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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 21134/2015

In the matter between:

MICHAEL BRUCE ABRAHAMSE Applicant

and

MOBILE TELEPHONE NETWORKS (PTY) LTD First Respondent

THE CITY OF CAPE TOWN Second Respondent

MARIZA DELILAN CLOETE Third Respondent

Court: Canca, AJ
Date of Hearing: 18 August 2016
Date of Judgment: 26 October 2016

JUDGMENT

INTRODUCTION

1. This is an application brought in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). The purpose of the application is to obtain an Order reviewing and setting aside the decision of the second respondent to:

(a) grant the first respondent consent to construct a freestanding telecommunications base station ("the base station") on the third respondent's property; and

(b) grant the first respondent consent to construct the base station by way of a minor works permit.

2. The decision to grant the consent referred to in 1(a) above was taken in terms of the Land Use Planning Ordinance 15 of 1985 ("LUPO") and the permission in 1(b) was granted in terms of the National Building Regulations and Building Standards Act, 103 of 1977 (the "NBR Act") and its Regulations.

3. Apart from determining whether the relevant provisions of PAJA have been complied with, a determination of whether the base station qualifies as a building warranting only a minor works permit might also be called for.

4. The first respondent opposes the application. The second respondent has elected to abide the Court's decision. The third respondent has not filed any papers and both she and the second respondent were not represented at the hearing of this matter.

THE PARTIES

5. The applicant, Michael Bruce Abrahamse, an adult male businessman, resides at 45 […], Morningstar, Philadelphia, Western Cape ("the applicant's property").

6. The first respondent, Mobile Telephone Networks (Pty) Ltd ("MTN"), a company duly registered and incorporated in terms of the company laws of South Africa, is a well-known international mobile telecommunications company, head-quartered in this country.

7. The second respondent is the City of Cape Town ("The City"), a metropolitan municipality established in terms of South Africa's municipal laws and the authority tasked with granting the permits referred to in paragraph 1 above.

8. The third respondent, Mariza Delilan Cloete, is an adult female businesswoman who resides at 141 […], Morningstar, Philadelphia, Western Cape ("the subject property").

BACKGROUND FACTS

9. This application has its genesis in Morningstar, Philadelphia, on the West Coast of the Western Cape Province, an area comprising mostly of agricultural small holdings where equestrian activities appear to dominate.

10. In summary, the background of this matter is the following. MTN, in order to increase capacity and to improve voice and data network coverage, needed to construct a base station in the area. It identified the subject property as the most suitable site.

11. During June 2013, MTN lodged an application in terms of LUPO to The City for consent to construct the base station on the subject property. A notice, in terms of

section 2.2.1 of the Cape Town Zoning Scheme Regulations, calling on parties in the area who might be affected by construction, to submit comments and/or objections was then published by The City. The closing date for submission of such comments and/or objections, with reasons, was 27 January 2014.

12. Four objections, including one from the applicant, were submitted, together with reasons and comment. The objections, in the main, centred around aesthetics, health concerns and an anticipated diminution of property values in the area, should the application succeed. The City only forwarded one objection to MTN for a response, namely an objection by Ms Colleen Durston ("the Durston objection"). MTN responded comprehensively to the Durston objection. It is worth noting that the Durston objection covered most of the three concerns referred to above.

13. MTN's stance to the Durstan objection was that:

(a) current research on base stations had reached the point where scientists were satisfied that base stations do not pose a threat to health;

(b) not only was the height of the proposed antennae to be erected going to be shorter than most trees in the area, but that, as the antennae was a lattice, it would be see-through. Its visual impact would therefore be reduced; and

(c) there was no evidence that base stations reduced property values. On the contrary, the property values might improve with the subsequent increased virtual accessibility, so the contention continued.

14. The applicant, having not had a response to his objection, followed up by addressing a number of requests for updates on the status of MTN's application with the relevant official at The City. These requests met with no response.

15. On receipt of MTN's response to the Durstan objection, The City's Land Use Management Department prepared a report which recommended the approval of MTN's application, with conditions. The City's authority tasked with considering and approving the application provisionally granted MTN the approval it sought on 19 March 2015. Following an appeal process, the provisional approval was declared final on 29 April 2015. However, because the Land Use Management Department's report did not include the other objections, the Council was not aware of the applicant's objection and his reasons therefor. The report that went to Council did not include the concerns that were specific to the applicant.

16. MTN thereafter submitted a building plan application in terms of the NBR Act to The City for the approval of building plans for the base station. That application was approved. The official who granted the approval, acting in terms of the authority granted to him by section 13(1)(6) of NBR Act and its regulations, gave MTN a minor works permit. A minor works permit exempts the holder from obtaining local authority approval for the building plans of a construction.

17. The applicant, who had not received any response to his correspondence, was unaware that the MTN application for the construction of the base station had been approved. The City failed to inform him that MTN's application had been successful. He also did not know that the building plans for the construction of the base station did not require local authority approval due to the base station having been considered a minor construction.

18. On his return from a holiday abroad with his family, the applicant, on the morning of 28 August 2015, noticed that construction of the base station had commenced during his absence. Shortly thereafter he launched an application interdicting MTN from continuing with the construction pending this review. That application was opposed. However, on 9 October 2015, Fortuin J, granted the applicant the relief he sought, with certain conditions.

19. The applicant then launched this application in early November 2015. It is appropriate to first set out the statutory regime underpinning the issues for determination in this matter. I shall, for the sake of convenience, first deal with the legislation, regulations and policies which applied when The City considered the application to construct the base station ("the consent use application").

THE LEGISLATIVE FRAMEWORK

20. It is not disputed that the impugned decision is an administrative act and falls to be decided in terms of the provisions of PAJA. Administrative actions have been eloquently and clearly defined by the Supreme Court of Appeal on several occasions. The definition need not be repeated here. See *Grey's Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others* 2005 (6) SA 313 (SCA) at para [21] and *Brashville Properties v Colmant* [2014] ZASCA 61 at para [11].

21. Section 3(1) of PAJA states that administrative action, which materially and adversely affects the rights or legitimate expectations of any person, must be procedurally fair. In order for the administrative action to be considered procedurally fair, the administrator, subject to certain conditions, must, in terms of section 3(2)(b) of PAJA, afford the person so affected, or where legitimate expectations have not been

met, a reasonable opportunity to make representations. Such representations must, obviously, be duly considered by the appropriate authority.

22. Section 2.2.1 of the Cape Town Zoning Scheme Regulations, promulgated in terms of section 9(2) of LUPO in November 2012 ("the zoning regulations"), state the following '*The City Manager shall cause an application submitted in terms of the zoning scheme to be advertised if, in his or her opinion, any person may be adversely affected by the proposed development'.*

23. Clause 6.3.2 of The City's Policy (for) Cellular Telecommunications Infrastructure ("the Telecommunications Policy") provides that public participation should be "*in accordance with the provisions of Council's Public Participation Policy for Land Use and Development Applications"*.

24. In terms of clause 2.3.3 of The City's Notification Policy for Land Use Development applications ("the Notification Policy"), The City may, where an application affects the public, call for a public enquiry or follow a notice and comment procedure or both, as provided for in section 4(1) of PAJA.

25. Where a notice and comment procedure is followed, section 4(3) of PAJA requires the administrator to, amongst others, consider any comments received and to comply with the prescribed procedures to be followed with regard to notice and comment. The aforementioned prescribed procedures are contained in clause 2.3.4 of the Zoning Regulations. In summary, clause 2.3.4 of the Zoning Regulations states that, on considering an application for approval in terms of a zoning scheme, The City shall take into account any comments or objections received before the closing date in response to an advertisement of the application and any existing rights.

26. The Notification Policy referred to in paragraph 24 above, also states that:

> *"3.5.1 Any person has the right to submit comments or object to the proposal …*
>
> *…*
>
> *3.6.1 Comments and/or objections and the applicant's response to these are incorporated into a departmental report which is submitted for a decision to the relevant council decision-making structure …*
>
> *3.6.2 …*
>
> *3.6.3 After a decision has been taken by the Council or its delegates, the applicant and the objectors (if any) must be notified of the decision.*
>
> *3.6.4 …*
>
> *3.6.5 …*
>
> *…"*

27. Having sketched the regulatory provisions applicable to the consent use application, it now remains for me to consider whether, based on the law, there is merit to the applicant's prayer that the consent use application should be reviewed and set aside.

28. It is trite that our law requires decision-makers to act fairly towards those affected by their decisions. See *Masethla v President of the Republic of South Africa and Another* 2008 (1) BCLR 1 (CC) at para 183. Jafta AJ (as he then was) in *Walele v City of Cape Town & Others* 2008 (6) SA 129 (CC) at 144B held that:

> *"The most important component of procedural fairness is the one expressed by the audi alteram partem principle (the audi principle) which requires that parties to be affected by an administrative decision be given a hearing before the decision is taken …"*

The learned Judge then went on to state that the right to be heard is based on "…. *the negative impact of the decision on the rights or legitimate expectations of the person claiming to have been entitled to a hearing before the decision was taken."*

29. The applicant attacks The City's decision to grant the consent use application on a number of fronts. However, Mr Felix, for the applicant, during argument limited the attack to the procedural aspects of the decision. Firstly, he contended that, having followed the notice and comment procedure, The City had a duty to consider the applicant's objection, given the peremptory nature of the applicable regulatory regime. Furthermore, unlike the other objections, the applicant's objection was unique, given the proximity of the base station to his property, making the applicant the most directly affected party, so the submission continued. The City's failure to have considered the abovementioned objections, particularly the one from the applicant, was procedurally unfair and, consequently, falls foul of PAJA and the City of Cape Town's own regulations and policies, Mr Felix contended further.

30. MTN's response is that the applicant's objection was exactly the same as that of the Durstan objection which it had considered and responded to. Therefore, it would have been *"monotonous and tedious* [for it to] *consider something which does not bring any different aspect or new version"*, particularly given that the applicant's objection was

a *"mere copy and paste"* of the Durstan objection, so the submission went. The applicant was not prejudiced by MTN only having considered and responded to the Durstan objection, as his views were captured by Durstan and thus, they were considered and addressed by both MTN and The City, so the argument continued. Mr Mokhari SC, for MTN, relied on Caine Brothers v Development Tribunal for KwaZulu Natal (471/2015) (2016) ZASCA 81 (30 May 2016) at paras 14 – 15, for this rather novel argument.

31. The objections are indeed similar in several respects. However, the Durstan property is not as close to the base station as that of the applicant and her objection lays a lot of emphasis on the possible side-effects of exposure to the electromagnetic field emissions by cellular base stations on the health of equines in the area. Furthermore, regarding the issue of aesthetics, the visual effect of the base station and the mast will be more severe on the applicant's property, where he already has a house. Ms Durstan's objection states that "*The mast area as shown on the applicant's* [MTN] *drawing, is directly opposite to the site of my proposed building"*. So, it would appear that, unlike the applicant, Ms Durstan does not yet have a building/homestead on her property and therefore possibly has the luxury of getting her architect to redesign her house or to move its intended location such that the visual impact of the base station and mast does not negatively affect her view. She complains that the base station and mast will restrict her view of Table Mountain. A further distinguishing feature of the applicant's objection is set out, in part, as follows in his objection:

> *"The applicant himself/herself [MTN] has provided the layout plan which clearly shows that the mast directly overlooks the Objector's entire home and erf. The rectangle indicated in the applicant's drawings of the Objector's front yard is directly adjacent to the site of the proposed mast.*

> *The rectangle is in fact a small vineyard, with the average height of the vines being approximately one meter. The mast measures some 15 metres in height (the equivalent to a 3 to 4 story building).*
>
> *….*
>
> *No matter what the colour* [of] *the structure, it will not blend with the surrounding area. The structure will still appear as an industrial-type installation totally out of place in a rural-residential area."*

This information is not contained in the Durstan objection which would indicate that The City's Council did not have all the relevant information before it when it took the decision to grant the consent to construct the base station.

32. The applicant's property is adjacent to the subject property. The base station would be situated approximately 30 metres from the applicant's front door. According to MTN's application, the base station will consist, *inter alia*, of the following:

(1) a 15-meter-high lattice mast,

(2) 3 MTN Omni Antennae attached to the mast,

(3) one microwave dish attached to the mast,

(4) a MTN container and

(5) a 2.4 meter high palisade fence enclosing the base station.

In addition, MTN also sought permission that the base station be constructed such that MTN could in future install 6 panel antennae (3 per future user), place 2 associated equipment containers (1 per future user) and to install 3 microwave dishes. The rationale for this being MTN's intention to share the base station with other users at some time in the future.

33. The applicant was not, unlike Durstan, that concerned about the possible side-effects of exposure to electromagnetic field emissions. In fact, the applicant states that he *"accepts all the information offered by* [MTN] *under* [the] *heading* [Health Issues] *however studies are still on-going and nothing is conclusive at this stage".* Regarding the diminution in property values concern of the objectors, the proximity to the applicant's property to the base station, and its situation next to the vineyard with one metre high vines (not trees of equal or greater height), its unsightliness might well override the benefits of increased virtual accessibility and result in reduced property values. The fact that only one of the four objections were considered by the Council might have given the impression that the other adjacent property owners were not concerned about the unsightliness of the base station and mast and the possible negative effect these structures would have on the values of the properties that were in close proximity to them.

34. In his Heads of Argument, after citing *Caine Brothers supra,* Mr Mokhari states the following:

> *"in this matter* [Caine Brothers] *applicant argued that the audi alteram partem principle had been violated in that it had not been given an opportunity to be heard, the SCA held that "the fact that the amended plan was not furnished to it [Caine Brothers] for comment is of no moment. .... The high court correctly found that the decisions were not reviewable on the ground of procedural irregularity."*

What Mr Mokhari, however, does not convey in his Heads of Argument, is that the applicant in *Caine Brothers* had been heard on more than one occasion and in different

fora. It is also unhelpful to quote the judgment out of context. Paragraph 14 starts with Lewis JA stating:

> *"From the brief history of the matter that I have traced, it is immediately apparent that Caine Brothers was given more than a fair hearing at every stage of the process. Mr Dickson and Mr Caine made representations at every opportunity. The fact that the amended plan was not furnished to it for comment is of no moment. The request by the tribunal for the plan and amended conditions of establishment, and the decision that followed on it, was precisely to take account of the objections made by Caine Brothers and others. The amendment was as a result of the hearings that were afforded to Caine Brothers. And the appeal tribunal afforded Mr Dickson, representing it, yet a further opportunity to put its case, adjourning the proceedings so that he could furnish a second set of heads of argument."*

35. It is obvious from the above that reliance on *Caine Brothers* in this application is misplaced. The facts in this matter are completely different to those in *Caine Brothers*. The applicant was simply not heard nor was his objection considered by the Council. That violated the *audi alteram partem* principle. It is not for an administrator, merely because he or she considers a task to be "*monotonous and tedious"* and in his or her view, *"does not bring* [a] *different aspect or new version"*, to shirk his or her duty to consider all objections. In any event, there were only four objections and therefore, considering all four objections could never be said to be *"monotonous"* or *"tedious"* work. The official who screened the objections was duty bound to pass on to MTN, for comment, all the objections and most certainly that of the applicant. Whatever response MTN would then have given should thereafter have been forwarded to The

City's Council for an ultimate decision as to whether or not to grant the application. As a directly affected party, the applicant's objection should have been considered by The City. The City's regulatory provisions are peremptory. Having called on persons who might potentially be affected by the installation of the base station to submit objections or comment, with reasons, The City created a legitimate expectation in the minds of the objectors that they would be heard and/or that their objections or comments would be considered by The City's Council or its delegates. See paragraphs 25 and 26 above.

36. In the light of the above, I am persuaded that The City's decision to approve MTN's application stands to be reviewed and set-aside as having been procedurally unfair.

37. Ordinarily, this finding would have trumped the second relief sought by the applicant as the grant of a minor works permit was dependent on a successful application for the base station. However, when I raised this point with counsel during argument, Mr Mokhari requested that I rule on this aspect as well as such a ruling would give certainty to MTN and The City as to whether a base station such as the one planned in this matter only required a minor works permit. I then asked counsel for written submissions on the benefits, if any, derived from obtaining a minor building works permit for an installation such as the one planned. I thank counsel for these submissions.

38. I have re-considered making a ruling on this aspect of the matter. Mr Felix, correctly, contended that it was only the second respondent who was in a position to comprehensively address the issue. Having merely elected to abide this Court's decision, I have no evidence, nor was any offered, that when MTN asked that I provide certainty to both it and The City, or that The City is, in fact, interested in such certainty.

Although MTN has, in broad terms, set out the benefits, in cost and time, of a grant of a minor works permit for such a construction, I am persuaded that, without the input by the second respondent on the differences, economic and social, between the grant of a minor works permit and one granted via the local authority process, I simply do not have sufficient information before me to arrive at a considered decision. It would have assisted me in making a determination on this aspect of the matter if MTN had requested The City, notwithstanding it's election to abide my decision, to have deposed to an affidavit with respect to this issue.

39. In the result, I order as follows:

(1) The decision taken by the second respondent on 19 March 2015 to grant the first respondent consent to construct a freestanding telecommunications base station on 141 […], Morningstar, Zonnekus Road, (Reference number: 70168746), is reviewed and set aside.

(2) In light of the finding in paragraph (1) above, the second respondent's decision to grant a minor works permit to the first respondent has fallen away.

(3) The first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

CANCA, AJ

Appearances

For the Applicant	:	Adv J K Felix
Instructed by	:	Linzi McHardy Johan Victor Attorneys Cape Town
For the First Respondent	:	Adv WR Mokhari SC and Adv M Mtembu
Instructed by	:	Mr Maphakela Mashiane, Moodley & Monama Inc. Sandton, Johannesburg