REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

20 Aug 2020 Vally J

Case No.: 14867/20

In the matter between:

Vumacam (Pty) Ltd	**Applicant**
and	
Johannesburg Roads Agency	**First Respondent**
City of Johannesburg Metropolitan Municipality	**Second Respondent**
The Right2Know Campaign	**First Amicus Curiae**
Gavin Dennis Borrageiro	**Second Amicus Curiae**

Judgment

Vally J

Introduction

[1] A wayleave is the right to use another party's property without owning or possessing it. The property is to be used in a specified way only. A common

wayleave involves the usage of public roads by private entities wanting to bury cables or to set up utility lines.

[2] In this matter the applicant, Vumacam (Pty) Ltd (Vumacam), over time sought wayleaves from the first respondent, Johannesburg Roads Agency (JRA). JRA granted some of them but not others because it decided to suspend the process of receiving and determining wayleave applications (the suspension decision). Vumacam is prejudiced by the decision. It approaches this Court seeking the following orders: (i) declaring the suspension decision to be unlawful and invalid; (ii) setting aside the suspension decision; (iii) a direction that the receipt of the wayleave applications be entertained, considered and determined; and, (iv) that all its wayleave applications that have been lodged prior to the suspension decision be determined within seven days of the date of the order.

The case of Vumacam

[3] Vumacam is a holder of a class of licence referred to as Electronic Communications Network Services (ECNS) issued in terms of the Electronic Communications Act, 36 of 2005 (the Act). In terms of the licence, Vumacam is entitled to construct and maintain an electronic communications network (ECN). Exercising its rights in terms of the licence Vumacam set out to construct a network of closed circuit television (CCTV) cameras connected to each other and to a data centre. The CCTV cameras are directed at detecting and preventing crime in the areas where they are located. However, they

surveil the movements of all people, the majority of whom are not engaged in criminal activities.

[4] Section 2 of the City of Johannesburg Metropolitan Municipality Public Road and Miscellaneous By-Laws (bylaws) precludes any person from placing "a rope, wire or pole on, under or across any public road" without first securing the written permission of the Council.[1] To secure the written permission the person has to apply for a wayleave which the bylaws refer to as "leave to cross the way". An applicant for a wayleave has to meet certain very specific requirements, but once these are met the bylaws make clear that the "wayleave will be issued." They are issued by JRA.

[5] In compliance with the bylaws, Vumacam has for some time successfully applied for wayleaves for purposes of installing CCTV cameras on public roads. These were always issued within 48 hours of an application being made. In April 2019 the applications were no longer smoothly processed. JRA began increasing or changing the requirements on an *ad-hoc* basis. This caused some tension between Vumacam and JRA, which was resolved in September 2019. Between October 2019 and March 2020, Vumacam was able to secure 64 wayleaves for CCTV purposes. However, it still had 29 outstanding applications at this time. JRA's wayleave department temporarily closed from 20 March 2020. This was caused by the outbreak of Covid-19 within the country. On 9 June 2020 JRA issued a letter to various parties, Vumacam being one of them, informing them that it would be accepting

[1] The Council is the "Metropolitan Municipality of the City of Johannesburg"

wayleave applications from 10 June 2020, save for ones concerning aerial and CCTV installations. These applications would remain "suspended until further notice." Consequently, Vumacam is precluded from further rolling out its CCTV network.

[6] JRA claims that Vumacam wants to install the cameras to surveil the movements of "innocent people" and sell the "footage" to third parties. JVR refers to the surveillance as "spy footage" which is a tradeable asset in the hands of Vumacam. The prevention and detection of crime is not the primary reason for the installation of the cameras, so alleges JRA.

[7] The essence of JRA's case is that Vumacam is spying on an individual's movements and thereby infringing their rights to privacy. To cope with the problems that arise from such spying activities a regulatory framework has to be established. The framework should focus on ensuring that the material collected through the cameras is handled in a manner that protects the privacy of individuals. To this end it needs to establish policies that will attend to issues such as:

a. The compliance requirements that have to be met before wayleaves for "the installation and operation of surveillance cameras in residential areas" can be given;
b. The manner in which the right to privacy of the public would be protected;
c. The place and manner in which the footage and related data captured by the cameras would be stored;

d. The requirements for disclosure, including to whom it may be disclosed, of the footage and related data captured by the cameras.

Application for admission as *amici* and their case

[8] Two parties, the Right2Know Campaign and a Mr Gavin Borrageiro, applied to join the proceedings as *amicus* (the *amici*). Their case is that authorising the installation of a network of video surveillance CCTV cameras infringes the right to privacy, the freedom of movement as well as the freedom of association. The infringement of these fundamental rights impels JRA to afford the general public an opportunity to comment on the applications of Vumacam before taking a decision thereto. As no such allowance is provided for in the application process, they wish to submit to this Court that the issue of public participation be given consideration when determining whether Vumacam is entitled to the relief it seeks, and further that the Court make it compulsory for JRA to seek the opinions of the public before taking a decision on the wayleave applications. This submission, they say, is not presented to the Court by either party in the matter. More importantly, they wish to be afforded an opportunity to submit that, absent the issue of public participation in the authorisation process, and the more fundamental point that there is no law authorising "bulk and indiscriminate CCTV video surveillance", JRA should not issue the wayleaves.

[9] JRA does not oppose the admission of the *amici.* Vumacam, on the other hand, refused to consent to the admission of the *amici.* It filed papers challenging the *amicis* request to be allowed to make submissions on the

ground that the *amici* present no argument distinct from that of JRA. As such, they fail to meet the threshold requirement to be admitted as *amici.* At the hearing Vumacam's counsel, Mr Steven Budlender SC, indicated that Vumacam did not, however, wish to be seen to be obstructive of the *amici's* involvement and would prefer to leave the matter in the hands of the Court.

[10] Having read their papers and having heard argument, it was clear to me that the *amici* had essentially jettisoned their contentions regarding the impact on the freedom of movement and the freedom of association of members of the public by the monitoring that takes places through the CCTV cameras. They also jettisoned their contention that public participation, in the form of comments on the wayleave application, should be made compulsory. This placed the *amici* in a position where they were asking to make the same point as that of JRA, although they emphasised a slightly different approach. They say that in the light of the prevailing legal *lacunae* it would not be just and equitable to grant Vumacam the relief it seeks. In the result, I came to the conclusion that there would be value in listening to the contentions of the *amici,* and accordingly orally issued an order admitting the *amici.* That order is repeated at the end of this judgment.

Analysis

[11] Both JRA and the *amici* were insistent that the application for wayleaves cannot be dislocated from the right to privacy of the public to use public spaces without having their movements monitored. The problem they both face is that

a wayleave application is very narrow in scope, as is the jurisdiction of JRA. This is manifest in the relevant bylaws.

[12] Schedule 2 of the bylaws sets out the basis of a wayleave as well as the process to be followed by an applicant seeking the wayleave.

[13] The foreword to schedule 2 of the bylaws indicates that the bylaws are promulgated to ensure that there is "careful control and co-ordination of all work in a road reserve".[2] JRA performs this function. It does so by receiving and approving or disapproving wayleave applications. While generally a wayleave is a right to use the property of another, in this schedule it is defined as narrowly as "a formal approval to carry out work in the road reserve". In terms of sub-item 1.1.1 of schedule 2 an aspirant applicant must first obtain approval from "the relevant municipal department or authorised agent" before actually applying for a wayleave. Sub-item 2.1 defines the work to be carried as that which "includes the digging of trenches, tunnelling, erection of signboards, erection of structures, shaping and landscaping and any other work that may affect motorists, cyclists, pedestrians, the road footways, kerbing, traffic signs, traffic signals, street lighting, underground or overhead services or any other structure or service that is contained within the road reserve." Sub-item 2.3.6 caters for "installation of services by private concerns, e.g. data cables to connect different buildings." The rest of schedule 2 attends to the procedures that must be followed by the applicant for a wayleave.

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[2] "Road reserve" is defined in the bylaws as "the full width of a public road and includes the verge and the roadway"

Finally, sub-item 3.1.3 provides that if the application conforms with the requirement of the schedule "a wayleave will be issued" by JRA which then "allows for the work to be carried out."

[14] In terms of the bylaws, the only reason JRA could refuse to entertain the application of Vumacam would be if Vumacam had failed to secure the approval of any other municipal department or authorised agent[3] if this is necessary, or if its application failed to conform with the requirements set out in schedule 2. JRA does not dispute this. Its case though is that I must read the requirement set out in sub-item 1.1.1 to mean that Vumacam must first obtain approval for the collection and usage of the data obtained from the CCTV cameras. It does not, nor can it, specify from whom the authorisation is to be obtained. There is no requirement in the bylaws which require Vumacam to first obtain approval for collecting and using data obtained from the CCTV cameras it wishes to install. JRA as well as the *amici* were constrained to identify any law which required Vumacam to obtain approval before it sought to install the CCTV cameras. The case is thus without merit.

[15] Recognising this shortcoming, JRA says that until a law allowing for the regulation of CCTV cameras is put into place it is entitled to refuse to entertain Vumacam's applications for the wayleaves. Stated differently, JRA's case is that the law is deficient in this respect, and until the deficiency is remedied it can suspend the duties imposed upon it by the bylaws. In response to Vumacam's request that it makes a determination on the wayleave

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[3] Sub-item 1.1.1

applications JRA says that "(g)iven that there is no CCTV legal framework, [it] is attempting to protect the City of Johannesburg when processing and granting wayleave applications", and that when a law dealing with this is passed, it "will apply retrospectively". JRA does not explain why it can confidently say that a law – in the form of a regulation or statute – will be passed and more importantly that such a law "will apply retrospectively." There is simply no basis for such a bold averment from an administrative body whose function in this case is to oversee the work that is undertaken at a road reserve and no more.

[16] JRA has no power to decide that the law is deficient. Nor does it have the power to suspend its duties pending the curing of the alleged deficiency. In other words, assuming in its favour that the law is deficient, it still does not have the power to suspend its duties pending promulgation of regulations or the enactment of a statute to deal with issues concerning the collection or usage of data obtained from CCTV cameras controlled by private bodies such as Vumacam. It concedes that there is no law that confers upon it the power to suspend its operations pending the promulgation of regulations or the enactment of a statute to deal with any breach of any person's right to privacy.[4] It is an administrative body having no powers outside of those conferred upon it by the law in general, and in this case by the bylaws in particular. It has to carry out its duties, which for the present purposes ase are restricted to control and coordinate work that is done at or in a road reserve. By refusing to accept

[4] *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 (4) SA 125 (SCA) at [60]

wayleave applications from Vumacam, it is either abdicating its duties or suspending them. It is therefore not acting in accordance with the law. It says that it adopted this course of action in order to protect the privacy rights of persons using the roads on which the CCTV cameras are placed. This may be well-meaning, but it is not lawful. Administrative bodies, like JRA, must perform their duties if the principle of legality, which is part of the rule of law, is to have any meaning.[5] Failing to do so in this case means that it would effectively frustrate Vumacam "by simply not taking a decision either way."[6] That the law does not allow. Accordingly, it has to consider the wayleave applications and issue a determination and if need be furnish supporting reasons.

[17] Finally, for purposes of closure it bears mentioning that there is no dispute that Vumacam complies with the legislative prescripts set out in the *Protection of Personal Information Act 4 of 2013* (POPIA) insofar as protecting an individual's privacy rights are concerned. This is so, notwithstanding the *amici's* contention that, given the absence of an enabling legal framework allowing for "bulk and indiscriminate CCTV video surveillance", it is not just and equitable to, amongst others, compel JRA to consider the wayleave applications. The *amici* point to the real harm that can eventuate from the widespread and indiscriminate digital surveillance that takes place through CCTV cameras in public spaces. However, save for emphasising the issue of a just and equitable remedy, the contention is a repeat of what JRA presents. It is nevertheless is misconceived. To compel JRA to do what the law requires

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[5] Compare: *Head of Department, Department of Education, Free State Province v Welkom High School and others* 2014 (2) SA 228 (CC) at [1]
[6] *Road Accident Fund v Duma and three similar cases* 2013 (6) SA 9 (SCA) at [20]

of it – consider and determine wayleave applications – can under no circumstances be unjust or inequitable. The lack of a legal framework, as mentioned above, is not a matter that falls within the purview of JRA. Thus, the reference to a just and equitable remedy is of no assistance. The collection of personal information via CCTV cameras at a road reserve (video surveillance) and the processing thereof, which reveals who travelled on which road – whether by vehicle or foot – and when they travelled there may infringe the privacy and/or another right(s) of that individual, and may for that reason be unlawful. However, that issue – the legality or otherwise of the conduct - is not engaged here.

[18] The *amici* drew attention to international instruments concerning the issues of privacy and security arising from video surveillance in public spaces. These are no doubt interesting and enlightening. My own research on the topic has revealed that courts are constantly confronted with complex issues involving the need to protect the privacy rights of individuals in the light of the growing prominence of, *inter alia*, the usage of automated facial recognition technology that accompanies video surveillance. The courts have anxiously considered a number of issues arising from the mass electronic surveillance that occurs through the capturing and processing of data from the CCTV cameras that pervade public spaces. The core issue is whether such activity is compatible with an individual's right to privacy. But all of these – the international instruments as well as the international case law - bear no relevance to the present case.

[19] Accordingly, Vumacam has to succeed. The parties agreed that costs should follow the result. I am of the view that it should be costs of one counsel only.

Order

[20] The following order is granted.

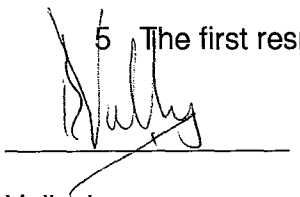
1 The Right2Know Campaign and Mr Gavin Dennis Borrageiro are admitted as, respectively, the first and second amicus.

2 The first decision to suspend the consideration of aerial and CCTV wayleave applications is declared to be unlawful and invalid and is set aside.

3 The first respondent is directed to proceed with the consideration and determination of aerial and CCTV wayleave applications.

4 The first respondent is directed to, within seven days of the date of this order, issue the applicant with a decision on the wayleave applications annexed to the Notice of Motion, together with reasons if the applications are, or if any individual one is, refused.

5 The first respondent is to pay the costs of the application.



Vally J

Dates of hearing:	7 August 2020
Date of judgment:	20 August 2020
For the Applicant:	Steven Budlender SC with Ingrid Cloete
Instructed by:	Schindlers Attorneys
For the defendant:	Kennedy Tsatsawane SC with Naledi Mothapo
Instructed by:	Madhlopa & Thenga Inc
For both amici:	Michael Power with Avani Singh
Instructed by:	Power Singh Inc