THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 20119/2014
Reportable

In the matter between:

MSUNDUZI MUNICIPALITY **APPELLANT**

and

DARK FIBRE AFRICA (RF) (PTY) LIMITED **RESPONDENT**

Neutral citation: *Msunduzi Municipality v Dark Fibre Africa* (20119/14) [2014] ZASCA 165 (01 October 2011)

Coram: Lewis, Cachalia and Swain JJA and Fourie and Dambuza AJJA

Heard: **19 September 2014**

Delivered: **01 October 2014**

Summary: Interpretation – s 22 of Electronic Communications Act 36 of 2005 – no permission required from landowner for an electronic network services licensee to exercise rights in terms of s 22 – landowner includes state organs – licensees must comply with applicable laws – applicable law cannot be used to limit the very act authorised in the licence - exercise of rights under s 22 constitutes administrative action and subject to PAJA constraints.

ORDER

On appeal from: Kwazulu-Natal High Court, Pietermaritzburg (Steyn J sitting as court of first instance)

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

DAMBUZA AJA (Lewis, Cachalia and Swain JJA and Fourie AJA concurring)

[1] This is an appeal, with leave of the court below, against an order of the Kwazulu-Natal Division of the High Court, Pietermaritzburg (Steyn J) dismissing an application to have the respondent interdicted from conducting construction work on municipal land within the area of jurisdiction of the appellant.

[2] The appellant is a local municipality established in terms of the Municipal Systems Act 32 of 2000. It controls land and public spaces in the Pietermaritzburg area.

[3] The respondent is a private company. It holds an Electronic Communications Network Services licence (ECNS) and an Electronic Communications Network licence (ECN) both issued by the Independent Communications Authority of South Africa in terms of the Electronic Communications Act 36 of 2005 (ECA).

[4] The background facts to this appeal are: in July 2012 the respondent notified the appellant of its intention to construct an underground fibre optic cable network along certain streets within Pietermaritzburg. Over the following 16 months, it made numerous attempts to obtain the appellant's approval for its construction implementation plans (the wayleaves). The respondent refused to grant such approval. On 9 September 2013 the respondent advised the appellant that if the approval was not granted by 17 September 2013, it would proceed with construction. On 12 November 2013 the respondent commenced construction. On 25 February 2014 the appellant instituted proceedings in the high court, on an urgent basis, seeking an interim interdict stopping the construction. The interim interdict was sought on the basis that the court would grant, as final relief, a declarator that the respondent had no entitlement to exercise any of the powers provided for in s 22 without the appellant's prior approval. The appellant contended that, as an alternative to the declaratory order, the respondent's decision to exercise rights under s 22 should be reviewed and set aside. It also sought an order that the respondent be permanently interdicted from entering land owned by the appellant and from constructing an electronic communications network or facility thereon. A further anticipated order was that the respondent remove its equipment on land owned by the appellant. The appellant's case was that the respondent had failed to obtain permission from it to commence construction.

[5] In dismissing the application, the high court followed the decision of this Court in *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC*[1] (*MTN*) and found that the respondent did not require permission from the appellant to exercise

[1] *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012(6) SA 638 (SCA)

its rights under s 22. That court also found that the appellant had not made out a proper case for review of the respondent's decision to commence construction.

[6] In *MTN*, a private licensee (MTN) invoked s 22 to justify its continued occupation, after expiry of its lease, of a base station located on the respondent's land. On appeal this court found that a licensee does not require the permission of a landowner to exercise its rights under s 22.

[7] Section 22 provides:

'22. Entry upon and construction of lines across land and waterways.

(1) An electronics communications network licensee may –

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

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

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

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

[8] Malan JA said:

'The powers given by s 22 are, as I have said, required to enable the providers of both fixed-line and wireless telecommunications operators to achieve their objectives….

…the reason for the powers given by s 22(1) would fall away if consent of the owner were to be a requirement. Section 22(1) specifically dispenses with the need to obtain the owner's

consent…..The words "with due regard" generally mean "with proper consideration" and, in the context, impose a duty on the licensee to *consider and submit to the applicable law.* This duty arises only when the licensee is engaged "in taking any action in terms of subsection (1)": the "action" referred to by s 22(1) is entering, constructing and maintaining, altering and removing. These actions are authorised. It is "in their taking" that due regard must be had to the applicable law. A fortiori the "applicable law" cannot limit the very action that is authorised by s 22(1)."[2] (My emphasis.)

[9] Thus this court, in *MTN*, expressly rejected the argument that the consent of a landowner is required to exercise rights under s 22(1). It further held that licensees are obliged to comply with applicable law, an issue to which I shall revert.

[10] The appeal was based on three grounds:

(a) that this court's interpretation of s 22 of the ECA in *MTN* was incorrect in that the court did not take into account the rights and duties of organs of state in their administrative role;

(b) that the respondent's decision to exercise its rights under s 22 did not meet the requirements of legality or of lawful administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA);

(c) that the respondent failed to have regard to applicable law within the meaning of s 22(2) of the ECA in executing its s 22 decision.

[11] The appellant contended that its delay in approving the respondent's wayleaves was justified in view of the respondent's attitude that its rights under

[2] Paragraphs 14 and 15.

s 22 were 'absolute'. This the appellant attributed to an overbroad statement in *MTN*, on the interpretation of the powers that licensees have under s 22. The argument was that in *MTN* this court found that licence holders were only obliged to 'have due regard to applicable laws' but did not necessarily have to comply with them. As already shown above, the court explained, in *MTN*, that licensees under s 22 are obliged to comply with applicable law, but such law cannot limit the very action that is authorised by section 22(1).[3] Counsel for the appellant conceded that if s 22 required the licensee to comply with applicable laws, as in my view was undoubtedly held in *MTN*, the dictum complained of was not overbroad.

[12] In so far as the appellant argued that a distinction must be drawn between private and state organ landowners, that argument also falls to be rejected. The appellant's argument was essentially that because of the public order or benefit role that state organs play, the regard that must be had to applicable law is that the law must be complied with, not only in respect of the execution of a decision but also in the taking thereof.

[13] There is, however, no scope, in the ECA, for the differential treatment of landowners contended for by the appellant. Express mention, in s 22(1)(*a*) of '…any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic' can only mean that s 22(1) is applicable to land held by state organs as it is to land held by private persons.

[3] Paragraph 15

[14] Once counsel for the appellant conceded that the interpretation of s 22 in *MTN* was not overbroad, the basis for the declarator sought in the main relief fell away, because the respondent did not have to obtain the appellant's approval to exercise its rights under s 22. All that the respondent had to do was to comply with applicable law when executing the works. No case was made that it had not done so.

[15] The review could also never have succeeded. Indeed, as was held in *MTN*, the respondent's decision to commence construction constituted administrative action. It was therefore subject to review on the grounds listed in s 6 of PAJA.[4] But, as submitted on behalf of the respondent, PAJA is exhaustive on the grounds upon which the respondent's decision can be challenged; the legality principle is not available as a separate basis for doing so. And even if the decision could be challenged on the legality principle, rationality, on which a legality challenge should be brought, is a much narrower basis than the grounds available under PAJA, which the appellant failed to prove.

[16] The appellant's argument on legality was not based on rationality. Its argument was that, for the respondent's decision to meet the legality requirement, the respondent had to accept the appellant's standard terms and conditions or such other conditions as would have the effect of protecting public interest. This was simply another way of imposing a consent requirement on the appellant. If the ECA did not require consent for the exercise of rights under s 22, failure to accept the appellant's conditions before taking the decision could not be unlawful and unreasonable.

[4] Section 6(2) of PAJA; *MTN supra*, paras 21, 24 and 35.

[17] The appellant contended further that the taking of the decision was procedurally unfair because the respondent had failed to give due notice of the imminent construction to members of the public, refused to agree to the appellant's conditions for the construction and abandoned the negotiation process it had started with the appellant. Again, as submitted on behalf of the respondent, the appellant failed to demonstrate that the exercise of the rights had a detrimental effect on members of the public. Further, it did not prove any right to challenge the respondent's decision on behalf of persons other than itself.

[18] Moreover, regarding the procedural unfairness the respondent had, over a period of approximately 16 months, attempted to prevail upon the appellant to approve its wayleave requests, to no avail. Attempts at reaching agreement on the conditions that the appellant sought to impose failed because of the failure, by the appellant's officials, to cooperate with the respondent.

[19] Further, the appellant had, as far back as late 2012, taken a unilateral decision to impose a moratorium on new and pending wayleave requests. This was only communicated to the respondent in December 2013, after construction had commenced. At the hearing of the appeal counsel for the appellant readily conceded that he could not make any submissions regarding the moratorium. In the end there was never going to be finality in respect of approval of the wayleaves and settlement on conditions of implementation as the appellant had precluded itself from engagement with the respondent.

[20] On lawfulness, the appellant contended that the respondent, in lodging its requests for wayleave approval, had submitted to the appellant's processes, raising

a legitimate expectation in favour of the appellant, that it would see those processes to finality before commencing with construction. In the light of that,, it was argued, its unilateral decision to commence construction was unlawful. This argument has no legal basis. The respondent was not required by law even to engage in a process of obtaining wayleaves. It did so only to facilitate working together with the appellant, and not because it was legally required to do so. Although the appellant argued that it had become practice for licensees to apply for wayleaves, and that the respondent was accordingly obliged to do so, this cannot be so. It would defeat the very object of s 22 which is to enable a licensee to enter upon land and perform its work without first obtaining the consent of the landowner. But the argument must in any event fail because, on the appellant's version, it had put a moratorium in place which would have precluded the respondent from even applying for wayleaves. And in addition, the argument fails to take into account the numerous failures by the appellant itself to cooperate with the respondent.

[21] A further argument by the appellant on the unlawfulness of the respondent's decision was that the respondent had not complied with applicable law as required under s 22(2) in that it had failed to comply with By-Law 32 of the Motor Vehicle and Road Traffic Regulation By-Laws, which prohibits digging on the appellant's roads and thoroughfares without permission from the City Engineer. Apart from the fact that this contention was made only in the appellant's reply, it falls foul of the principle that applicable law may not be used to limit the very act authorised under s 22.

[22] As to the complaint, by the appellant, that in executing the works the respondent failed to comply with applicable laws, standards and procedures in executing the works, the correct procedure would have been for the appellant to seek a court order compelling the respondent to comply with such laws.

[23] In summary, the application was misconceived in that it was based upon an erroneous interpretation of the Act, namely that the consent of a public authority was required before a licensee could take the action envisaged by s 22. In addition, no case was made out for a review of the decision in terms of PAJA. Although a public authority would be entitled to challenge the manner in which a licensee takes the action contemplated in s 22, which does not comply with the 'applicable law', that was not the challenge raised in this case

[24] On the question of costs, there is no reason to fear that an award of costs against the appellant might have a chilling effect on constitutional litigation. Accordingly the usual rules as to costs must apply.

[25] Consequently, the appeal is dismissed with costs, including the costs of two counsel.

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N Dambuza
Acting Judge of Appeal

APPEARANCES:

For Appellant:	AJ Dickson SC (with him HS Gani) Instructed by: Matthew Francis Inc., Pietermaritzburg Rossouw Attorneys, Bloemfontein
For Respondent:	DN Unterhalter SC (with him J Wilson) Instructed by: Roestof & Kruse Attorneys, Pretoria Symington & De Kok, Bloemfontein