

TELKOM V VODACOM: WHY VODACOM'S FIBRE VICTORY IS A BOOST FOR SA'S 4TH INDUSTRIAL REVOLUTION GOALS

Category: Dispute Resolution, Infrastructure and Telecommunications, Technology Law
written by Lucien Pierce | April 10, 2019



Vodacom has been successful in a Supreme Court of Appeal (“**SCA**”) battle to get access to underground ducts, sleeves and manhole covers (“**the Infrastructure**”) within the Dennegeur Residential Estate in Cape Town (“**the Estate**”).

The Estate had, twenty years ago, installed the Infrastructure, but had permitted Telkom to run its ADSL copper cables in the ducts. In 2016, the Estate invited Vodacom to install fibre infrastructure for its residents. Vodacom laid the fibre in the same ducts as Telkom. Telkom approached the lower courts and obtained a court order (a spoliation order) which returned the exclusive use of the Infrastructure to it.

But, before getting into why this judgment is important for SA's 4th Industrial Revolution goals, here's a bit of context. In around 2000, I represented a foreign client before the Independent Communications Authority of South Africa's (“**ICASA**”) Complaints and Compliance Committee (“**the CCC**”). The client intended providing a cost-efficient digital communications service that entailed the use of [frame-relay technology](#) (an innovative technology at the time). Telkom, got wind of this and lodged a complaint with the CCC claiming that only it was entitled to use frame-relay technology, an argument similar to saying “*I own your car because it travels on my toll-road*”. Needless to say, litigation is expensive and the client simply closed shop and disinvested. An opportunity missed for SA.

Anyway, back to the present. The South African government [has recognised](#) that:

“...we are not very well placed, ranking between 46th and 75th globally on a variety of metrics termed ‘Readiness for the 4th Industrial Revolution’.”

There are a number of components to achieving 4IR goals, one of which is *enabling infrastructure i.e. broadband and communications*.

What comes across in the judgment, is that our SCA Judges are, and have in other recent

communications-related judgments been, "[getting with the programme](#)" as far as 4IR is concerned. Telkom's argument was that it had exclusive use of the Infrastructure and that by allowing Vodacom to lay its fibre in the ducts, it was being deprived of this exclusive use. To use the toll-road analogy, Telkom argued that, even though the toll road belongs to the Estate, Telkom is the only one that should be allowed to use it.

The SCA Judges came up with a practical and wise answer to this argument: they simply said that Telkom had the right to exclusive use of the space in ducts where its cables run, but if there is any other available space in the ducts, then anyone else can use it. Sticking to the toll-road analogy, the Judges said that the ducts are like a multi-laned toll-road, and if there are other empty lanes on it, then other cars can travel in those lanes.

Although they have not explicitly used the terminology "4th Industrial Revolution" our SCA Judges have consistently recognised the need for South Africa to improve its capabilities so that it is able to offer all of the benefits that come with 4IR. The following quote, cited in the judgment, says it all:

"Fast and reliable electronic communications services have the potential to improve the quality of life of all people in South Africa. They do so through increasing the availability of text, audio and other media at schools, universities and colleges, and boosting business and employment opportunities

Reliable electronic communications go beyond just benefiting the commercial interest of licensees to the detriment of ownership of property. The [Electronic Communications Act] is designed to avoid this no winner conflict. What it seeks is to bring our country to the edge of social and economic development for rural and urban residents in a world in which technology is so obviously linked to progress."

Who would have thought that Judges, some of whom joke that they don't even know how to use their mobile phones properly, would be the flag bearers of South Africa's pursuit of the 4th Industrial Revolution. If they continue this enlightened approach, there will be fewer missed opportunities for South Africa. You can find a copy of the judgment [here](#).

P.S. I don't have a bone to pick with Telkom, it has made quantum leaps in its approach, from the days when it was the king of [POTS](#).