



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

In the matter between

Case No: 13543/14

**CARL HENRICUS BEEKMANS N.O.
STEPHEN MARSHALL N.O.
TIMOTHY LISTER MAUGHAN N.O.**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT**

And

**MOBILE TELEPHONE NETWORKS (PTY) LTD
CITY OF CAPE TOWN**

**FIRST RESPONDENT
SECOND RESPONDENT**

Coram: ROGERS J

Heard: 21 MAY 2015

Delivered: 3 JUNE 2015

JUDGMENT

ROGERS J:

Introduction

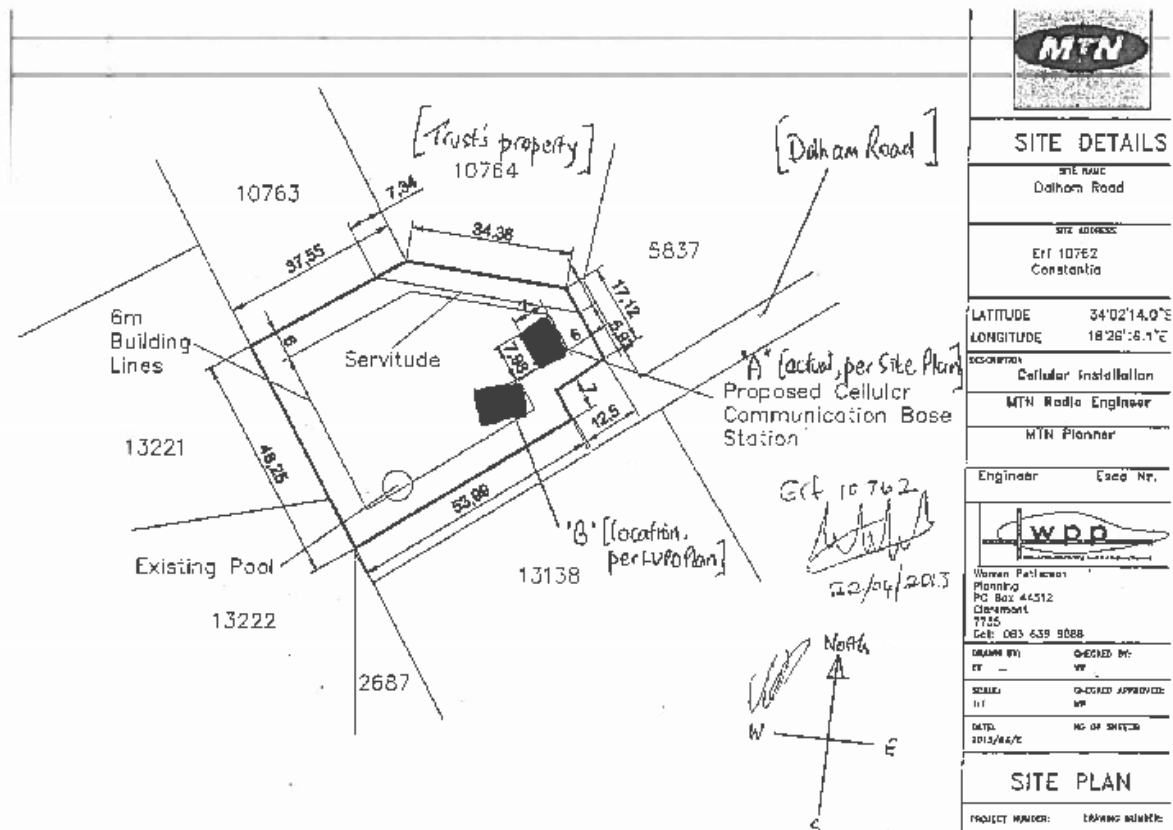
[1] This case is about the construction by the first respondent ('MTN') of a base telecommunication station, including a 14,5 metre high mast, on Erf 10762 Constantia, which lies at the south-west end of Dalham Road.¹ The applicants, to whom I shall refer collectively as 'the Trust', are the owners of Erf 10764, which abuts Erf 10762 on the latter's northern boundary. The Trust seeks to set aside building plan approval granted to MTN by the second respondent ('the City') on 17 October 2013. The case raises questions regarding the interpretation and application of the National Building Regulations and Building Standards Act 103 of 1997 ('the Act') and the regulations promulgated thereunder in relation to so-called 'temporary buildings'.

[2] MTN opposes the application. The City abides and has not participated in the proceedings. Mr Mitchell SC leading Mr Kelly appears for the Trust and Mr Mtembu for MTN.

The facts

[3] To assist in what follows, I reproduce below a Site Plan of Erf 10764, on which certain features, to be discussed later, are marked:

¹ Three separately paginated files were placed before me, being the papers in the present application, the papers in an earlier urgent application, and the record furnished by the City in terms of Rule 53. Where it is necessary to identify a document in this judgment, I shall do so by page number preceded by the letters A, U and R as appropriate.



[4] The history of the matter is briefly the following. Erf 10762 is zoned Single Residential. Prior to the construction of the base station it was vacant land. In order to construct the base station MTN needed to get approval for a departure in terms of s 15 of the Land Use Planning Ordinance 15 of 1985 ('LUPO'). During May 2008 MTN lodged an application in terms of s 15(1)(b) of LUPO to use the property on a temporary basis, being five years, as a base station. There were four objections, including from the Constantia Property Owners' Association ('the CPOA'). The two main objections, as summarised in the City's planning report dated 4 October 2010, were health and safety concerns and adverse aesthetic impact, both of which might reduce the value of surrounding properties. MTN's position was that there is no conclusive evidence of adverse health effects. The proposed temporary departure would only be issued for five years, thus giving opportunity to decommission the site if research proved that it was detrimental to health. Visual impact would be minimised by disguising the mast as a pine tree blending in with the existing trees.

[5] The planning report recommended that the application be approved on specified conditions. On 20 October 2010 the Council granted the departure on the

recommended conditions. The approval was valid for five years. After five years, or if the site was decommissioned before such time, MTN was to remove all site infrastructure and the property was to be rehabilitated. If the base station was still required to be operational after five years, a new application had to be made for consideration and approval. The mast was to be disguised as a pine tree. Importantly for present purposes, the 'location' of the base station was, in terms of a 'special condition', to be 'generally in accordance with' three specified plans referred to in the approval as Site Development Plans. In truth only one of the three specified plans, titled 'Site Locality Drawing Plan View', indicated the intended location of the base station on the property.² For convenience I shall refer to this as the LUPO Plan. The other two specified plans were Equipment Layout plans.³

[6] The City notified MTN of this decision by way of a letter dated 4 November 2010 addressed to MTN's town planners, Warren Petterson Planning ('WPP'). This letter stated that the validity period of five years would run from the Council's final notification letter. It appears that this would be issued after the finalisation of any administrative appeals. The CPOA duly lodged an appeal. By way of a letter dated 30 January 2013 the City notified the CPOA that the Competent Authority had dismissed the appeal. Why the appeal took so long does not appear from the papers. On 5 March 2013 the City sent a final notification letter to WPP, stating that the appeal process had been concluded and that the previous approval was now regarded as final.

[7] MTN not only required a departure in terms of LUPO (which it now had); it also needed approval in terms of the Act to construct the base station, which was to be a three-room brick-and-mortar structure with a corrugated iron roof and a wall-enclosed slab with gated vehicular access on which the mast was to be erected. Two of the rooms are described on the plans as Operator Rooms, the third as an Equipment Room. The structure is not intended for human habitation.

[8] During April 2013 MTN submitted building plans for approval in terms of s 4 of the Act. At this stage there was no indication that the approval which MTN was

² A43 and R344; marked-up version at A47.

³ R345 and R346.

seeking was anything other than ordinary building plan approval in accordance with s 7(1) of the Act.

[9] In an internal report by a Mr Gossman (Senior Engineering Technician in the City's Health Department: Specialised Services) the writer inter alia recommended 'that a rigorous public participation process' be followed 'as there has been public outcry in the media some time ago in that particular area'.

[10] Objections to building plan approval were lodged by 21 property owners in the area, including the Trust, during May and June 2013. The objectors, including the Trust, submitted objections in identical form in which only the health issue was raised and in terms of which the objectors asked that approval be refused in terms of s 7(1)(b)(ii)(bb) (ie on the basis that the building would 'probably or in fact be dangerous to life or property'). The Trust lodged an additional objection through its town planner, Tommy Brümmer Town Planners ('TBTP'). The thrust of the TBTP objection was aesthetic. The Trust complained that the base station, and in particular the mast, would be unsightly and objectionable and devalue surrounding properties. An expert opinion from a professional valuer was attached. The Trust said that if the mast could be successfully disguised, it should be disguised as a stone pine, which were common in the area, and 'not some arbitrary pine tree that is not common to the region at all'.

[11] In regard to the location of the base station, TBTP said the following:

'o The positioning of the proposed mast at the eastern side of Erf 10762 is regarded as highly insensitive due to this position being at the focal point of the western axis of Dalham Road, which ends in a cul-de-sac with turning circle. The mast will be highly visible to any user of Dalham Road travelling in a westerly direction, given that the mast will be in the direct line of sight to any person driving or walking along the road. No attempt has been made to locate the mast closer to the trio of Stone pines located within the southern boundary of Erf 10762⁴ Constantia.

⁴ The letter says 'Erf 19762' but this is an obvious typographical error: there is no Erf 19762 abutting Erf 10762.

- The mast will be visible from a number of other locations as well and will most certainly compete with the trio of Stone Pines which are imminently visible from the surrounding network of roads in the area...'

[12] These concerns found some support in an internal City report dated 12 July 2013 authored by the Regional Manager of Environmental and Heritage Resources Management: Southern Region. The writer said that the importance of mature trees as visual screening was clearly stipulated in the City's Cellular Telecommunications Infrastructure Policy. Since Erf 10762 did not itself contain large trees, the mature stone pines in the vicinity of the site formed the only apt visual mitigation. He proposed that due consideration be given to tree species that would ultimately provide effective screening for a 14,5 metre high mast.

[13] On 3 October 2013 the City notified MTN that the application for building plan approval was refused in terms of s 7. The only document in the record furnished by the City shedding light on this decision is an internal memorandum of the previous day written by Mr William Carter: Section Head BDM in which he said that the application should be returned to the MTN unapproved in its current form. He continued:

'The applicant is to submit a written application in terms of Regulation A23(1).... The period to be applied for as a temporary building (cell mast) is to be for a maximum of five (5) years. This is to bring it in line with the Temporary Land Use Departure that has been granted for this property.

This will then replace the Section 4 application and Ipos is to indicate it as a temporary building.'

[14] On 10 October 2013 WPP on behalf of MTN informed the City that MTN withdrew the previous application in terms of s 7 and wished to submit a revised application in terms of regulation A23(1) for a period of five years corresponding with the duration of the approved departure. No new plans were submitted; the City was simply asked to reassess, now in terms of regulation A23, the plans already submitted.

[15] On 17 October 2013 the City, in the person of Mr Carter, addressed a letter to WPP as follows:

‘Provisional authorisation is hereby granted in terms of Regulation A23(1)... to proceed with the erection of the Temporary Cellular Communication Base Station as proposed on building plan application number 01461/2013 subject to the following conditions:

1. The period it may remain on the property is five (5) years from the granting of the Temporary Land Use Departure (granted in March 2013). It will then be demolished and all material moved from the property. One or more extensions may be considered on request of the owner as contemplated in Sub-regulation A23(4)⁵ provided that the Land Use Departure is further extended.
2. The Building Development Management Section reserves the right to order you to remove the temporary structure should it be deemed necessary for health or safety reasons or on non-compliance with any of the conditions imposed in granting this authorisation.
3. All conditions set out in the granting of the Temporary Land Use Departure remain and are to be adhered to.

This authorisation does not exempt you from complying with any other applicable law with regard to the erection and/or use of the Temporary Cellular Communication Base Station.’

[16] The building plans referred to in this approval, and bearing the City’s date stamp 17 October 2013, formed part of the record furnished by the City in terms of rule 53.⁶ As I have mentioned, these are the plans initially submitted for approval in terms of s 4 read with s 7 of the Act. The LUPO Plan was one of the plans included in the batch of approved building drawings.⁷ Two of the other drawings in the batch were Site Plans, one of which (with additional markings) I have reproduced above.⁸ One of the Trust’s complaints in the present application is that these Site Plans show a different location for the base station from the one in the LUPO Plan. The Trust says that MTN has erected the base station at the location reflected in the Site Plans, a location which in the Trust’s view is not ‘generally in accordance with’ the LUPO Plan. This is one of the grounds on which the Trust seeks to have the building

⁵ The letter refers to regulation A25(4) but that is a typographical error.

⁶ R341-347.

⁷ R344.

⁸ R340 and R343.

plan approval set aside. The other has to do with the City's use and apparent understanding of the scope of regulation A23.

[17] Mr Mitchell submitted, in relation to the condonation issue to be considered presently, that TBTP had inspected the building plans in order to prepare its objection on behalf of the Trust but that one could infer that they had not noticed that the Site Plans differed from the LUPO Plan in regard to the location of the base station. The inference arose from the first of the two bullet points I quoted earlier from TBTP's objection to the building plans. The location reflected on the LUPO Plan is the focal point of the western axis of Dalham Road and would be in the direct line of sight of a person driving down Dalham Road towards the property. The location on the Site Plans is somewhat to the right as one drives down Dalham Road.⁹

[18] This inference seems to be correct and I accept that, if TBTP looked at the plans at all in preparing its objection, it must have failed to notice the difference in location. This is not as surprising as it might at first blush seem. It must be remembered that the LUPO Plan itself was included in the building plans. The Site Plans were drawn to a different scale and differently orientated. Accordingly, a person looking at the plans without close analysis might form his opinion on the location of the base station from the LUPO Plan. I am less confident that TBTP did actually look at the building plans. Its objection does not refer to any particular features of the building plans. The plans forming part of the LUPO approval already indicated in some detail the structure to be erected. TBTP's objection, which seems in essence to have been a rerun of the LUPO objections on aesthetics, may have been prepared without examining the building plans and on the assumption that the base station was to be positioned at the location indicated in the LUPO Plan.

[19] In mid-November 2013 Mr Brümmer learnt in an email from Mr Carter that MTN's building plans had been approved. Mr Carter simply told Mr Brümmer that 'the plans were approved last month'. The Trust and Brümmer say that they assumed, wrongly in the event, that the plans had been approved in the usual way

⁹ See also para 49.3 of the founding affidavit record A19.

in terms of s 7. They did not take steps at that stage to impeach the approval of the plans on review (they had no right to an administrative appeal).

[20] In mid-July 2014 MTN began construction. The Trust says that this is when it learnt the base station's actual location differed from the LUPO Plan. On 31 July 2014 the Trust launched an urgent application in two parts. Part A, which was set down for 8 August 2014, was for urgent interim relief; Part B sought a review and setting aside of the approval of the building plans on 17 October 2013. Part B is the matter now before me. By 31 July 2014 the Trust had learnt, through investigations made by TBTP, that the plans had purportedly been approved in terms of regulation A23.

[21] There was correspondence between the parties' attorneys in early August 2014. In the first of these letters, dated 5 August 2014, MTN's attorneys said that MTN conceded that construction of the current location contravened the approved departure. They stated that MTN had ceased construction at the non-approved location and would rehabilitate the site and commence construction at the correct location. Subsequent correspondence reflected a difference of opinion as to whether construction at the 'correct location' was dependent on further building plan approval. In the meanwhile, and on 6 August 2014, MTN filed an answering affidavit in relation to Part A, attaching its attorneys' letter of 5 August 2014 and stating that the matter was no longer urgent. In para 13 MTN's deponent said that MTN had ceased construction work 'on unapproved site'. Part A was removed from the roll on 8 August 2014 on the basis that urgency had fallen away though there was no resolution as to whether further building plan approval was needed.

[22] In an internal MTN email of 29 August 2014 a Mr Ockie Theron emphasised that in terms of the approved LUPO departure the base station only needed to be 'generally in accordance' with the LUPO Plan. The City's approval of the building plans indicated that the City's officials regarded the plans as generally being in accordance with the LUPO Plan. He expressed the opinion that MTN was entitled to build in accordance with the approved building plans but requested clarity from MTN's legal department. In an internal response of 2 September 2014 Ms Shelley Gray asked Mr Theron to get an opinion from an experienced town planner to verify

whether 'we actually have a leg to stand on here or whether we need to redo the Land Use Departure to comply with the approved building plans.' Ms Gray said that as a town planner herself she regarded the building plan approval as being definitive and that the approved LUPO departure was 'only about allowing MTN to deploy a base station on the premises'.¹⁰

[23] On 9 September 2014 WPP furnished the opinion contemplated in Ms Gray's email. The author said that the building plans were assessed by the town planning officials who had imposed the departure conditions. These officials were of the opinion that the building plans were 'generally in accordance with' the LUPO Plan. (This latter statement was, in context, an inference drawn by the author from the fact that the City had approved the building plans and that the City's Town Planning Department participated in the approval process.)¹¹ The approvals which MTN had could thus, in the author's opinion, be considered as valid and final. As long as MTN built in accordance with the approved building plans, the validity of its actions could not be questioned. The author continued by observing that the LUPO departure related to the proposed use of the land whereas the Act prescribed building standards and regulated construction. He concluded:

'Based on the above and a subsequent site inspection to confirm that MTN is in fact constructing the site in accordance with the approvals issued by the City of Cape Town, we would like to confirm that the site is in fact being constructed at the approved position. The construction is by no means contrary to the approvals issued or any other governing legislation.'

[24] Presumably on the basis of this opinion, MTN resumed construction at the location indicated on the approved building plans. The Trust learnt of this on 27 October 2014. On 31 October 2014 the Trust launched a second application in which it sought urgent interim relief pending the determination of Part B of the earlier application. MTN opposed the urgent application. Its deponent said, among other things, that the concession made in its attorneys' letter of 5 August 2014 and in his

¹⁰ This is how I understand the relevant part of her email which reads thus: 'As a town planner myself, my argument seems to favour the building plan being *'Functus Officio'* in terms of the NBR, the location was approved was processed via council, please verify that the applicable town planning department signed off on the building plans and if so then they also agreed to the location making the Land Use Departure only about allowing MTN to deploy a base station on the premises.' [sic]

¹¹ The building plans bear inter alia the stamp of the City's Zoning Administration.

Part A answering affidavit had been based solely on the Trust's founding papers in the original application and the digital photographs attached thereto. From such information and his own observation (as I understand it, observation of the materials forming part of the founding papers), but without the benefit of expert opinion, he had conceded that construction was taking place in the wrong location. After obtaining WPP's expert opinion MTN was now advised that the position where construction had started in July 2014 was the correct position as approved both in terms of LUPO and the Act. He attached the internal MTN emails and opinion, the content of which I have already summarised.

[25] The urgent application, having been postponed to 13 November 2014, was on that date argued before Allie J. On the following day she dismissed the application with costs, finding that the Trust had not made sufficient allegations in regard to urgency. She did not comment on the merits of the case.

[26] The pleadings in Part B of the earlier application followed and the matter came before me for argument on 21 May 2015. I was told from the bar that construction of the base site is now complete. Construction would not have got far by the time the original application was launched on 31 July 2014 or when the urgent application was launched on 31 October 2014.

The statutory regime

[27] The term 'building' is defined in s 1 of the Act as including 'any other structure, whether of a temporary or permanent nature and irrespective of the materials used in the erection thereof' and which is erected or used for in connection with various purposes, among which are 'the rendering of any service'. There is no doubting that the base station as reflected in the building plans, including the mast, is a 'building' as defined.

[28] Section 1 states that 'this Act' includes 'the national building regulations made and directives issued in terms of it'.

[29] Section 4(1) provides that no person shall, without the prior approval in writing of the local authority, 'erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act'. The application for approval must, in terms of s 4(3)(b), be accompanied 'by such plans, specifications, documents and information as may be required by or under this Act' and 'by such particulars as may be required by the local authority... for the carrying out of the objects and purposes of this Act'.

[30] Section 6(1)(a) states that the local authority's building control officer (for whose appointment s 5 makes provision) must make recommendations to the local authority 'regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4(3)'.

[31] Section 7 deals with the granting and refusing of applications for building plan approval. In terms of s 7(1)(a) the local authority must grant its approval if satisfied that the application complies with the requirements of the Act 'and any other applicable law'. This is subject, however, to s 7(1)(b) which states that the local authority must refuse approval either if it is not satisfied on the matters set out in s 7(1)(a) or if it is satisfied of the existence of one or more of the negative attributes set out in s7(b)(ii). These negative attributes are (a) that the building is to be erected in such manner or will be of such nature or appearance that the area will probably or in fact be disfigured thereby or that the building will probably or in fact be unsightly or objectionable or that it will probably or in fact derogate from the value of adjoining or neighbouring properties; or (b) that the building will probably or in fact be dangerous to life or property.

[32] In *Walele v City of Cape Town & Others* 2008 (6) SA 129 (CC) the majority held that the recommendation of the building control officer ('BCO') contemplated in s 6(1)(a) was intended by the statute to be the proper means by which the decision-maker in s 7(1) was to be informed of the factors relevant to the s 7(1) assessment. A mere endorsement and signature by the BCO to the effect that he recommended the plans for approval did not suffice. The BCO had to ensure that adequate information was placed before the decision-maker so that the latter could consider

applications for approval of building plans properly and in a balanced way (paras 64-72).

[33] Section 7(6) provides as follows:

‘ The provisions of this section shall not be construed so as to prohibit a local authority, before granting or refusing its approval in accordance with subsection (1) in respect of an application, from granting at the written request of the applicant and on such conditions as the local authority may think fit, provisional authorization to an applicant to commence or proceed with the erection of a building to which such application relates.’

[34] The regulations were promulgated in terms of s 17(1) of the Act. One of the matters which in terms of that sub-section may be the subject of regulations is the regulation, restriction or prohibition of the erection of temporary buildings and the occupation or use thereof or access thereto (para (o)). In terms of s 17(2), different national building regulations may be made in respect of different buildings or categories of buildings.

[35] The regulations define ‘temporary building’ as meaning

‘any building that is so declared by the owner and that is being used or is to be used for a specified purpose for a specified limited period of time, but does not include a builder’s shed.’

[36] Part A of the regulations is headed ‘Administration’. Regulation A2(1) lists the plans, drawings and particulars which must accompany an application for approval to erect ‘any building’. The prescribed content of these plans and particulars is set out in regulations A4 to A10. Regulation A2(1) is, however, subject to several provisos, one of which is that in the case of any temporary building only such plans and particulars as contemplated in regulation A23 shall be submitted. (The provisos are erroneously excluded from the current edition of the regulations published by LexisNexis. This may have come about through an erroneous rendering of the amendments to the regulations effected in May 2008. Immediately prior to these amendments the provisos appeared after para (f) of regulation A2(1), there being at that stage no para (g). One of the 2008 amendments was the substitution of para (f)(v), which was the last sub-para of A2(1)(f). The LexisNexis editors may have

thought that the provisos formed part of sub-para (f)(v) and thus deleted it and inserted the new para (f)(v) which contained no provisos of its own. This was incorrect. The provisos applied, and still apply, to the whole of regulation A2(1) and should now be read as appearing after sub-para (g), which was also inserted in 2008.)

[37] Regulation A23, which is headed 'Temporary Buildings', reads thus:

'(1) On receipt of any application to erect a building which the applicant has declared to be a temporary building, the local authority may, subject to the provisions of sub-regulations (2), (3) and (4), grant provisional authorization to the applicant to proceed with the erection of such building in accordance with any conditions or directions specified in such authorization.

(2) before granting such authorization the local authority may require the submission of –

(a) a statement of the period for which authorization is required;

(b) a site plan;

(c) layout drawings in sufficient detail to enable the local authority to determine the general size, form, materials of construction and use of the proposed building; and

(d) any structural detail required by the local authority to determine the structural safety of the proposed building.

(3) The local authority shall grant the authorization contemplated in sub-regulation (1) for a limited period, to be determined with regard to the period specified by the applicant.

(4) The local authority may at the request of the owner grant approval for one or more extensions of the period contemplated in sub-regulation (3): Provided that where it is intended that the public should have access to such building each such request shall be accompanied by a certificate signed by an approved competent person, indicating that the condition of the structural system is satisfactory.

(5) The owner of such building may, not later than the last day of the period contemplated in sub-regulation (3), submit to the local authority such additional plans and details as required by the local authority in order to consider an application in terms of section 4 of the Act.

(6) Where such local authority has granted approval in respect of an application contemplated in sub-regulation (5), the owner shall submit to the local authority an affidavit

stating that any part of such building erected in terms of the provisional authorization has been erected in accordance with the plans and details contemplated in sub-regulation (5).

(7) If any plans and details contemplated in sub-regulation (5) have not been submitted to such local authority or if such local authority has refused to grant approval in respect thereof, the owner shall forthwith remove or demolish such building.'

[38] Regulation A1(7)(a) states that where in any application the owner has declared the building to be a 'temporary building', the local authority shall, before granting provisional authorization in terms of Regulation A23,

'... assess such building in relation to –

- (i) the intended use and life of the building;
- (ii) the area in which it is to be erected; and
- (iii) the availability of suitable materials from which it may be constructed.'

[39] Regulation A25(10) provides that where any building, 'excluding a temporary building', is being or has been erected without the prior approval contemplated in s 4(1), the local authority must serve a notice on the owner calling upon him to obtain the approval required by the Act by a date specified in the notice.

Condonation

[40] A preliminary matter requiring consideration is the Trust's application for condonation of its failure to comply with the 180-day limit specified in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The decision which the Trust attacks on review was taken by the City on 17 October 2013. The Trust learnt of the decision on 12 November 2013. A period of 180 days, reckoned from the latter date, expired on 12 May 2014. The review application was issued about one and a half months later, on 31 July 2014.

[41] I am not sure that it is right to count the 180 day-period from 12 November 2013. In terms of s 7(1)(b) of PAJA the period is reckoned from the date on which the applicant became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons for it. It is

not suggested that the Trust could reasonably have become aware of the decision to grant building plan approval earlier than 12 November 2013. However, it would not yet have known of the reasons. Whether, if reasons had been requested, they would have been furnished sooner than one and a half months after 12 November 2013 may be doubted. (Section 5 of PAJA gives an affected party 90 days to request reasons and a further 90 days to the administrator to provide the reasons.) It is true that in the event the Trust did not request reasons from the City before instituting the review application. However, that was probably because by then (the second half of July 2014) construction work had started and the Trust felt it needed to launch proceedings urgently.

[42] In assessing the date by which the Trust could reasonably have become aware of the reasons for the building plan approval, I shall confine myself to the two broad grounds of review advanced, namely the wrong-location point and the temporary-building point (the latter being concerned with the process followed by the City). I am prepared to assume that by 12 November 2013 the Trust could reasonably have become aware that the base station location on the Site Plans differed from the location on the LUPO Plan, though as a fact the discrepancy had probably not been noticed. I am also prepared to assume that the Trust, if it had made prompt investigations after 12 November 2013, could have ascertained that the building plan approval had been given in terms of regulation A23 rather than s 7. If there had been no pressing urgency to institute legal proceedings, the Trust could reasonably have requested the City to give reasons for approving a different location and for invoking regulation A23. On the location point, the City might have said that there was no discrepancy at all or that the City had not noticed the discrepancy or that in its view the discrepancy had not prevented the location from being 'generally in accordance with' the LUPO Plan. On the temporary-building point, the City would presumably have explained why it regarded the base station as a 'temporary building' and how it understood regulation A23 to operate in relation to the Act and regulations as a whole. To find that the review application launched on 31 July 2014 was out of time would require one to find that these reasons, if requested reasonably promptly after 12 November 2013, would have been answered by (say) the end of December 2013. I repeat that I am doubtful as to that; s 5 of PAJA would not have imposed such a stringent timeline.

[43] But if one assumes that the application was out of time, the court may grant condonation in terms of s 9(2) of PAJA where the interests of justice so require. In *PricewaterhouseCoopers Inc & Others v Van Vollenhoven NO Another* [2010] 2 All SA 256 (SCA) it was said that in assessing the interests of justice a court should have regard to the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay (which must cover the full period thereof), the importance of the issues raised in the review and prospects of success (paras 6-7).

[44] The period of delay in the present case was at most one and a half months. Because the Trust's town planner, in preparing the Trust's objection, had not noticed the location discrepancy, it was only on 14 July 2014, with the commencement of construction, that the Trust realised that something was amiss. Further investigation was done and the review application was promptly launched at the end of July. Mr Mtembu, correctly in my view, thus did not press the argument that the Trust had not sufficiently explained the delay in respect of the location point. He submitted, however, that there was no satisfactory explanation in respect of the temporary-building point. He relied on the judgment of the Supreme Court of Appeal in *Camps Bay Ratepayers and Residents Association & Another v Harrison & Another* 2010 (2) SA 519 (SCA) for the proposition that a PAJA application might be timeous in respect of one ground of review but not in respect of another. In my view this does not accord with the way in which the Supreme Court of Appeal's judgment on this point was explained and clarified by the Constitutional Court in the further appeal reported at 2011 (4) SA 42 (CC) para 25 read with paras 48-63. In the latter case Brand AJ said that the late additional ground of review was time-barred because it was in truth a review directed not at the decision with which the original ground of review was concerned but at an earlier decision. In para 47 Brand AJ said that the Supreme Court of Appeal had not held that a new ground of review could not be introduced into an existing application after 180 days; what it found was that, on a proper analysis of the facts, the applicant's new ground was aimed at a decision that had already been taken in February 2005, and not at a decision which was taken in September 2007.

[45] On a parity of reasoning, if the Trust has satisfactorily explained its delay in respect of the location point and if for this reason the late institution of the review application should be condoned, the Trust is not barred from relying on the temporary-building point merely because an application based solely on that ground would have been out of time. It should also be remembered that is not as if there is no explanation for the delay regarding the temporary-building point. MTN's application, insofar as the Trust was aware, was an application for building plan approval in terms of s 4 read with s 7. This formed the basis of the Trust's objections. At no stage did the City inform the Trust that it was now reassessing the plans in terms of regulation A 23. When Mr Carter told TBTP on 11 November 2013 that the building plans had been approved, he did not say that this was in terms of regulation A23. I am not sure that the Trust can be criticised for not having sent its town planner to examine the approval.

[46] The delay did not cause material prejudice, since the review application was launched promptly after construction began. MTN, after initially conceding that it was constructing the base station in the wrong location and ceasing work at a very early stage, resumed construction with full knowledge that a review application was pending. MTN opposed the Trust's renewed request for urgent relief. Almost all work has thus been undertaken by MTN at its peril. If a successful review eventually has the result that the base station must be demolished (I do not say it will), MTN will have been the author of its own misfortune. The application raises important questions regarding the application of the Act and regulations in relation to so-called temporary buildings. As will appear hereunder, the Trust has favourable prospects of success. In the circumstances, I am satisfied that the interests of justice require any delay on the Trust's part to be condoned.

The temporary-building point

[47] It is convenient to consider the temporary-building point first. I use this tag to cover several related complaints advanced by the Trust concerning the process followed by the City and which can be summarised thus: (i) The City should not have approved construction of the base station as a 'temporary building', given that

MTN is entitled to make repeated applications to extend the temporary departure.¹²

(ii) Even if regulation A23 were applicable, the City was required to assess the application in accordance with s 7¹³ and to obtain a recommendation from the BCO in terms of s 6.¹⁴ The City did not have a recommendation from the BCO and did not assess the application in accordance with s 7. (iii) The City failed to have regard to the 21 objections and received no reports from its officials thereon.¹⁵ (iv) Had the City assessed the building plan application properly in accordance with s 7, it would have concluded that the building was likely to disfigure the area, be unsightly and objectionable and probably derogate from the value of surrounding properties.¹⁶

[48] On the facts, it is clear that the City's view when approving the building plans was that s 7 was inapplicable and that it therefore did not need to assess the matters specified in s 7(1). It is also clear that there was no recommendation from the BCO in terms of s 6(1)(a) as explained in *Walele*.

[49] It is regrettable that the City did not file an affidavit explaining its line of reasoning. This it could have done while abiding the result. Indeed, rule 53(1) expressly permitted the City, when furnishing the record, to furnish reasons for its decision. The result of its silence is that the Trust's allegations about how the City approached the matter are answered. This does not mean that the Trust's allegations necessarily have to be accepted as correct. But if the Trust's allegations on these matters are the most probable inferences to be drawn from established facts, the absence of an answer from the City in my view entitles the court to accept them as correct.

[50] Mr Mitchell submitted that the City invoked regulation A23 specifically to avoid having to address the 21 objections and the factors specified in s 7(1). This allegation, which comes close to one of mala fides, was not made in the founding or supplementary founding papers and is thus not open to the Trust. In any event, I do not think the submission is the most probable inference from established facts. It is

¹² Para 9 record A94; paras 9.2 – 9.4 record A174-175; para 21 record A181.

¹³ Para 46.1 record A17; para 10 record A94-95.

¹⁴ Para 10 record A94-95.

¹⁵ Para 12 record A95-96.

¹⁶ Paras 47—50 record A18-20; paras 18-19 record A97-98.

at least as probable that the City, particularly in the person of Mr Carter, thought that it was inappropriate to assess the application in terms of s 7, having regard to the fact that (so Mr Carter opined) the base station was, by virtue of the temporary LUPO departure, a 'temporary building'. He may even have been concerned that approval in terms of s 7(1) would be construed as giving MTN long-term rights in conflict with the LUPO departure. He evidently thought that the way to reconcile building plan approval with the LUPO departure was to grant approval for a temporary building in terms of regulation A23, since the latter regulation unlike s 7(1) permits approval to be given for a limited period.

[51] It is thus necessary to consider whether the City's approach as just summarised was correct. This in turn calls for a proper interpretation of regulation A23 and its inter-relationship with the provisions of the Act.

Is the base station a 'temporary building'?

[52] I start with the definition of 'temporary building' in the regulations. The first point to note is that a temporary building as thus defined is also a 'building' as defined in s 1 of the Act. The second is that there are two requirements to be met for a building to qualify as a 'temporary building': (i) the building must have been so declared by the owner; and (ii) the building must be one which is being used or will be used 'for a specified purpose for a specified limited period of time'.

[53] As to first of these requirements, regulation A23(3) contemplates that the owner will have specified the temporary period as does the definition of 'temporary building' itself ('... for a specified limited period of time'). Although regulation A23(2)(a) suggests that the local authority 'may' (not 'must') require a statement of the period for which authorization is required, it seems to me that a proper declaration by the owner must incorporate a specified period of time. At any rate, it is likely that the local authority in practice will always require a statement of the period.

[54] As to the second requirement, the enquiry is a factual one and is not determined by the owner's say so in his declaration. Regulation A1(7)(a) obliges the

local authority, when considering a regulation A23 application, to assess inter alia 'the intended use and life of the building'. The local authority must thus properly consider whether the building is to be used 'for a specified limited period of time'. Furthermore, although in the performance of its functions the local authority would need to decide whether the building is to be used for a specified limited period of time, its determination of that question is not decisive. The relevant jurisdictional fact for the application of regulation A23 is not the local authority's satisfaction or opinion that the building is to be used for a specified purpose for a specified limited period of time but whether as a fact the building is to be so used.

[55] Although the period for which a building is to be used is a question of fact, the relevant fact is concerned with the owner's intentions (as distinct from his formal declaration). Since the owner's intentions can (apart from his declaration) only be determined inferentially, the objective characteristics of the proposed structure and its intended use and purpose are likely to play an important and even decisive role in determining whether in truth the building is one which the owner intends to use only for a specified period of time.

[56] In the present case, MTN's letter of 10 October 2013 requested permission for the base station as a temporary structure for a period corresponding to that of the LUPO departure. I am not convinced that this letter constituted a valid declaration by the owner as contemplated in the definition of 'temporary building'. To seek approval for a building as a temporary structure for five years is not quite the same thing as declaring that the building is only to be used for a period of five years. One knows that when MTN initially submitted its application for building plan approval it did not do so on the basis that the base station was to be temporary. However, I shall assume that the letter of 10 October 2013 was a sufficient declaration by MTN.

[57] As to the objective question whether the base station was to be used 'for a specified limited period of time', the City appears to have assumed that because the LUPO departure was for five years the base station was one which was to be used for a specified limited period of time. The same thinking underlies MTN's letter of 10 October 2013. I do not think that this is a correct assumption. Although the LUPO

departure was for a period of five years, the conditions of approval expressly contemplated that the base station might need to remain operational for a longer period and reference was made to the fact that in this event there would need to be a new departure application. So there might be repeated 'temporary' departures, resulting in the base station continuing to be used indefinitely into the future. An alternative to further temporary departures (s 15(1)(b)) of LUPO) would be a permanent change in land use (s 15(1)(a) of LUPO) or a rezoning of the property (s 16 of LUPO).

[58] It is true that without some further LUPO approval the base station would have to be demolished after five years but it by no means follows that MTN intended that the base station should only be in use for five years. I am quite sure that MTN intended nothing of the kind. MTN's motivation for the departure emphasised the need for improved network coverage. Other sites had been considered but none met MTN's requirements. This particular site was optimal. In response to objections, MTN said that the site could be decommissioned after five years if further research showed that base stations of this kind had deleterious health effects.

[59] Although there is no information before me about the cost of constructing the base station, it must be considerable. The mast and supporting equipment are no doubt sophisticated and costly. The structure housing the equipment and on which the mast is to be installed has all the hallmarks of permanence, with specifications for foundations, external cavity walls, cement screed floors, rhino board ceilings, corrugated iron roofing and parapet walls at each end.¹⁷ The roofed building, with three rooms, is 7,98m length x 3,56m width x 2,5m height (with the parapets and roof extending above this). The external slab on which the mast stands is 7,98m length x 3,5m width surrounded by a 2,4 m high wall.

[60] MTN in its answering papers did not say that it intended to use the base station for only five years. Its answer to the contention that the structure should not have been approved as a temporary building was that approval as a temporary building is not precluded merely because there is provision 'for an infinite number of

¹⁷ See Elevation and Section Drawings at R341.

resubmissions'.¹⁸ There is no evidence that MTN has ever demolished base stations after a short period of time. As a matter of practical reality, it seems unlikely that the City, having decided in a process finalised in early 2013, that the first five-year departure should be granted, would thereafter refuse rolling five-year extensions (or eventually a rezoning) in the absence of some material change in circumstances. The base station will not become aesthetically less pleasing with the passing of time. If anything, the growth of mature trees will shield it more than at present. New scientific discoveries may lead to a conclusion that base stations should, for health reasons, not be located near residential dwellings but there is no reason to suppose that MTN expects this to happen. If new research to this effect emerges, it would presumably affect a great many base stations in South Africa.

[61] A further relevant consideration is that the five-year period of the LUPO departure expires, at the latest, on 5 March 2018. MTN only obtained building plan approval in October 2013 and started construction in mid-July 2014. If one assumes that in the ordinary course the base station could (but for the first urgent application) have been operative by the end of 2014, MTN would only have had three years and two months before the LUPO departure expired. This makes it even more implausible that MTN could have intended the base station only to be operative for the period of the LUPO departure.

[62] In my view, therefore, the base station did not qualify as a 'temporary building'. To the extent that the determination of this question was one for the City's satisfaction or opinion rather than the court's objective determination, the City approached the matter on a fundamentally flawed basis. The City does not appear to have investigated at all whether MTN had the intention of using the base station for only a limited period of time.

[63] In the circumstances, and even if the other issues on this part of the case were decided against the Trust, the provisional authorization granted on 17 October 2013 cannot be allowed to stand.

¹⁸ Para 43 at record A117.

Regulation A23

[64] In case this matter should go further, it may be desirable if I state my views on the other legal issues on this part of the case, ie on the assumption that the base station was properly regarded by the City as a temporary building.

[65] The regulations must as far as reasonably possible be interpreted in a manner consistent with the Act. Any regulation that could not be reconciled with the Act would be ultra vires but no attack on the validity of the regulations has been made in the present case.

[66] Section 4(1) requires prior approval of the local authority where a building is to be erected 'in respect of which plans and specifications are to be drawn and submitted in terms of this Act'. Section 4(3) states that the application for approval shall be accompanied by such plans, specifications, documents and information as may be required by or under the Act and by such further particulars as the local authority may require. In these provisions of s 4 the word 'Act' bears its defined meaning, ie includes the regulations, because it is the regulations that identify the buildings for which plans and specifications must be drawn and set out what those plans, specifications, documents and information comprise. Section 4(3) envisages two types of documentation and information, namely that which must mandatorily be furnished in terms of the Act as read with the regulations and that for which the local authority may in its discretion call.

[67] Where an application in terms of s 4(3) has been submitted, the BCO must in terms of s 6(1)(a) make a recommendation to the local authority. After considering the BCO's recommendation, the local authority must grant or refuse the application in accordance with s 7(1). The latter section thus applies in those cases where a BCO recommendation in terms of s 6(1)(a) is required. Such a recommendation is required if the building is of the kind contemplated in s 4(3) read with s 4(1).

[68] Section 17(1)(o) permits the Minister to make regulations to regulate, restrict or prohibit the erection of temporary buildings and the occupation or use thereof or access thereto.

[69] These various provisions in the Act thus notionally permit regulations to be promulgated which would exclude temporary buildings from the category of buildings for which plans and specifications must mandatorily be submitted (s 4(1)). If regulations to this effect were passed, a person wishing to erect a temporary building would not have to submit an application in terms of s 4(3), with the result that there would not have to be a BCO recommendation in terms of s 6(1)(c) or resultant decision by the local authority in terms of s 7(1). One would nevertheless expect such regulations to control the erection of temporary buildings by way of a separate regime.

[70] This, in my view, is what Part A of the regulations does. In the previous version of the regulations, published in June 1988, regulation A2(1) achieved this in the opening words of the sub-regulation (my underlining): 'Any person intending to erect any building, excluding a temporary building, shall...'. The new version of the regulations promulgated in October 1990 (this is the current version, subject to further amendments) deleted the underlined words and instead added, at the end of A2(1) as a whole, the provisos previously mentioned. Part A must naturally be interpreted as a whole. Regulation A2 as read with regulations A3 to 10, although dealing in general terms with 'buildings', must be interpreted with due regard to the provisos to regulation A2(1) and to regulations A23 and A24(10). The proviso relating to temporary buildings and regulation A23(2) make it clear that there are no plans and drawings which are mandatorily required for the erection of temporary buildings. It is within the discretion of the local authority to decide what plans, drawings and other information it requires. While it is difficult to imagine that a local authority could ever properly exercise its powers under regulation A23 without calling for some information, a temporary building is nevertheless not one in respect of which plans and specifications as contemplated in s 4(1) read with s 4(3) must in terms of the Act be submitted. This is reinforced by regulation A24(10) which excludes temporary buildings from those in respect of which the local authority can by notice insist that the owner seek approval in terms of s 4(1).

[71] This does not mean that a person can start erecting a temporary building without any approval at all. A building is only a temporary building for purposes of regulation A23 if, inter alia, the owner has declared it to be a temporary building. In

context, the declaration must be made in an application for authorization in terms of regulation A23. If no such application is made, the building, even if in fact intended to be temporary, would be a building to which the prohibition in s 4(1) applies.

[72] I therefore reject the Trust's submission that ss 4, 6(1)(a) and 7(1) apply to the erection of temporary buildings where an application in terms of regulation A23 is made and the building in question is properly to be regarded as a 'temporary building' as defined. However, and for this very reason, one should not construe the expression 'temporary building' in too liberal a fashion, since the regulation A23 procedure exempts the owner from requirements which are generally regarded as necessary and desirable for the control of building activity in the public interest and deprives neighbouring owners of the protections afforded by s 7(1) (and see *Walele supra* paras 52, 56 and 70-72; *Turnbull-Jackson v Hibiscus Coast Municipality & Others* 2014 (6) SA 592 (CC) paras 80-85 and 88-89). This fortifies me in my conclusion that a building is not to be regarded as a 'temporary building' merely because the owner may have to demolish it if he does not get further departures or a rezoning.

[73] If an owner makes an application in terms of regulation A23 in respect of a building which can properly be regarded as a 'temporary building', the local authority may thus grant the 'provisional authorization' contemplated in regulation A23(1) after receiving such information as it may call for in terms of regulation A23(2) and after making the investigations required by regulation A1(7)(a). The provisional authorization must in terms of regulation 23(3) be for a 'limited period of time'. This period must be determined by the local authority 'with regard to the period specified by the applicant'. The local authority could determine a period shorter than that requested by the applicant though it could also grant the authorization for the full period specified by the applicant.

[74] Regulation 23(4) permits one or more extensions of the provisional authorization. In the light of my interpretation of the term 'temporary building', I do not think the provision for extensions is intended to apply where, from the outset, the owner intends to seek indefinite extensions. It would be contrary to the purposes of the legislation and the notion of a 'temporary building' that an owner could ab initio

apply for (say) a five-year 'temporary' authorization with the intention of seeking five-year extensions indefinitely into the future. Regulation 23(4) simply permits an extension to be sought where it turns out, after the provisional authorization has been granted, that the building needs to be used for a further definite limited period. Examples might be where temporary accommodation for construction workers is erected and the construction contract is not completed by the anticipated date or temporary classrooms are erected pending completion of permanent extensions to a school and the extensions are not completed timeously.

[75] Although the authorization for which regulation A23(1) provides, and which may in appropriate circumstances be extended in terms of regulation A23(4), is styled a 'provisional authorization', the word 'provisional' is perhaps inapt because, as Mr Mitchell urged upon me, it usually means, in relation to decisions, an initial decision of a temporary nature pending the making of a final decision (cf *Branca v Cobarro* [1947] KB 854 (CA) at 858 – 'something which is going to operate until something else happens'). In the context of regulation A23, however, the 'provisional authorization' is not in my view provisional upon some further process of approval. Regulation A23(5) states that before the end of the stipulated period the owner 'may' (not 'must') submit an application in terms of s 4 of the Act. If matters turn out as the owner expects and he only needs the building for the period specified in his application, he must simply remove or demolish the building at the end of the specified period (see regulation A23(7)). I do not think that a provisional authorization may be granted for a structure as a 'temporary building' if, from the outset, the owner intends it to be a permanent structure. Regulation A23(5) is intended to cater for the case where, after provisional authorization for construction as a temporary building has been given, the owner decides that he does not wish to use the building only for a temporary period. In such cases, instead of seeking an extension in terms of regulation A23(4), the owner may seek permanent approval in terms of s 4 of the Act which would then require compliance with ss 6(1)(a) and 7(1).

[76] Accordingly, the word 'provisional' in regulation A23 must be understood as meaning 'temporary', without the connotation of being subject to some further approval. This is, after all, the first meaning given in leading dictionaries (*Webster's Third New International Dictionary*: 'provided for a temporary need'; *Shorter Oxford*

English Dictionary: ‘Of, belonging to, or of the nature of a temporary provision or arrangement; provided or adopted for present needs or for the time being’) This ‘provisional’ authorization may be contrasted with s 7(6) of the Act, which permits a local authority to grant ‘provisional’ authorization for construction of a (permanent) building to begin pending the approval in terms of s 7(1) of an application lodged in terms of s 4. That provision has no bearing on the present case.

[77] Regulation A23 may be regarded as unsatisfactory in not setting some limit on the temporary period for which authorization for the erection of a temporary building may be sought. As Mr Mitchell asked rhetorically in argument, if the ‘specified limited period of time’ in the definition of ‘temporary building’ could be five years (as the City accepted in this case), could it be 10 years or 20 years? However, as matters stand, there is no set limit. But a local authority is not obliged to grant authorization in terms of regulation A23 merely because the owner only intends to use the building for a specified period. The longer the specified period, the more likely it is that the local authority will decline to deal with the matter in terms of regulation A23. And the longer the specified period, the more likely it is that the local authority will conclude that the owner in truth intends to use the building indefinitely into the future, so that it is not a ‘temporary building’ at all.

[78] The fact that a local authority is not required to assess a regulation A23 in accordance with s 7(1) does not mean that it can disregard the interests of those who might be adversely affected by a provisional authorization. The exercise of the power is still subject to the law relating to administrative action and to the principle of legality. However, the Trust’s main complaint (apart from contending that the base station is not a ‘temporary building’) is that the City should have assessed the application in accordance with s 7(1) and that had it done so it would have been bound to conclude that the application for approval should fail. If the base station, contrary to my view, were properly regarded as a ‘temporary building’, the City was not obliged to assess the application in terms of s 7(1). Since the City, on the view I take of the case, will still need to deal with MTN’s application in terms of s 7(1), I prefer to express no opinion as to the conclusions it could properly reach under that section after receiving a recommendation from its BCO.

The location point

[79] Because of the Trust's contention that s 7(1) applied, its argument on the location point focused on s 7(1)(a), which provides that an application for building plan approval must be granted if the application complies with the requirements of the Act 'and any other applicable law'. The argument was that the only LUPO departure for which MTN had obtained approval was a departure containing a condition as to the location on which the base station was to be constructed. It followed that building plans for the construction of the base station at a different location were in conflict with another law, namely LUPO. Since the City did not see itself as acting in terms of s 7(1), it would not have considered the matter in these terms. But I think it would be equally true to say that the City could not lawfully grant a provisional authorization in terms of regulation A23 if this would be contrary to another law with which the owner had to comply.

[80] The evidence in the papers regarding the location point can be summarised as follows. In the founding affidavit the Trust's deponent attached a mark-up copy of the LUPO Plan on which he had indicated the location where MTN was actually constructing the base station.¹⁹ He said the actual construction site was immediately adjacent to the driveway of the Trust's property on the north-western side of Dalham Road and within very close proximity to the Trust's property. By contrast, the location indicated on the LUPO Plan was approximately 30 m away, on the south-eastern side of Dalham Road and behind a wall on the edge of Dalham Road.²⁰ He also attached photographs on which the proposed mast was superimposed in the position indicated on the LUPO Plan.²¹ These showed, he said, that the mast was to be located a short distance away from a trio of stone pines.²²

[81] As noted, in correspondence written shortly after the launching of the application and also in its initial answering affidavit,²³ MTN admitted that

¹⁹ Record A47.

²⁰ Paras 14-17 record A9-10.

²¹ Record A51.

²² Paras 19-20 record A11.

²³ Paras 13-17 record A79-80.

construction was taking place in the wrong location. The allegation that the actual site was approximately 30 m to the south-east from the LUPO site was not denied.

[82] After the production of the City's record, the Trust filed a supplementary founding affidavit. The deponent attached the Site Plan²⁴ forming part of the approved building plans, saying that the location of the base station on the Site Plan differed substantially from the location on the LUPO Plan.²⁵ This is the Site Plan which, with some additional markings, I have reproduced earlier in this judgment.

[83] MTN responded to the above allegation in its supplementary answering affidavit. The allegation was denied. The deponent said that the location on the LUPO Plan was the same as on the building plan.²⁶ He attached an email dated 12 August 2014 written by the City's BCO, Christo Pheiffer.²⁷ This email, however, says no more than that a site inspection revealed that the actual site of construction accorded with the approved building plans. That is uncontentious.

[84] In argument Mr Mtembu placed reliance on what MTN's deponent said in the urgent application. Since both sides referred to the urgent application, I accept that I should regard that material as properly before me. However, that application does not traverse the specific allegations made by the Trust as to the difference in the locations. WPP's opinion on which MTN placed reliance in the urgent application does not seem to me to go further than stating that the location reflected in the Site Plan accords with the LUPO Plan in the sense of being 'generally in accordance' therewith and that the City must be presumed to have been of that mind.

[85] I thus do not think that there is a genuine dispute of fact that the actual location differs from the LUPO Plan. The difficulty I feel in coming to a firm conclusion on this part of the case is whether the actual location is 'generally in accordance with' the LUPO location. The word 'generally' in the LUPO approval involves some derogation from exactness and should be understood as 'approximately'. That is a matter of degree and judgment, having regard to the

²⁴ Record A103.

²⁵ Para 13 record A96.

²⁶ Paras 51-53 record A118.

²⁷ Record A165.

purposes which the City sought to achieve in specifying the location as a special condition, the distance of the actual location from the approved location and the extent to which the actual location is less satisfactory than the approved location in achieving the purposes for which the location was specified as a condition.

[86] The objections filed in the LUPO application are not part of the record furnished by the City. However, and having regard to the Planning report of 4 October 2010, summarising MTN's motivation and the objectors' complaints, the visual impact of the mast was clearly an important matter. On the other hand, it was not the aesthetic impact specifically on the Trust's property that was debated. The actual position is now somewhat closer to the Trust's property and the mast is further away from the trio of stone pines. At least from certain angles, this makes it more obtrusive. On the other hand, it no longer lies on the western axis of Dalham Road and is not in the direct line of sight of a person approaching the property from Dalham Road (it will be recalled that this was one of the criticisms made by TBTP on the mistaken assumption that the building plan location was the same as the LUPO Plan). So the difference in location might be aesthetically worse in some respects and aesthetically better in others.

[87] As to the physical extent of the discrepancy, the LUPO Plan does not include dimensions. Its scale is not stated but is quite large (coarse). One can see from the Site Plans that the LUPO Plan does not depict all the boundaries of Erf 10762. The LUPO Plan does not show the property's building lines which, according to the Site Plans, are set back six metres from the boundary. The location of the base station on the LUPO Plan is indicated by a small black block on a small depiction of the property. I assume this must be taken as being just within the building lines though they are not reflected on the LUPO Plan. I have compared the LUPO Plan²⁸ with the Site Plan drawn to the scale 1:100.²⁹ Dalham Road runs towards Erf 10762 in a south-westerly direction. Erf 10762 lies straight ahead at the end of the road but the boundary there does a dog-leg. If one were to transpose the location indicated on the LUPO Plan to the Site Plan (which could not be done with absolute precision), the base station would be located just inside the building line in the corner created

²⁸ The A3 version at R344.

²⁹ R340.

by the portion of the dog-leg further away from Dalham Road (more or less the south-east corner of the building line). The actual location depicted on the Site Plan is located just inside the building line in the corner created by the portion of the dog-leg closer to Dalham Road, just before the boundary starts to run away diagonally from Dalham Road in a westerly direction. Although the Trust's deponent alleges that the LUPO site is about 30 meters to the south-west of the actual site (the latter corresponding with the Site Plan), the Site Plan, which is to scale, indicates by my assessment that the LUPO site is about five metres to the west and eight meters to the south of the actual site. (On the Site Plan reproduced earlier in this judgment, the blacked-in rectangles reflect respectively the base station's actual location on the Site Plan and my transposed location from the LUPO Plan.) The property as a whole is 2670m² in extent.³⁰ The distance from the LUPO location (even by my assessment, which differs from that of the Trust's deponent) is not trivial but might arguably, in combination with other considerations, be regarded as not so great as to render the actual location in conflict with the LUPO condition.

[88] In the circumstances, if it were necessary to decide the location point, I would not feel confident of doing so without more exact information and if necessary an inspection in loco, the possibility of which was briefly mentioned during argument. However, the conclusion I have reached on the procedure followed by the City (ie its erroneous treatment of the building as a 'temporary building') means that the matter will in any event have to be reconsidered by the City. While I have thought it prudent to express my view on the legal issues relating to the interpretation of regulation A23, there would be unnecessary delay and cost if, for purposes of deciding a point which might in the event be academic, the matter were adjourned for further evidence and an inspection followed by further argument. This issue should rather be addressed in the City's consideration of the matter in terms of s 7. I may add, in this regard, that there is nothing in the City's record to show that its officials were aware, when granting the approval of 17 October 2013, that there was a difference in location.

³⁰ A30 para 2.4; R32.

Conclusion

[89] For these reasons the application to set aside the City's decision of 17 October 2013 must succeed, on the basis that the City was not entitled to grant authorization for the construction of the base station as a 'temporary building' in terms of regulation A23. Costs should follow the result.

[90] There is nothing which the court can remit to the City for reconsideration. I venture to suggest, though, that the sensible course for the parties to follow is to regard the City's refusal of the s 4 application and the resultant withdrawal of that application by MTN as based on an erroneous belief regarding the scope of regulation A23 and thus to treat the s 4 application as still pending, clearing the way for the City to adjudicate it in terms of s 7(1) after obtaining a recommendation from the BCO in terms of s 6(1)(a) and such further information it may think necessary on the location issue.

[91] I make the following order:

(a) Insofar as needs be, the period prescribed by s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 is extended in terms of s 9(2), with the result that any delay which there may have been in the launching of the application is condoned.

(b) The decision taken by the second respondent on 17 October 2013, granting approval to the first respondent, in terms of regulation A23 of the regulations promulgated in terms of the National Standards and Building Regulations Act 103 of 1997, to construct a cellular base station and mast on Erf 10762 Constantia, Dalham Road, Constantia, is reviewed and set aside.

(c) The first respondent is to pay the applicants' costs in respect of the application for Part B relief, such costs to include those attendant on the employment of two counsel.

APPEARANCES

For Applicants

Messrs D Mitchell SC and L Kelly

Instructed by

Francis Thompson & Aspden

Unit 17, 10 Pepper Street

Cape Town

For First Respondent

Mr AM Mtembu

Instructed by

Mashiane Moodley & Monama Inc

Suite 19, Second Floor

Katherine & West Building

114 West Street

Sandton

c/o Shepstone & Wylie Attorneys

18th Floor, 2 Long Street

Cape Town