IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 2763/2014

In the matter between:

The Msunduzi Municipality **Applicant**

and

Dark Fibre Africa (RF) (Pty) Ltd **Respondent**

J U D G M E N T

STEYN J

[1] The applicant seeks interim relief to restrain and interdict the respondent from conducting construction work on municipal property pending the final determination of its application for certain declaratory and review relief relating to the legality of the respondent's conduct. The terms of the interdicts sought are set out in paragraphs 2.1 to 2.3 of the notice of motion. The applicant also seeks the costs of the application for interim relief, including the costs consequent upon the employment of two counsel. The applicant contends that the respondent had acted unlawfully in that it had failed to obtain its permission and failed to act in accordance with conditions specified by the applicant before it commenced construction.

Parties

[2] The applicant is the Msunduzi Municipality which is a municipality duly established and responsible for the City of Pietermaritzburg. It is the owner of various properties within the city. The respondent is a company with registration number 2007/013968/07 and it trades under the name and style of D7A Open Access Network. The respondent is the holder of certain electronic communications network services licences issued in terms of the Electronic Communication Act, 36 of 2005 (hereinafter referred to as 'ECA') and constructs *inter alia* fibre optic cable networks upon, under, along or across streets and/or roads, consisting of the laying of underground ducts containing fibre optic cables. The application was heard on 27 March 2014. On 25 February the applicant brought the application on an urgent basis before Bezuidenhout AJ who adjourned it and ordered:

> "(a) The interim relief sought in Part A of the notice of motion is adjourned to 17 March 2014;
>
> (b) Respondent is to file its notice of opposition by 28 February 2014 and to file its answering affidavit by 7 March 2014; and
>
> (c) Applicant is to file any replying affidavit by 14 March 2014;
>
> (d) Costs are reserved."

[3] The parties have for some time prior to this application been engaged in a process of negotiating the approval of wayleave permits and the terms of these permits. The applicant's approval was dependent on the adherence to the terms as referred to in annexure D7A4. The document contains *inter alia* the following conditions:

> "1a. Proof of R5mil Public Liability Insurance cover for the planned duration of the project. To be extended as per delays to cover the actual duration of the project.
>
> b. Proof of each contractor's Indemnity Insurance.
>
> c. A letter is required from other service providers (Telkom, MTN, Vodacom, Transtel, Cell C, Neotel, Plessey, and Eskom) stating that they do not have any coinciding projects planned within 6 months that can be combined with the trenching of this project.

…

g. Proof of advertisement in local papers giving public warning and detailing the extent of the project and the exact locations.

2 … A maximum of ten test pits at a time may be dug (any deviations from this must be applied for per section and written consent received from this Unit prior to commencement). …

3. Should any unforeseeable damages occur at any stage during this project, all repairs are to be effected immediately and all related costs are to be borne by the company making this application. Details of repair strategy teams are to be submitted.

…

5. During the trenching operations, all health and safety requirements in terms of the various acts are to be adhered to in terms of the environment, workers and the public (i.e. Full barriers, signage, etc).

…

8. For control purposes only one road per area may be worked on and be fully completed before the next road is commenced with.

…

19. Work at all road crossings must be well planned to ensure:

…

b. No disruption of traffic during peak traffic (7-8am as well as 11.30-1pm on Saturdays)

…

f. Msunduzi traffic Control is to be notified in advance.

23. Should the Municipality or their contractor perform work at the same location as your trenching, before your final reinstatement is completed, then in this case you are still fully responsible for the reinstatement.

..

25. An updated as built plan showing all your services within the Msunduzi Municipal area is to be submitted to this office upon completion."

[4] The following facts are not disputed:

4.1 The respondent submitted wayleave applications to the applicant during 2012, whereby it requested permission to commence construction. The applications were in respect of the very construction which the applicant now seeks to restrain.

4.2 The applicant furnished the respondent with its standard conditions which are contained in a letter. (See annexure D7A4 at page 144 *et seq*.)

4.3 The standard conditions relate to the manner in which construction is to be performed. The applications have never been approved.

4.4 The respondent commenced construction during November 2013 without any approval of the wayleave applications and without complying with the applicant's standard conditions.

4.5 The respondent is a duly authorised network services licencee.

Requirements for the relief sought

[5] The requirements of an interdict are well established and laid down by Innes JA in *Setlogelo v Setlogelo* 1914 AD 221 at 227, that is that the plaintiff has to show that it has (a) a clear right; (b) an injury actually committed or reasonably apprehended (or an actual or threatened invasion of that right); and (c) the absence of a similar protection by any other ordinary suitable remedy in law. In *Ladychin Investments v South African National Roads Agency* 2001 (3) SA 344 (N) the court stated the principles of governing interim relief, as:

> "1. The requirements for a final interdict are well established and required the applicant to show:
>
> (a) A clear right;
> (b) a well-grounded apprehension of irreparable injury;
> (c) the absence of any other ordinary remedy.
>
> If an applicant can prove the above requirements he will also, obviously, be entitled to an interim interdict.

2. Where the applicant cannot show a clear right then he has to show a right which, though *prima facie* established, is open to some doubt. In that event the applicant will have to show that the balance of convenience favours him. The test for the grant of relief involves a consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant; the weaker the prospects of success the greater the need for the balance of convenience to favour him. By balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.

3. Even if there are material conflicts of fact the Courts will still grant interim relief. The proper approach is to take the facts as set out by the applicant, together with any facts set out by the respondent, which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at a trial.

4. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he should not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to 'some doubt'.

5. If there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meantime, subject of course to the respective prejudice in the grant or refusal of interim relief.

6. Although the grant of a temporary interdict interferes with a right which is apparently possessed by the respondent, the position of the respondent is protected because, although the applicant sets up a case which *prima facie* establishes that the respondent has not the right apparently exercised by him, the test whether or not temporary relief is to be granted is the harm which will be done.

7. And in a proper case it might well be that no relief would be granted to the applicant except on conditions which would compensate the respondent for interference with his right, should the applicant fail to show at the trial that he was entitled to interfere."

My emphasis.

(Also see *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 352 (D&CLD) at 383E-F and *Eriksen Motors v Protea Motors* 1973 (3) SA 85 (A) at 691F.)

[6] It is well established that an applicant in motion proceedings stands or falls by its notice of motion and the averments in its founding affidavit. (See *President of the Republic of South Africa and Others v SARFU* 2000 (1) SA 1 (CC) at para 150).

[7] The applicant in its founding affidavit, para 8, submits that the final relief sought is "designed to secure orders declaring the respondent's conduct to be unlawful and interdicting the respondent from entering upon the applicant's land without authority in the future. The application for interim relief is designed to restrain the respondent, pending the final determination of the application for final relief."

[8] The respondent alleges that it exercised its rights under section 22 of ECA and relies on *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) 638 (SCA) for exercising its right in the manner it did. More specifically it relies upon the finding that the content of section 22(2) does not limit the action authorised by section 22(1). Respondent claims that it is not under any duty to obtain permission or approval from applicant to commence the construction. The respondent, however, concedes that it has a duty to adopt reasonable and fair processes.

Legal Framework

[9] Section 22 of ECA is pivotal to this application especially since it authorises the respondent to commence construction on land, the issue however is whether it is so unrestricted as claimed by the respondent. Section 22 of ECA reads as follows:

> "22. Entry upon and construction of lines across land and waterways. - (1) An electronic communications network service licensee may –
>
> (a) enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic;

(b) construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public 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 any action in terms of subsection (1), due regard must be had to applicable law and the environmental policy of the Republic." (My emphasis)

[10] The SCA in *MTN* stated the rationale for section 22 as follows:

> "Section 22(1) specifically dispenses with the need to obtain the owner's consent. It is no answer to suggest that, because no provision is made for, for example, the delictual liability of the licensee, limitations on the liability of the landowner and responsibility to maintain access roads, an agreement of lease or other agreement is required. It seems to me that the general provisions of the law are sufficient to provide for these eventualities. The words 'with due regard' generally mean 'with proper consideration' and, in the context, impose a duty on the licensee to consider and submit to the applicable law. This duty arises only when the licensee is engaged 'in taking any action in terms of subsection (1)': the 'action' referred to by s 22(1) is entering, constructing and maintaining, altering and removing. These actions are authorised. It is 'in their taking' that due regard must be had to the applicable law. A fortiori the 'applicable law' cannot limit the very action that is authorised by s 22(1)."

The *MTN* decision is binding on me and insofar as it is at odds with the two decisions relied on by the applicant, I will follow the SCA's interpretation of ECA. In my view there is no distinction to be made between the present application and the *MTN* case. The SCA particularly dispensed with the need of an owner's consent as follows:

> "A proper, constitutional, interpretation thus meant that the consent of the landowner had to be obtained for an exercise of the rights in terms of s 22(1). I find this interpretation 'unduly strained'. It cannot be correct simply because the reason for the powers given by s 22(1) would fall away if consent of the owner were to be a requirement. Section 22(1) specifically dispenses with the need to obtain the owner's

consent. It is a no answer to suggest that, because no provision is made for, for example, the delictual liability of the licensee, limitations on the liability of the landowner and responsibility to maintain access roads, an agreement of lease or other agreement is required. It seems to me that the general provisions of the law are sufficient to provide for these eventualities. The words 'with due regard' generally mean 'with proper consideration' and, in the context, impose a duty on the licensee to consider and submit to the applicable law. This duty arises only when the licensee is engaged 'in taking any action in terms of subsection (1)': the 'action' referred to by s 22(1) is entering, constructing and maintaining, altering and removing. These actions are authorised. It is 'in their taking that due regard must be had to the applicable law. A fortiori the 'applicable law' cannot limit the very action that is authorised by s 22(1)."

(Ad para 15.)

[11] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA (CC) at 506I-J O'Regan J stated the following with regard to section 6 of PAJA:

> "The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily, arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rest squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative that do not fall within the scope of PAJA, as PAJA gives effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will off course be constitutional matters."

[12] The Promotion of Administrative Justice Act 3 of 2000 ('PAJA') is premised on administrative action which is lawful, reasonable and procedurally fair. (See section 33 of the Constitution of the Republic of South Africa, 1996.) Applicant complained that the respondent had failed to act in accordance with its PAJA obligations. Accordingly it is necessary to consider what would constitute fair administrative action in general. The SCA in MTN determined that such action should be lawful, reasonable and fair. In *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa, In Re : Vodacom (Pty) Ltd v Chairperson of the*

Independent Communications Authority of South Africa and Others [2014] ZAGPJHC 51 (31 March 2014) at para 40 the court summarised action that is reviewable in terms of PAJA, and I agree with it. It is *inter alia* when an administrator who took the said action:

> "(i) was not authorised to do so by the empowering legislation;
>
> (ii) acted under a delegation of power, which was not authorised by the empowering legislation;
>
> (iii) the action was procedurally unfair;
>
> (iv) the action was materially influenced by an error of law;
>
> (v) the action was taken –
>
> - for a reason not authorised by the empowering legislation;
> - on the basis of irrelevant considerations or because relevant considerations were not considered; or
> - arbitrarily or capriciously;
>
> (vi) the action itself –
>
> - contravenes any legislation or is not authorised by the empowering provision of such legislation; or
> - is not rationally connected to the purpose for which it was taken; or the purpose of the empowering provision; or the information before the administration; or the reasons given for it by the administrator."

[13] As I understand the respondent's argument it disputes that the applicant has succeeded in its founding affidavit to invoke PAJA, in fact, so it was argued, the applicant failed to explain which rights have been affected and how these rights have been violated. In my view the founding affidavit not only fails to list the applicable law that was not adhered to, but fails to challenge the rationality of the respondent's decision to proceed with the construction in the manner it did. In light of the SCA's finding in *MTN* that a decision in terms of section 22 of ECA constitutes administrative action, it is necessary to view the issues before me through a public law lens.

[14] Applicant contended in its oral argument that its clear right is that the respondent acted without due regard to applicable law and has not conducted itself in accordance with its PAJA obligations. In support of this submission, the applicant relied on paragraphs 32 to 42 of its founding affidavit. The paragraphs *inter alia* deal with the fact that the respondent has all along been aware of the process adopted by the applicant which obliges it to apply for a wayleave permit, and since such wayleave permits were not granted, construction should not have commenced. Much reliance is placed by the applicant on these wayleave permits. The problem that I have with this contention is that the *MTN case* unequivocally states that permission is not a requirement for action in terms of section 22 of ECA. Mr Dickson SC in his oral argument conceded, albeit with great reluctance, that permission is not required to exercise any powers given by s 22(1). He however argued that the conditions imposed by wayleave permits arise from the applicant's obligations as a municipality and are designed to safeguard the interests of the public.

[15] As much as applicant is relying on the non-issue of wayleave permits, it is necessary to consider the content of Circular 40 of 2013, issued by the applicant on 13 August 2013. It reads as follows:

> "It has been brought to the attention of the Municipal Manager that private companies and our own internal business units are digging sections on municipal property without relevant way leave approval. In this regard, all way leaves issued since the 1st January 2013 are null land void and must be terminated with immediate effect.
>
> In future all way leave applications must be directed to the Deputy Municipal Manager : Economic Development who will administer the process for onward submission to the Strategic Management Committee.'
>
> The above provisions apply to the internal business units within the municipality too.
>
> This is to be implemented with immediate effect."
>
> (My emphasis)

In light of the aforesaid memorandum and the papers filed on behalf of the Applicant it is clear that applicant has placed a moratorium on wayleave permits being issued. What is of concern *in casu* is Applicant's complaint of the respondent's conduct of commencing construction before a permits has been issued, whilst it is evident that such permits, given the moratorium would in all likelihood not have been granted. This issue certainly begs the question whether any negotiations conducted after the moratorium could have been in good faith, given its existence.

[16] Before this court can decide whether the respondent failed in its duty to have had due regard to applicable law, it should be satisfied that the applicant has made out a case, showing that the respondent failed to do so. Respondent submitted that the applicant has failed to stipulate the law that it relies on and which it considers as not being adhered to and in doing so it failed to establish a *prima facie* right. An analysis of the applicant's founding affidavit shows that no specific bylaw has been stipulated, reference is however made to the Motor Vehicle and Road Traffic Regulation bylaws (No. 60 of 1958) in the replying affidavit. As much as paragraph 34 refers to sections 151, 152 and 156 of the Constitution, these provisions relate to the status of municipalities, their development duties and their functions and powers and do not assist the applicant in making out a case that the 'applicable law' has not been considered. I am mindful of the fact that a claimant who relies on a particular section of a statute need not specifically mention the sections, as long as there are sufficient facts that are pleaded from which the conclusion can be drawn that the provisions of a statute apply. (See *Ketteringham v City of Cape Town* 1934 AD 80 at 90.) The present matter is however distinguishable from *Ketteringham* since the applicable law forms the basis of the case pleaded and informs the respondent of the case it needs to meet.

[17] Undoubtedly the manner in which the respondent exercised its rights as a licencee should be of grave concern to every land owner. The action *in casu* appears to be without complying with the conditions required by the applicant.

Despite the aforesaid it is the duty of applicant, in my view, to substantiate the need of each and every condition that has been flouted and how these conditions relate to the existing laws or environmental policies. If the content of section 22(2) of ECA is considered then the respondent is obliged to have due regard to the applicable law, such law is definitive of any unlawful conduct.

[18] Having considered the content of the founding affidavit filed on behalf of the applicant, I am of the view that it lacks particularity and specific facts that show how the respondent acted in a procedurally unfair manner. Malan JA in *MTN* defines procedural fairness as "giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of participants, but is likely to improve the quality and rationality of administrative decisions-making and to enhance its legitimacy." (para 21)

[19] Mr Unterhalter SC has argued that the relief sought in part B is incompetent. It is accordingly necessary to consider B. The following is sought:

> "1. It is declared that the respondent has no entitlement to exercise any of the powers provided for in section 22 of the *Electronic Communications Act, 36 of 2005*, without the prior approval of the applicant.
>
> 2. Alternatively to paragraph 1 above, the decision of the respondent to exercise the powers in section 22 of the ECA and to enter upon land in the ownership of the applicant for the purpose of constructing and/or maintaining an open access optic fibre network is reviewed and set aside alternatively is declared invalid and is set aside.
>
> 3. The respondent is permanently interdicted and restrained from:
>
> 3.1 Entering upon any land (including any street, road, footpath and land reserved for public purposes) in the ownership or control of the applicant (hereinafter referred to as "the applicant's land").

3.2 Constructing or engaging any party to construct any electronic communications network or facility upon, under, over, along or across any of the applicant's land.

4. The respondent is directed to remove all optic fibre cables and any other apparatus or equipment as may have been constructed and installed by it on any of the applicant's land and to restore it to its original state at its (respondent's) cost and to the satisfaction of the applicant, within a period of 1 month as from the date of this order.

5. The respondent is directed to bear the costs of the application, including the costs of the application for interim relief and all reserved costs, such costs to include the costs consequent upon the applicant's employment of two counsel."

[20] In my view the relief sought in part B impacts on and qualifies whether the applicant is entitled to the interim relief. In light of the *MTN* judgment the relief sought in terms of paragraph 1 is not competent since no permission is required. I am not persuaded on the papers that the decision of the respondent to exercise its powers in terms of section 22 is truly susceptible to review. Respondent is a licencee in terms of ECA and its decision, in my view, is based on its duly awarded license. Akin to the facts of *MTN*, the Respondent *in casu* is not an organ of state but a juristic person excercising public power. See section 1 of PAJA which defined administrative action as: "any decision taken, or any failure to take a decision by- a)… b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which, adversely affects the rights of any person and which has a direct, external legal effect-". Importantly the SCA however in *MTN* held that any decision in terms of section 22 constitutes administrative action. (See para 21) I interpret this to mean that any exercise of powers in terms of the section amounts to administrative action but not merely the decision in isolation. The decision to act is dependent on a licence being granted. This much has been qualified by the SCA in the latter part of para 21 as follows: "The kind of action that will constitute a 'decision' is a matter of construction in the context of the case."

[21] The Applicant has not made out a case for the decision to be reviewed or set aside. Applicant's complaint is about the manner in which the respondent exercised its powers, not that it is acting procedurally unfair. In light of the aforesaid the applicant has very limited prospects of success, if any on the relief sought in part B. This court is not deciding on the issues that ought to be decided when the matter is reveiwed but has to consider the prospects since the interim relief is related to the relief sought under B.

[22] In order to determine whether the applicant has a right is a matter of substantive law and the *onus* is on the applicant to establish and define the right. Having considered the papers before me I am not persuaded in all of the circumstances that the applicant has succeeded in its *onus* to establish a *prima facie* right in terms of PAJA and that it is entitled to the relief sought.

[23] **Order**

The application is hereby dismissed with costs, such costs to include the costs of two counsel.

……

STEYN J

Application heard on :	27 March 2014
Counsel for the applicant :	Mr AJ Dickson SC
Instructed by :	Matthew Francis Inc
Counsel for the respondent :	Mr D Unterhalter SC
Instructed by :	Roestoff & Kruse Attorneys
Judgment handed down on :	14 April 2014