IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

27/3/2014

CASE NO: 6859/2014

DATE OF HEARING: 18 MARCH 2014

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

27-3-2014
DATE

SIGNATURE

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Applicant

and

LINK AFRICA (PTY) LTD First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

MINISTER OF COMMUNICATIONS Third Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION AND BACKGROUND

1. This case involves the attempts by the by the first respondent (Link Africa) to exercise what it describes as its statutory powers under the Electronic Communications Act 36 of 2005 (the ECA) to construct and develop a fibre-optic electronic communications network within the jurisdiction of the City of Tshwane (the City).

2. It is common cause that Link Africa is the holder of an electronic communications network services (ECNS) license granted by The Independent Communications Authority of South Africa (ICASA) in terms of ECA. The first respondent alleges that the license confers upon it various statutory powers under sections 22 and 24 of the ECA, enabling it to construct and maintain an electronic communications network consisting of fibre optic cables. It is those powers that Link Africa seeks to exercise. It seeks to do so by deploying its patented FOCUS™ technology, in the City's municipal area, including in particular in the City's existing service ducts, sewer and storm water infrastructure.

3. The City has brought this application to prevent Link Africa from constructing and developing its network. It seeks final relief. The first respondent alleges that the relief sought is inappropriate because:

3.1 the City's core contentions are inconsistent with a binding and recent interpretation of the Supreme Court of Appeal with regard to section 22 of the ECA, referred to hereunder.

3.2 the City has not demonstrated that it will suffer any prejudice at all were Link Africa to proceed to construct its network.

3.3 the City has also not demonstrated that other ECNS licensees or Link Africa's competitors will suffer any prejudice at all were Link Africa to proceed to construct its network.

3.4 by contrast, Link Africa has demonstrated that it will suffer considerable prejudice were the relief sought by the City to be granted and indeed has already suffered prejudice by virtue of the present application.

3.5 it is common cause that South Africa is facing serious problems regarding a lack of broadband capacity, which is in turn causing serious economic difficulties for the country. Link Africa's construction of its network would be in line with the call of the Minister of Communications for greater broadband

capacity availability to be developed to remedy these problems.

3.6 Link Africa's construction of its network will ultimately benefit members of the public and businesses who will make use of the network.

4. The answering papers of Link Africa set out fully the history of this matter, the nature of ECN networks, the broadband difficulties facing the country and the plans of Link Africa in relation to its network. The essential facts are not disputed by the City.

5. The real issues are contained in three legal contentions of the City which are the following:

5.1 Firstly, Mr Ngalwana who with Mr Khumalo, appeared for the City contended that sections 22 and 24 of the ECA do not entitle Link Africa to construct its network *without the City's consent*.

5.2 Secondly, the City contends that Link Africa's decision to construct its network falls to be reviewed and set aside.

5.3 Thirdly, the City contends, in the alternative that sections 22 and 24 of the ECA fall to be declared unconstitutional and invalid.

6. The first respondent contends that each of the legal contentions are untenable.

THE PROPER INTERPRETATION OF SECTIONS 22 AND 24 OF THE ECA

7. The objects of the ECA contained in section 2 thereof include the following:

7.1 Promoting the universal provision of electronic communications networks and electronic communications services and connectivity for all;

7.2 Ensuring the provision of a variety of quality communications services at reasonable prices; and

7.3 Promoting the interests of consumers with regard to the price, quality and the variety of electronic communications services.

8. In line with these aims, sections 22 and 24 of the ECA grant various rights to ECNS licensees to allow them to construct and install electronic communications networks. These sections provide as follows:

"22 Entry upon and construction of lines across land and waterways

(1) An electronic communications network service licensee may-

(a) enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic;

(b) construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purpose, any railway and any waterway of the Republic; and

(c) alter or remove its electronic communications network or electronic communications facilities, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.

(2) In taking any action in terms of subsection (1), due regard must be had to applicable law and the environmental policy of the Republic."

"24 Pipes under streets

(1) An electronic communications network service licensee may, after providing thirty (30) days prior written notice to the local authority or person owning or responsible for the care and maintenance of any street, road or footpath-

(a) construct and maintain in the manner specified in that notice any pipes, tunnels or tubes required for electronic communications network facilities under any such street, road or footpath;

(b) alter or remove any pipes, tunnels or tubes required for electronic communications network facilities under any such street, road or footpath and may for such purposes break or open up any street, road or footpath; and

(c) alter the position of any pipe, not being a sewer drain or main, for the supply of water, gas or electricity.

(2) The local authority or person to whom any such pipe belongs or by whom it is used is entitled, at all times while any work in connection with the alteration in the position of that pipe is in progress, to supervise that work.

(3) The licensee must pay all reasonable expenses incurred by any such local authority or person in connection with any alteration or removal under this section or any supervision of work relating to such alteration."

9. Mr Ngalwana submitted that, notwithstanding the breadth of the powers conferred by these sections, they do not entitle an ECNS licensee to exercise them unless the City consents thereto.

10. Mr Budlender who appeared for the first respondent submitted that the argument about the consent is directly at odds with the decision of the Supreme Court of Appeal in the recent matter of Mobile Telephone Networks (Pty) Ltd v SMI Trading CC 2012 (6) SA 638 (SCA). That matter concerned a base station constructed by another ECNS licensee, MTN, on land belonging to a private landowner. The case turned on the proper construction of section 22 of the ECA. The landowner argued, and as I understand, so does the City in this case, that:

"[A] purposive construction of s 22 would not authorise a licensee to occupy the land indefinitely but that s 22(2), by emphasising that the actions in terms of s 22(1) must be taken 'with due regard for applicable law', also referred to private landownership. A proper, constitutional, interpretation thus meant that the consent of the landowner had to be obtained for an exercise of the rights in terms of s 22(1)."

11. However, the Supreme Court of Appeal in the MTN judgment rejected this contention. Malan JA stated as follows:

"I find this interpretation 'unduly strained'. It cannot be correct simply because the reason for the powers given by s 22(1) would fall away if consent of the owner were to be a requirement. Section 22(1) specifically dispenses with the need to obtain the owner's consent. It is no answer to suggest that, because no provision is made for, for example, the delictual liability of the licensee, limitations on the liability of the landowner and responsibility to maintain access roads, an agreement of lease or other agreement is required. It seems to me that the general provisions of the law are sufficient to provide for these eventualities. The words 'with due regard' generally mean 'with proper consideration' and, in the context, impose a duty on the licensee to consider and submit to the applicable law. This duty arises only when the licensee is engaged 'in taking any action in terms of subsection (1)': the 'action' referred

to by s 22(1) is entering, constructing and maintaining, altering and removing. These actions are authorised. It is 'in their taking' that due regard must be had to the applicable law. A fortiori the 'applicable law' cannot limit the very action that is authorised by s 22(1)."

12. The City's core contentions appear to be in conflict with the, directly on point, decision of the Supreme Court of Appeal to which I am bound.

13. Mr Ngalwana submitted that there is a distinction between this case and the MTN case. He argued that the MTN case concerned a private landowner relying on his common law rights of ownership, whereas this case concerns a public landowner relying on the Municipal Asset Transfer Regulations, 2008 (the MAT Regulations).

14. Mr Budlender submitted that the MAT Regulations are not applicable and do not assist the City for the following reasons:

14.1 Section 22(1) of the ECA sets out the powers of ECNS licensees in respect of "*any land*". It goes on to expressly specify that this includes any "*street, road, footpath or land reserved for public purposes*". It appears to be rather clear that the powers of ECNS licensees apply both to private and public land.

14.2 The Supreme Court of Appeal appears to have considered this aspect in explaining that "*section 22(1) empowers a licensee to enter upon public and private land, construct and maintain its network or facilities and alter and remove them*".

14.3 Section 22 does not set out two regimes, one applicable to private land and one applicable to public land. On the contrary, it sets out a single regime applicable to both public and private land. The section thus cannot mean different things depending on whether it is being use for public or private land.

14.4 Moreover, while the City repeatedly emphasises the MAT Regulations that apply to the City's land, it surely cannot suggest that these are of a higher order than the private land ownership rights at issue in the MTN case. This is especially the case seeing as the Supreme Court of Appeal expressly recognised that those private rights fell within the protection of the constitutional right to property guaranteed by section 25(1) of the Constitution.

15. Mr Budlender submitted further that even if the City's argument regarding section 22(1) of the ECA were tenable it appears to have overlooked the even broader powers afforded by section 24 of the ECA.

16. Section 24 of the ECA deals with the powers of ECNS licensees in relation to networks that are to be constructed or maintained in pipes, tunnels or tubes underneath any street, road or footpath. This section did not arise in the MTN case because that case involved a base station – not a network underground.

17. Section 24(1) of the ECA is clear that the ECNS licensees have the rights to construct and maintain such underground networks subject only to the duty to give 30 days "*prior written notice*" to the local authority concerned. The City's contention in this regard can thus not hold any water.

18. The rights of the local authority are then specified by sections 24(2) and 24(3). These rights are only that the local authority is entitled at all times to supervise the work concerned and that the ECNS licensee must pay all reasonable expenses incurred by the local authority in connection with the construction and maintenance of the networks or the supervision referred to.

19. It must follow in my view and correctly submitted by Mr Budlender, that it simply cannot mean that a local authority must give its consent before section 24 powers are exercised. To do so would render the section largely meaningless.

20. Mr Budlender submitted for all of these reasons the City's interpretative argument regarding consent is untenable. I agree.

THE CITY'S ATTEMPT TO REVIEW AND SET ASIDE THE LINK AFRICA DECISION

21. Mr Ngalwana submitted that the City's contention is that the decision of Link Africa to construct and deploy its network falls to be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

22. In light of the MTN judgment it does appear to me that a decision by an ECNS licensee to exercise its section 22(1) powers amounts to administrative action under PAJA. It is thus subject to review by the party affected by it.

23. Mr Budlender submitted however that the City's attempts to review Link Africa's decision in this case are fatally flawed for three reasons as more fully appear hereunder.

Unreasonable delay

24. The attempted review should be dismissed on the grounds of unreasonable delay.

25. The first time that the City sought to review the Link Africa decision was in its amended Notice of Motion and supplementary founding affidavit filed on 4 March 2014. This was more than four months after Link Africa had informed the City of its decision, on 1 November 2013.

26. When Link Africa raised this question of unreasonable delay, the City elected not to provide any explanation at all for its delay. Instead, it resorted to a contention that because the review had been launched within 180 days of the decision, no question of delay could arise.

27. This however, submitted the first respondent, involves a misunderstanding of PAJA. Section 7(1) (b) of PAJA provides that an application for judicial review "*must be instituted without unreasonable delay and not later than 180 days after the date ... on which the person concerned was informed of the administrative action*".

28. I was referred to Professor Hoexter, the leading authority on administrative law, who in her book Hoexter, Administrative Law in South Africa (2012) at 534 has explained the effect of this provision: *"[I]t is possible for a delay to be found to be unreasonable even if proceedings are brought within the 180- day limit.*"

29. The High Court in the decision of Thabo Mogudi Security Services CC v Randfontein Local Municipality [2010] 4 All SA 314 (GSJ) at para 59 has adopted the same position: "*Section 7(1) requires that the proceedings for judicial review must be instituted "without unreasonable delay and not later than 180 days ...". This entails a twofold enquiry. The first is whether the proceedings were instituted "without unreasonable delay". If they were not, then the enquiry ends there, without having regard to whether such proceedings were instituted within a period of 180 days. In other words, a period less than 180 days could be found by the court to constitute unreasonable delay.*"

30. In the present case, the City has not denied the averment that there has been prejudice caused to Link Africa by the delay and has not offered any explanation for its delay. This is despite the duty resting on the City to do so. See Lion Match Co Ltd v Paper Printing Wood & Allied Workers Union and Others 2001 (4) SA 149 (SCA) at para 35.

31. On this basis, the first respondent submits that the complaint of unreasonable delay must be upheld and the application must be dismissed on this basis alone. I agree with the submissions of Mr Budlender and find that the delay was indeed unreasonable given the circumstances.

No regard to the MAT regulations

32. The main ground of review relied on by the City is the contention that the Link Africa could not have had due regard to the MAT Regulations.

33. However, Link Africa in its answering affidavits answers this contention directly as follows: "*I specifically deny the allegation that Link Africa failed to consider relevant considerations. Link Africa gave careful consideration to all relevant factors, including considering the response of the City to Link Africa's call for representations, which referred to procurement processes and legislation and specifically mentioned the Municipal Asset Transfer Regulations and the Public Finance Management Act 1 of 1999; and considering and giving due regard to all legislation which was potentially relevant, including section 217 of the Constitution and the provisions of the Local Government: Municipal Systems Act 32 of 2000.*"

34. The City sought to contest the truth of this factual allegation. The first respondent submitted that the City cannot be permitted to do so because in an opposed application Link Africa's allegations therefore must be accepted unless it is "*so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the*

papers". See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E – 635C.

35. Mr Budlender submitted that the fact that the City might disagree with Link Africa's decision is one thing but it cannot contend that its disagreement is such that Link Africa must be disbelieved or that it has committed a reviewable irregularity. To do so would be to collapse the distinction between appeal and review. I am also in agreement with the first respondent's submission in this regard.

The due regard standard

36. Third, and in any event, it must be borne in mind that the "due regard" standard relied on by the City in its review application only appears in section 22 of the ECA, not section 24.

37. That latter section contains no such qualification and requires only that 30 days' notice be given – which was plainly the case. Link Africa had always indicated that it was relying on both its section 22 and section 24 powers. Either is sufficient to allow it to proceed.

38. For this reason, even if Link Africa's exercise of its section 22 powers was irregular it is entitled to proceed to exercise its section 24 powers to construct and maintain its network.

39. Mr Budlender thus submitted that the review therefore falls to be dismissed. I am inclined to agree.

THE CONSTITUTIONAL CHALLENGE

40. Lastly the City submitted that the court ought to declare sections 22 and 24 of the ECA to be unconstitutional. Two contentions were submitted in this regard. First, the City asserts in a single sentence that because sections 22 and 24 do not require the landowner's consent it is "*patently unconstitutional because it permits arbitrary deprivation of property in contravention of section 25 of the Constitution.*"

41. Section 25(1) of the Constitution provides as follows: *"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*" The City's contention appears to be that it is the bearer of the right to property under section 25 of the Constitution. That, as submitted by Mr Budlender, is a novel proposition and for which the City cited no authority.

42. It is also inconsistent with section 7(1) of the Constitution which provides that the "*This Bill of Rights ... enshrines the rights of all people in our country*". It is thus difficult to understand how the City could be said to be one of those people.

43. These contentions are again inconsistent with the MTN judgment. It is correct, as the City contends that there was no constitutional challenge in that case. But the reasoning of that judgment nevertheless bears directly on the sustainability of the City's contentions.

44. In this regard the judgment rejected the notion that section 22 of the ECA allowed for an arbitrary deprivation of property. The court reached this conclusion because it held:

44.1 Not all deprivations of property are arbitrary. Everything depends on the extent of the deprivation, viewed against the purpose of the deprivation.

44.2 Any decision by an ECNS licensee which gave rise to an arbitrary deprivation of property would not be permitted by section 22 of the ECA and would be set aside on review.

45. The court's reasoning makes clear that the section cannot be regarded as giving rise to, or permitting, an arbitrary deprivation of property.

46. In the present case the City could not explain why the deprivation of property occasioned by the Link Africa decision is arbitrary.

47. The facts demonstrate that:

47.1 The need to roll-out networks such as the Link Africa network is acute and is essential to avoid negative effects on the South African economy.

47.2 There is no tenable suggestion of any disadvantage to the City.

47.3 The deployment of Link Africa's network in the City's sewer system involves a series of advantages to the City and those people and businesses requiring network access (I quote from the first respondent's answering affidavit):

"68.1 fibre-optic cables are installed using existing underground infrastructure;

68.2 the technology used avoids the high costs and disruption associated with the traditional road digging method of installing cables;

68.3 the municipality derives some additional benefit to its sewer network – CCTV footage and pipe cleaning free of charge;

68.4 it is a faster and more effective product in the implementation process than any other product in the market; and

68.5 it is a safe, secure network with virtually unlimited bandwidth."

48. In the circumstances, the constitutional argument based section 25 of the Constitution should fail.

49. The second contention is that sections 22 and 24 of the ECA are unconstitutional because (on the City's contention) they are at odds with other provisions of the law.

50. Mr Budlender submitted that quite apart from the fact that the City's interpretation is not well-founded, the argument is again untenable because there is no principle of law which says that a statute dealing with issue A is unconstitutional because it impliedly amends or affects a statute dealing with issue B. On the contrary, our courts have developed various presumptions of interpretation to deal with exactly this issue.

51. The City moreover cannot point to a single provision of the Constitution that is said to be violated by sections 22 and 24. Instead, its attack is in truth and expression of its unhappiness at

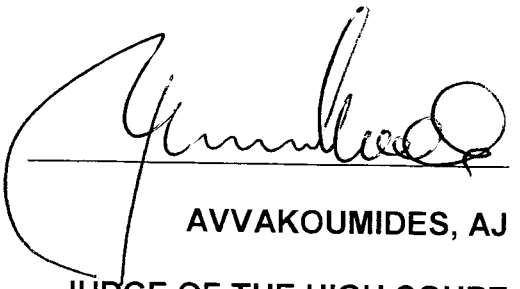
the approach taken by Parliament. Whatever the merits of this unhappiness, it does not give rise to unconstitutionality.

52. This is made clear by decisions of the Constitutional Court dealing with the rationality requirement of the Constitution. In the case of Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others 2008 (5) SA 171 (CC) paras 62 – 63 the Constitutional Court held: "*The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature.*"

CONCLUSION

53. In all the circumstances I am of the view that all three contentions of the City cannot succeed for the reasons given above. The applicant has not established a right to any relief, and its application falls to be dismissed in its entirety, with costs.

54. Consequently the application is dismissed with costs.



AVVAKOUMIDES, AJ

JUDGE OF THE HIGH COURT

Representation for the Applicant:

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Instructed by	Dlamini Attorneys

Representation for First Respondent:

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