

In the matter between:

CITY OF TSHWANE

APPLICANT

and

LINK AFRICA

RESPONDENT

(1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.  
14/5/2014  
DATE

SIGNATURE

JUDGMENT

[Application: Leave to Appeal]

AVVAKOUMIDES AJ: Before me is an application for leave to appeal, to the Supreme Court of Appeal, against the judgment of this Court, handed down on 27 March 2014. The application for leave to appeal raises three grounds, namely the absence of the City's consent, the unconstitutionality of sections 22 and 24 of the Electronic Communications Act No. 36 of 2005 (the Act) and the review of the respondent's actions in exercising its rights in terms of the aforesaid sections.

At the commencement of the application, I was informed by Mr Khumalo, appearing for the applicant (the City), that the City abandons its argument and reliance upon the ground that the City's consent was necessary for the respondent to exercise its rights in terms of sections 22 and 24 of the Act. The abandonment of this ground by the City arises from the decision in *Msunduzi Municipality v Dark Fibre Africa (RF) (Pty) Ltd*, case number 2763/2014, a decision by Steyn J in the Kwazulu-Natal Division, Pietermaritzburg, wherein it was held that the requirement of consent was not necessary.

That leaves the remaining two issues, namely the unconstitutionality of sections 22 and 24 of the Act and the review aspect. The City submitted that the respondent's use of the City's underground pipes, sewers and pipes for an indefinite period of time, as contemplated, constituted a transfer of the City's assets as contemplated in the provisions of the Municipal Asset Regulations, 2008. The City argued that this transfer holds certain ramifications for the City, thus rendering the particular sections unconstitutional. There were no further grounds forwarded by the City in support of the requirements for the sections to be struck down as being unconstitutional. On the facts before me, and on the application as it stands after the consent aspect having been abandoned, it is my view that there are no reasonable prospects of success on appeal regarding the validity of the two mentioned clauses.

On the question of review I remain unpersuaded on the papers that the decision of the respondent to exercise its powers in terms of section 22 is truly susceptible to review.

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The respondent is a licensee in terms of the Electronic Communications Act and its decision is based on its duly awarded licence. In the MTN case, the Supreme Court of Appeal held that any decision in terms of section 22 constitutes administrative action. Correctly interpreted, however, this means that any exercise of powers in terms of the section amounts to administrative action but not merely the decision in isolation. The applicant's case initially and prior to the abandonment of the consent ground, was that the decision is subject to review because of the absence of the City's consent together with the unconstitutionality of the two sections. The ground of consent has been abandoned.

The applicant's complaint was not aimed at the procedural unfairness of the respondent's actions or decision but the manner in which it exercised its powers in the absence of the City's consent. Given these circumstances I am not persuaded that there are any reasonable prospects of success on appeal.

#### ORDER

Consequently the application for leave to appeal is dismissed with costs.