

Short Notes on:

CELL PHONE TOWERS CAUSE CONSTITUTIONAL DISPUTE

Introduction

It is no secret that the world is evolving at a rapid pace, with technological advancements causing us to re-evaluate several legislative minefields. Recently, Telkom's cell phone mast took centre stage as the Constitutional Court handed down judgment in a matter that reminded us that municipal bylaws are not to be disregarded, even when industry giants are in town.

The matter of *Telkom SA SOC Limited v City of Cape Town and Another* [2020] ZACC 15 saw the telecommunications giant exhaust the full court process of appeal to try and challenge the validity of the conduct of the City of Cape Town (hereinafter referred to as 'the City') relating to the construction of an illegal cell phone mast. The Court was able to deal with the complex theory of legislative supremacy fully and recorded an eloquent thesis on government co-operation.

Background

During 2015 Telkom sought to expand its infrastructure by rolling out a project which was to see the construction of 135 cellular phone masts and rooftop stations¹. One site identified for such construction was private property in the area of Heathfield, Cape Town. This property was zoned for residential purposes and therefore required Telkom to apply to have a portion of the property rezoned to allow for the construction of a cell phone tower in line with municipal bylaws.

Telkom however, proceeded to erect the tower while the rezoning application was still pending, causing residents to complain to the City of Cape Town. In response, the City issued Telkom with a fine and halted its rezoning application pending payment of the fine, a move which aggrieved Telkom.

¹ At para 7.

The Relevant Arguments

Telkom, under Section 22 of the Electronic Communications Act² (hereinafter referred to as 'the Act'), was a license electronic communications service licensee. It was, therefore, able to enter upon any land, including land reserved for public purposes and construct and maintain electronic communications facilities and alter such facilities should it be necessary.

The City, however, required that before any cell phone tower is constructed, its consent was to be obtained in line with the National Building Regulations and Building Standards Act³ (hereinafter referred to as the Building Standards Act).

In summary, Telkom believed that since it was a holder of this license, it should be allowed to dispense with the processes of municipal bylaws in its attempt to exercise its rights conferred by national legislation. The City believed this to be the wrong approach and defended against the notion that it lacked the legislative capacity to enforce its bylaws and policy.

Consideration of the Court

The *Court a quo*, in upholding the Cape Town High Court's assessment of the matter applied provisions of the Constitution⁴.

S41 of the Constitution provides that all spheres of government and all organs of state must '*exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere*'⁵ and further '*co-operate with one another in mutual trust and good faith by coordinating their actions and legislation with one another*'.⁶

When the above is read with S156(3) of the Constitution, providing that '*a bylaw that conflicts with national or provincial legislation is invalid. If there is a conflict between a bylaw and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the bylaw must be regarded as valid for as long as that legislation is inoperative*', the Court ruled the position was not as complex as what Telkom was suggesting.

² 36 of 2005.

³ 103 of 1977.

⁴ The Constitution of the Republic of South Africa, 1996.

⁵ S41(g) of the Constitution

⁶ S41(h)(iv) of the Constitution.

In explanation, the Court relied on the *Maccsand*⁷ judgment compelling Telkom to comply with the bylaw as there was no real conflict between the bylaw and national legislation. This decision was further solidified in S22(2) of the Act which provided that licensees are to have due regard to the applicable law and environmental policy of the Republic. The intention here was for the local legislative provisions to be adhered to.

Conclusion

Developing networks require updated hardware and these items have a tendency to either be an eye-sore or somehow adversely affects human health with regular exposure. The decision in this matter can be seen as a defence of the citizens' opinion and amenability to these kinds of expansions. Although the nature of the dispute related more to a legislative overlap, alternatively, it can be viewed as confirmation that the industry heavyweights cannot just do as they please without due regard to the local landscape, both physically and in sentiment with the residents living there.

⁷ *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC)