ISSN 1826-3534

federalismi.it
RIVISTA DI DIRITTO PUBBLICO ITALIANO, COMPARATO, EUROPEO

FOCUS AFRICA
14 DICEMBRE 2022

The "shield": the South African Constitutional Court as safe harbour for local government land planning

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Abstract [En]: Recently, the South African Constitutional Court delivered a relevant judgement in matter of local government competence vis a vis with central legislation. Once again, the Constitutional Court shielded municipalities competence in land management and planning. The case involved the central legislation related to telecommunications network and facilities in disregard of municipal bylaws in land planning. The Court protected the competence in zooning schemes and planning of local government from "interferences" from higher level of government but asked both levels to rely more on the principle of cooperative government.

Titolo: The "shield": la Corte costituzionale sudafricana si rivela porto sicuro per le competenze delle municipalità e del governo locale
Abstract [It]: Recentemente, la Corte costituzionale sudafricana ha depositato un importante giudizio che ha visto contrapporre le competenze del governo locale alla legislazione centrale. In linea con i precedenti, la Corte costituzionale ha difeso le competenze in tema di pianificazione territoriale del governo locale. Nel caso in oggetto la Corte è stata chiamata a sindacare la costituzionalità di una norma della legislazione centrale in tema di telecomunicazioni a fronte della competenza delle municipalità in *land planning*. La Corte, ancora una volta, ha difeso le competenze costituzionalmente garantite agli enti locali auspicando, però, un'attitudine maggiormente orientata alla cooperazione tra i livelli di governo.

Keyowords: South Africa, local government, Constitutional Court, municipal bylaws
Parole chiave: Sudafrica, governo locale, Corte costituzionale, regolamenti municipali, conflitto di competenza

Case note: Telkom SA SOC Limited v City of Cape Town and Another (CCT287/19) [2020] ZACC 15

1. Introduction

On 20 June 2020 the Constitutional Court of South Africa delivered a relevant judgement[1] in the field of local government, assessing the constitutional legitimacy of municipal bylaws as regards national legislation. The issue under scrutiny was the compliance of municipal bylaws with section 2 of the Electronic Communication Act, 36 of 2005 (hereinafter ECA). In particular, the case involved the duty

* Articolo sottoposto a referaggio.
[1] Telkom SA SOC Limited v City of Cape Town and Another (CCT287/19) [2020] ZACC 15; 2020 (10) BCLR 1283 (CC); 2021 (1) SA 1 (CC) (25 June 2020).

of the right's holder under the mentioned Act[2], Telkom SA SOC Limited (Telkom) a state-owned company and a provider in the field of telecommunications, to comply with municipal zooning schemes in building and maintaining electronic communications networks and facilities.

The ECA implementation is a direct answer to the National Development Plan 2030 (NDP)[3], which envisages the enhancement of ICT network. What matters here is that ECA entrusts the Minister of Communications and Digital Technologies with the power to undertake a rapid deployment of ICT networks. This policy was originally followed by a White Paper[4] with the indication to pursue speedily the implementation of the ACT and to facilitate the administrative process for obtaining service licensees. Among the priorities set up by the White Paper, there is the need to build a fibre optic network through cables and ducts, on poles as well as access to high sites, to municipal and private land and property for cell phone masts[5]. According to art. 22(1) of ECA, a licensee may enter upon any land of the Republic to build and maintain facilities upon, under and over or across any land. Within the power conferred by this section, moreover, "due regard must be had to applicable law and the environmental policy of the Republic"[6]. It has been argued that this is an example of non-consensual statutory servitudes with the purpose to reach the rapid deployment of ICT facilities; consequently, several conflicts between the licensees and municipalities arose, because this Act does not foresee additional juridical tools for reconciling private and public interests[7]. The core of this litigation was the constitutionality of s. 22 of the ECA with local government functions and powers listed Part B of Schedule 4 and Part B of Schedule 5, read in combination with the underlying principle stated in Section 151 (4). This disposition states that national and provincial spheres of government may not compromise or impede or, which is the same thing, must respect powers and functions of municipalities, which are administrative powers to regulate those matters listed in Schedule 4, Part B and Schedule 5, Part B, where municipal planning is comprised. Nevertheless, there might be a conflict between national (or provincial) legislation and a municipal bylaw: to this regard, secondary sources of law are not valid; in case of contrast, national/provincial legislation prevails according to s. 156(3) [8]. Therefore, the Court had to ascertain if a real conflict had occurred

[2] According to s. 22(1): «An electronic communications network service licensee may […] enter upon any land […] construct and maintain an electronic communications network or electronic communications […] alter or remove its electronic communications network or electronic communications facilities».

[3] National Planning Commission, National Development Plan 2030: Our Future – Make it Work, 15 August 2012.

[4] National Integrated ICT Policy White Paper10 ('White Paper'), GN 1212 in GG 40325 (3 October 2016).

[5] Electronic Communications Act, No. 36 of 2005.

[6] Electronic Communications Act, No. 36 of 2005, Section 22(2).

[7] G. MULLER, *Civiliter exercise of statutory servitude: Reflections on Link Africa and Telkom*, in Constitutional Court Review, Vol. 11, 2021, p. 148. According to the Author the wording of Section 22(1) and (2) mirrors the Government policy to pursue and realise the rapid deployment of telecommunications infrastructure and facilities.

[8] S. 156(3): «Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative».

between s. 22 of ECA and municipal zooning schemes. To put it another way, the issues were the following: (1) if a municipal bylaw, which required a licensee obtain municipal approval for building a cell phone masts, was valid or not; (2) if ECA and municipal bylaw may operate together considering their overlap since telecommunication is a national legislation competence and zooning is located within municipal functional areas.

By stating that right's holder grounded on s. 22(1) cannot disregard municipal planning and that ECA must comply with applicable bylaws, the Court confirmed its role of guardian of local government. The Court appealed to the principle of cooperative government for the resolution of this conflict between national legislation and local bylaw. In the Court's reasoning, this was a case of overlapping competences between two spheres of government which regulates different matters to be solved considering something akin to the double aspect doctrine introduced elsewhere[9].

2. Local government in South Africa: a snapshot

For understanding this case it is crucial to bear in mind the constitutional protection granted the local government by the Constitution. The South African constitutional framework related to local government is unique within the family of federal and regional countries[10]. Firstly, local government is explicitly recognised as one of the three spheres of government in a three-layered system[11]; as stated in Section 40, national provincial and local spheres of government are distinctive, interdependent and interrelated[12].

The reason for this constitutional provision is grounded in the past; indeed, under the Constitution of the Union of South Africa of 1909 and during the apartheid, local bodies were relegated under the umbrella of provincial – and then national – legislation. During the apartheid era, local government was also the symbol of the entrenchment of apartheid; Parliament legislated on local government extensively and used its power to racially divide the South African territory along ethnic lines[13].

[9] The reference is to Canada, where the double aspect doctrine has been developed by the Judicial Committee of Privy Council and then "adapted" by the Canadian Supreme Court. See for example P. MACKLEM, *Canadian Constitutional Law* – 5th Ed., Toronto, Emond Montgomery Publications, 2017, p. 187 ss.

[10] See N. STEYTLER (ed.), *The place and role of local government in federal systems*, Cape Town, Konrad Adenauer Stiftung, 2005; N. STEYTLER, *Comparative Conclusions*, in J. KINCAID – N. STETYLER (eds.), *Local Government and Metropolitan Regions in Federal Countries*, Montreal, McGill-Queen's University Press, 2009, p. 393 ss.

[11] Specifically related to planning see J. VAN WYK, *Planning in All its (Dis)guises: Spheres of Government, Functional Areas and Authority*, in Potchefstroom Electronic Law Journal, Vol. 15, n. 5(2012), pp. 287-318.

[12] S. 40(1) and (2): 40. (1) «*In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.* (2) *All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides*».

[13] Most notably the *Group Areas Act of 1950*.

The new constitutional framework sought to redress local government status, because the de-racialisation of South Africa was intended to work in pair with a new structure of local government. Nevertheless, the constitutional accommodation of local government was not immediate; owing to the Constitutional Court's famous first Certification judgement[14], the Constitutional Assembly was forced to embody a more precise constitutional provisions related to local government. Many reasons were pulled up: among them, the need to promote democratic participation at the local level as well as to reintegrate rural and dispersed communities and to promote democratic participation in the new South African path[15]. Besides that, the local sphere was considered better suited from a developmental policy perspective, since the central level planning was deemed to have limits in understandings the needs of diverse communities[16].

In the Constitution, municipalities are indeed seen to play a key role in respect of national policy implementation. It does not come as a surprise that the "objects" of local government are enumerated in s. 152; and their tasks are to provide democratic and accountable government, to ensure basic services, to promote social and economic development, etc. These reasons have been strongly emphasized by the Constitutional Court by stressing the subordinate role of municipalities in previous constitutional dispensation because they were not recognised and protected by the Constitution[17].

The 1996 Constitution then embodies several principles as regards the protection of local government autonomy[18]. Alongside to the abovementioned s. 151(4), it is worth mentioning section 154(1) and (2), because it imposes the duty to national and provincial governments to support and strengthen the capacity of municipalities to exercise their powers and function. Strictly speaking, municipalities possess the right to administer functional areas listed in Part B of Schedule 4 and Part B of Schedule 5 and other matters assigned by national or provincial legislation. Municipalities have the executive authority and the right to administer, i.e., the right to implement national and provincial legislation and the right to enact bylaws; nevertheless, the Court earlier, in *Fedsure*, stated that municipal councils are deliberative legislative assemblies putting on an equal footing national, provincial and municipal assemblies[19]. Moreover, local

[14] *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), parr. 299-305.

[15] H. FAST, *Local Government in the Rural Areas of South Africa: Structure, Capacity and Constraints*, in Law Democracy and Development, Issue 1(1997), p. 251 ss.

[16] N. STEYTLER, *Local government in South Africa: Entrenching decentralised government*, N. STEYTLER (ed.), *The place and role of local government in federal systems*, op. cit., pp. 186-187.

[17] In Fedsure the Court stated that "local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognized in the Constitution itself". *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)*, par. 2, 46, 122; *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA).

[18] See G. PIMSTONE, *The Constitutional Basis of Local Government in South Africa*, Johannesburg, Konrad Adenauer Stiftung occasional paper, March 1998. For a comprehensive account on local government see J. DE VISSER – N. STEYTLER, *Local government Law of South Africa*, Cape Town, LexisNexis, 2017.

[19] *Fedsure Life Assurance*, cit., par. 26.

government must be assigned the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5, according to which local government is assigned such a matter if it might be better managed locally. To this end, the Constitution entrusts them with a certain degree of revenue raising powers (s. 229)[20]. Without going too far, the constitutional investiture means that local government is asked to play a crucial role in South Africa, and this is mirrored also by the presence of the three different categories of municipalities in the Constitution, in what has been described recently as "the most comprehensive and successful endeavour to date to grant cities constitutional status and standing"[21]. To this regard, the new constitutional enterprise took the first concrete steps with several acts starting from early during the transition, with the Local Government Transition Act (LGTA) followed by several pieces of legislation about the definitions of municipal boundaries, the local institutions, and the structure of the different categories of municipalities[22].

Since the Constitution empowers local government and protects municipalities from "interferences" from the other levels, the Constitutional Court has often shielded municipalities from many attempts from the above to override municipal powers and functions, especially zoning schemes and planning, as the case in comment[23].

[20] See N. STEYTLER – J. DE VISSER, *Local Government*, in S. WOOLMAN – M. BISHOP, *Constitutional Law of South Africa* - 2nd Edition, Cape Town, Juta, 2013, p. 22-42 ff.

[21] R. HIRSCHL, *Cities in Federal Sytems: Comaprative Perspectives*, in E. ARBAN (ed.), *Cities in Federal Constitutional Theory*, Oxford, Oxford University Press, 2022, p. 87.

[22] See R. MASTENBROEK – N. STEYTLER, *Local Government and Development: the new constitutional enterprise?*, in Law, Democracy and Development, Vol. 1, Issue 2, 1997, p. 233 ff..

[23] It has been rightly remembered by De Visser. Cfr. J. DE VISSER, *Mines, malls and cellphone masts: how the Constitutional Court confirms the need for municipal approval and government doesn't seem to want to listen?*, in Local Government Bulletin, Vol. 17, Issue 2, June 2022. The following are the cases decided by the Constitutional Court in favour of municipalities: City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC): MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province In re: Minister for Mineral Resources and Swartland Municipality and Others and Maccsand (Pty) Ltd and The City of Cape Town and Others (CCT 102/11, 103/11) [2012] ZACC 10; 2012 (9) BCLR 947 (CC); Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others, 2014 (2) BCLR 182 (CC); Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others 2014 (5) BCLR 59 (CC); Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others (CCT114/15) [2016] ZACC 2; 2016 (4) BCLR 469 (CC); 2016 (3) SA 160 (CC); City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others (CCT186/17) [2018] ZACC 15; 2018 (8) BCLR 881 (CC) ; 2018 (5) SA 1 (CC) (7 June 2018). On these judgements and about the "course" undertaken by the Constitutional Court see: D. BORGSTRÖM – U.K. NAIDOO, *Playing with Power: The Competing Competencies of Provincial and Local Government*, in Constitutional Court Review, Volume 6, 2014, pp. 57–74.

3. Factual background and constitutional litigation

The case originated by the desire of Telkom to declare invalid the provisions of the Municipal Planning By-laws 2015[24] and the Zoning Scheme Regulations Telecommunications Mast Infrastructure Policy (Policy no. 40544), because it contravened section 22 of the ECA. Telkom, being the right's holder according to s. 22 of the ECA, was tasked to provide to build telecommunications services and facilities. From 2015 onwards, Telkom erected 135 cellular phone masts and rooftop stations, as part of the plan to develop a fibre-optic network of more or less 147.000 kilometres across the country. Telkom identified the property of Mr Kalu in Heathfield (Cape Town) as one site for a cell phone mast and made an agreement with the property owner, according to which a part of Kalu's property would be leased to Telkom. Thus, the mast was intended to be built without any approval under the National Building Regulations and Building Standards Act 103 of 1977. Moreover, Kalu property did not fall within those areas feasible for a freestanding base station (FBTS) and a rooftop base telecommunication station (RBTS); in fact, being the property zoned according to the Bylaw as Single Residential Zone 1 any construction of masts was deemed to be prohibited[25].

In January 2016, Telkom asked to rezone a portion of Kalu property to Utility Zoning, but the City of Cape Town denied such a claim, for not having paid the fee and for incomplete information. Telkom went ahead providing information and the fee and shortly after it started building the masts without obtaining the rezoning and the plan approval. The reaction of the City of Cape Town was to apply for an administrative penalty on Telkom and, at the same time, kept aside the application for rezoning. Henceforth, Telkom sued the City in the High Court; Telkom impugned the bylaw and the Policy being them in conflict with the national legislation on telecommunications, the sole Act to regulate facilities for this purpose, especially in light of s. 22 of the ECA. Shortly after, the City of Cape Town launched a counterapplication grounded on the fact that Telkom erected the mast without the municipal approval and in violation of the Standards Act as well as municipal bylaw.

The High Court was not persuaded by Telkom claims, dismissed the First Applicant application, and allowed the counterapplication. Yet, the High Court explained broadly the reasons, which had been repeated twice, but with fewer words by the Court of Appeal and the Constitutional Court. The High Court emphasised that s. 22 cannot «operate in a vacuum […] it has to co-exist in a web of other laws including municipal by-laws»; recalling the same s. 22(2)[26] the high Court elucidated the applicant that the licensee must comply with all bylaws enacted by the municipalities in their own functional areas as well

[24] City of Cape Town Municipal Planning By-Law, 2015, Province of the Western Cape: Provincial Gazette Extraordinary, 7414 of 29 June 2015.

[25] The facts of the case are extensively explained in the judgement of the High Court. See Telkom SA Soc Ltd v Kalu NO and Another (10354/2017) [2018] ZAWCHC 53, parr. 5-9.

[26] Electronic Communications Act, No. 36 of 2005, Section 22(2).

as other permits, licenses, and authorisations[27]. Hence, the High Court found that the City of Cape Town had «the exclusive legislative competence to regulate zoning of all land in its area for all purposes, regardless of whether the purpose affects a national interest». The judging Court, basically, stated the need to harmonise different sources of law without "harassing" the lower level; it meant that it was (and is still) possible to integrate different sources of law of different functional areas through cooperation among spheres of government.

The appeal filed by Telkom at the Court of Appeal was purely on the constitutionality of the municipal bylaw[28]. The Court recalling previous judgements, remembered the meaning of word "planning" as control and regulation of land use and, concretely, the zoning of land and the establishment of townships[29]. The Court stressed heavily the need avoid intrusions in municipalities competences from the above also recalling Section 41(1), a leading principle in matter of cooperative government. Moreover, the precedent worked properly where Telkom argued that cross municipal boundary networks should be regulated by provincial or national legislation. Relying on *Habitat Council*, the Court dismissed the argument because the right tool has been already enacted, the Spatial Planning and Land Use Management Act, 16 of 2013 (SPLUMA)[30]; and alleging that Telkom was not contesting more than one planning system which is impeding the exercise of his rights as a licensee, but that it should not have constraints in erecting telecommunications infrastructure; thus, it would fall outside the regulatory control[31]. Again, Telkom arguments were dismissed, and it appealed the Constitutional Court.

Telkom contested two issues: the first was the competence of municipalities, as previously claimed, while the second the conflict and the supposed invalidity of the bylaw with s. 22(1) of the ECA in light of s. 156(3) of the Constitution.

As for the first issue, Telkom argued that City planning is not valid for the use of land related to telecommunications infrastructure, because they are extended beyond the boundaries of a single

[27] The Court added that «*the licensee is still required to obtain all other permits, licenses and authorisations required by law which do not constitute a 'municipality's consent', such as rezoning or departure, building plan approval or exemption (which the First Applicant concedes is required), environmental authorisations, heritage authorisation, and civil aviation permits, amongst others. It is for these reasons that I am not in agreement with the Applicants' contention that the By-law and the Mast Policy exceed the boundaries between spheres of planning law*». Ivi, parr. 48-55.

[28] Telkom SA SOC Ltd v City of Cape Town (1038/2018) [2019] ZASCA 121, par. 11.

[29] *Johannesburg Municipality v Gauteng Development Tribunal and others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) par. 41; *Telkom SA SOC Ltd v City of Cape Town and Another* (1038/2018) [2019] ZASCA 121; [2019] 4 All SA 682 (SCA); 2020 (1) SA 514 (SCA), par. 11; *The City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* [2010] ZACC 11; 2010 (6) SA 182 (CC) par. 57. Specifically on this landmark judgement see J. DE VISSER - N. STEYTLER, *Confronting the State of Local Government: The 2013 Constitutional Court Decisions*, in Constitutional Court Review, Volume 6, 2014, pp. 5-6.

[30] Telkom SA SOC Ltd v City of Cape Town, cit., par. 27. On SPLUMA see J. DE VISSER – X. POSWA, *Municipal Law Making under SPLUMA: A Survey of Fifteen "First Generation" Municipal Planning By-Laws*, in Potchefstroom Electronic Law Journal, 22(2019), pp. 1–28.

[31] Ivi, cit., par. 28-29.

municipality; the way out, according to Telkom, would be a restrictive notion of municipal planning. The Constitutional Court denied the claim on the same basis of previous courts: municipal bylaw did not infringe the matter "telecommunications infrastructure" and it is a proper exercise of municipal planning; similarly, the dismission of the argument "cross-boundary networks" was made on the same ground, because provincial or national use of land may not compromise municipal competences[32].

Perhaps the subsequent paragraphs are the most important of the judgement. And this is true for at least two reasons: firstly, the Court stressed heavily than ever the need to understand the protection of local government competences; secondly the Court appealed to an originalist approach, regarding the language chosen by the founding fathers. In fact, the Court continued, «there is nothing in the text of the relevant Schedule which suggests that provincial planning and national planning carry a meaning that includes zoning and subdivision of land». It would be unworkable because «under the Constitution there is no provision for dividing the land in accordance with planning that attaches to each sphere […]». Similarly, that kind of zooning claimed by Telkom would also be subject to the free will of the national sphere, if the latter wants to use that land for different projects. It would not comply with the rule of law and the Constitution[33], given that the problem, as already mentioned, is that of coordination and cooperation, principles embodied by the Constitution as guidelines for the relationship among spheres of government[34].

Lesser words may be spent regarding the conflict between ss. 22(1) and 156(3) since it has already been addressed in the introduction in light to focus the main issue. Nevertheless, it is important to stress that Telkom was relying on a wrong interpretation of two previous judgements, especially *Link Africa*[35], where it was recalled that bylaws may not be adopted to thwart purposes of a given Act; it is simply an *obiter* stating that any Act or regulation adopted for achieving different purposes than those prescribed by the Constitution is null and void (*ultra vires*)[36]. The Court, thus, dismissed Telkom appeal but it prescribed to

[32] Telkom, cit., parr. 20-26.
[33] Ivi, parr. 28-29.
[34] S. 41(1): «*All spheres of government and all organs of state within each sphere must - (a) preserve the peace, national unity and the indivisibility of the Republic; (b) secure the well-being of the people of the Republic; (c) provide effective, transparent, accountable and coherent government for the Republic as a whole; (d) be loyal to the Constitution, the Republic and its people; (e) respect the constitutional status, institutions, powers and functions of government in the other spheres; (f) not assume any power or function except those conferred on them in terms of the Constitution; (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and (h) co-operate with one another in mutual trust and good faith by (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another*».
[35] City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others (CCT184/14) [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) (23 September 2015).
[36] Telkom, cit., parr. 38-42.

make easier the applications procedure for the licensee to promote good administration and avoid conflicts.

4. Concluding remarks.

Local government continues to be identified as the core level to redress the consequences of the previous Apartheid regime. Apartheid manipulated legally the space with tragic outcomes at what has been called the "nano-level", the interpersonal relations; at the "micro-level", it implemented urban group areas; and, thirdly, at the "macro-level", it created unequal relationships between the Bantustan, the reserves, townships, and white South African urban centres. The legacy of apartheid is especially clear in municipalities and local government areas where space is a social product legally justified and imposed from the above. The perspective of critical legal geography helps to understand the attention of the South African Constitution and Constitutional Court to local government[37].

Concerning the topic of the judgement under scrutiny, the right to build telecommunications facilities was scrutinised also in the abovementioned *Link Africa*[38], despite the outcome was different. At stake, there was the constitutionality of ss. 22 and 24 of the ECA because they would have permitted an indiscriminate deprivation of property. The Court denied the argument of the municipality on the basis of the common-law servitudes which permits the right's holder to exercise the non-consensual servitude *civiliter modo*, in the words of the Court «respectfully and with due caution» and it was correct since s. 22(2) of the ECA states that «in taking any action […] due regard must be had to applicable law and the environmental policy of the Republic».

It means that, in the Courts' opinion, the Act harmonises the rights of the licensee, local government interests also through a constitutional oriented interpretation of common law traditions[39]. Hence, relying on Link Africa was not properly fit for Telkom since in the former it was contested the constitutionality of the Act, while in the latter at stake there was the municipal competence in land planning through bylaws. The real issue, in this case, was whether or not the Court lost the occasion to define better the relationship between licenses and local authorities in light of the common-law tradition of servitudes.

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[37] See R. MADLALATE, *Dismantling Apartheid Geography: Transformation and the Limits of Law*, in Constitutional Court Review, Vol. 9(2019), pp. 199-200, 202-203. See on this topic M. NICOLINI, *Legal Geography: Comparative Law and the Production of Space*, Cham, Springer, 2022.

[38] In this case the licensee obtained the permission to install fibre optic cables next to sewage infrastructure, but the municipality started to implement a strategy for broadband connectivity shortly after the beginning of the deployment of the cables. Here the claimant was the municipality who sought the declaration of unconstitutionality of ss. 22 and 24 of the ECA because these provisions do not permit the municipality to decide and approve licenses. It necessary to highlight that in this case it was a public property and not a private property, as well as, under the scrutiny of the court there was the sole constitutionality of the Act, not a conflict of competence.

[39] G. MULLER, *Civiliter exercise of statutory servitude: Reflections on Link Africa and Telkom*, cit., pp. 154 ss.

Maybe the reasons of this "omission" lie elsewhere: it is possible to infer that the Court did not appeal to common law perhaps for its intrinsic connection with practical cases. Rather, it appealed twice to loyal cooperation as a normative principle since the constitution prescribes it as guiding principle in state-provincial-local relations. Firstly, the Court said that the problem of zoning and the purpose of national and provincial legislation is «not a matter of interpretation», but an issue of cooperation, since any implementation of national and provincial policy requires the inclusion of local government in decision making where his competence is affected. Secondly, at the end of the judgement, the Court expressed its concerns relating the length of the procedure to obtain a license, if considered in pair with the purpose of national Act on telecommunications facilities.

Indeed, this judgement shows how national, provincial governments, and public entities in general tend to ignore local government competences and the Court still tirelessly continue to answer to the same questions, stating that municipal planning is a matter exclusively reserved to municipal bylaws. The call is for a harmonisation of competences of the different spheres of government in order to meet the imperative principle of cooperative government[40]. At the end it is worth nothing the founding fathers were right in "protecting" and empowering local government, defining functions, competences, and capabilities, due to the intrusion from higher level of government.

[40] J. DE VISSER, *Mines, malls and cellphone masts*…, cit. Even though it has to bear in mind that it is difficult, in practice, to find for cooperative government, mechanisms to find its place in the legislative and decision-making processes in South Africa. Cfr. J. VAN WYK, *Planning in All its (Dis)guises: Spheres of Government*…, cit., p. 314.