



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 59383/21

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

DATE: 13 February 2023

In the matter between:

**THURWOOD INVESTMENTS (PTY) LTD
T/A BKT FIBER JV**

Applicant

And

**CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY**

Respondent

JUDGMENT

VILJOEN AJ

- [1] The applicant (“BKT”) was contracted to install aerial fibre-to-the-home broadband infrastructure in some regions of Kwa-Thema. The operational areas relevant to this application are situated within the respondent (“the COE”).
- [2] The COE has a wayleave policy to safeguard the services infrastructure within the public road reserve. To control and coordinate work in the public road reserve, the COE requires potential providers of public services to obtain a wayleave before work may be conducted in the road reserve. In terms of the policy, a wayleave holder has permission to place a new service, do excavations, perform vehicular and pedestrian control, and perform reinstatement work in the public road reserve. A wayleave may be subject to general conditions, e.g., a limited time to conduct the work.
- [3] BKT applied for and was granted wayleaves that enabled it to install the aerial fibre network in Kwa-Thema.
- [4] Armed with the approved wayleaves, BKT commenced the construction of its network in September 2021. The network is not yet completed.
- [5] On 21 October 2021, an extraordinary meeting of the council of the COE purported to adopt a resolution in the following terms:

“RESOLVED:

- 1. That Council must order HALTING the installation of fibre through poles as it defaces the image of the City.*
- 2. That the City must ENGAGE the private contractors to explore installation of fibre underground and stop the installation of poles.*

3. *That the City CONSIDERS reviewing the way-leave [sic] application in which must specify[sic] that all installations must be made underground.*"

- [6] The terms of the resolution could have been more explicitly formulated, a testament perhaps to the haste with which it was produced and purportedly adopted.
- [7] Part B of the notice of motion condenses the resolution's content to "[a] decision to halt aerial installation of fibre through poles". The resolution, however, must, as any other document, be read as a whole.¹ The resolution, in addition to demanding the immediate cessation of aerial installation, envisages a consultation process with fibre contractors to explore the potential of a change to the installation methodology. It further calls for the consideration of the addition to wayleave applications of a requirement that fibre should be installed underground, presumably upon the conclusion of consultation process.
- [8] It is common cause that the resolution was taken without prior notification to or consultation with BKT, other contractors similarly occupied with installing aerial fibre infrastructure or the public at large.
- [9] BKT learnt of the existence of the resolution when, on 15 November 2021, the Ekurhuleni Metropolitan Police Department stopped BKT from further work. Some letter-writing between BKT's attorneys and the COE ensued, culminating in confirmation from the COE that it considered the resolution valid and enforceable.

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [18]

- [10] On 29 November 2021, BKT's wayleave consultant applied for the renewal of its wayleaves. The divisional head of the Roads and Stormwater Department of the COE verbally stated in response that he could not grant any extension of wayleaves because the resolution had tied his hands. This communication was followed by an email attaching a copy of the resolution.
- [11] BKT launched this application in December 2021. Part A of the application sought, on an urgent basis, the suspension of the resolution, the prohibition of the enforcement of the resolution and the extension of BKT's wayleaves (with some qualifications) pending the outcome of Part B. Part A was struck from the roll for lack of urgency on 11 January 2022.
- [12] Part B of the application, as I referred to above, seeks the review and the setting aside of the COE's "*decision to halt aerial installation of fibre through poles as set out in a resolution purportedly passed by the [COE] on or about 25 October 2021.*"
- [13] BKT argues that the resolution is unlawful. It contends that it is procedurally unfair, contravenes the COE's Standing Order, and violates the rights afforded licenced electronic communications network service providers by section 22 of the *Electronic Communications Act, 36 of 2005* ("the ECA"), *inter alia* to construct and maintain communications networks under, over or along streets or land reserved for public purposes.
- [14] The COE defends the resolution by asserting that community unrest and acts of violence in Kwa-Thema because of the installation of overhead fibre-to-the-home in that area urgently compelled it to restore order. It contends that

the matter's exigencies justified the resolution's adoption without notice. This excuse has little to commend it, in my view.

[15] In adopting the resolution, the COE was obligated to act procedurally fairly: patently, the resolution impacted the rights and legitimate expectations of BKT, and other contractors, not to mention the public at large.² Those potentially affected by the resolution were thus entitled, *inter alia*, to adequate notice of the nature and purpose of the proposed resolution and a reasonable opportunity to make representations.³ It is so that prompt action was likely required if the COE's version of events is accepted. This did not, in my view, justify the total abandonment of the notice requirements.

[16] It follows that COE's order to halt ongoing work was unlawful. However, as I shall explain below, an enquiry into the unlawfulness of the resolution has been overtaken by events. It is thus unnecessary for me finally to pronounce on the procedural fairness or the other grounds of review BKT raised.

[17] BKT asserts the right to work on the public road reserve as the holder of wayleaves and in terms of section 22 of the ECA.

[18] It is quite correct that when this application was launched, BKT was entitled vis-à-vis the COE on the strength of its wayleaves to proceed with its work. The resolution abrogated that right insofar as it ordered a cessation of work, as I said.

[19] The interim relief sought in Part A would have maintained the status quo before the resolution. The resolution and its enforcement would be

² Section 3(1), *Promotion of Administrative Justice Act*, 2000

³ Section 3(2), *PAJA*

suspended, and the renewal of BKT's wayleaves secured pending the determination of Part B. BKT would consequently have been able to continue its work as its wayleaves would remain current.

[20] BKT, however, failed to secure interim relief. Therefore, BKT's wayleaves expired. The parties agree that BKT can since the expiration of its wayleaves no longer lawfully work in the public road reserve. Reviewing and setting aside the resolution will not restore BKT's wayleaves or the position as it stood before the resolution was taken. BKT would remain unable lawfully to work in the public road reserve.

[21] BKT appreciated the significance of extending its wayleave. It applied, ultimately unsuccessfully, for the renewal of thereof. In the founding affidavit, BKT's deponent states:

"53. Notwithstanding the above, upon BKT applying for an extension of the previous aerial wayleaves, which it has a legitimate expectation would be granted, the COE refused to grant the extensions ostensibly, [sic] on the strength of the Resolution."

[22] The COE's refusal to extend BKT's wayleaves constituted administrative action distinct from the resolution. The refusal ought to have been challenged by review proceedings. The relief BKT seeks in Part B cannot invalidate the COE's decision not to extend the wayleaves and will not resurrect them.⁴ The relief sought would not even ensure the success of future applications for new wayleaves. The COE must assess new wayleave applications against its wayleave policy and decide whether to grant or refuse any application on the merits thereof.

⁴ C.f. *Shanduka Resources (Pty) Ltd v Western Cape Nickel Mining (Pty) Ltd* [2017] All SA 279 (WCC) at [50]

- [23] Herein the present matter is distinguishable on the facts from the judgment in *Vumacam (Pty) Ltd v Johannesburg Roads Agency and others*.⁵ In the *Vumacam* matter the decisionmaker refused to accept any application for a wayleave for purposes of installing aerial fibre or CCTV cameras. I do not agree that the COE's resolution should be interpreted as creating an absolute bar to all future aerial fibre installations.
- [24] In the context of section 22 of the ECA, I was referred to the judgments of the Constitutional Court in *Tshwane City v Link Africa and others*,⁶ and of the Supreme Court of Appeal in *Dark Fibre Africa (Pty) Ltd v City of Cape Town*⁷ and *Telkom SOC Ltd v Cape Town (City) and another*.⁸ These judgments confirm that municipalities may not withhold consent to section 22 licensees to construct infrastructure but may regulate how the licensees must exercise the power derived from that section through, for example, wayleaves.
- [25] BKT contends that by requiring underground installation instead of aerial installation, the COE thwarts the provisions of section 22. Underground installation, the argument goes, renders BKT's venture uneconomical. It is submitted that "[if BKT] is not permitted to install an aerial fibre network there, it cannot install a fibre network at all." I have some difficulty with this submission. Nowhere in section 22 or in the judgments I was referred to was it suggested that a municipality, in regulating the so-called "modalities" of installation, had to maintain the economic viability of a licensee's project.

⁵ [2020] ZAGPJHC 342
⁶ 2015 (6) SA 440 (CC)
⁷ 2019 (3) SA 425 (SCA)
⁸ 2020 (1) SA 514 (SCA)

- [26] In any event, even if section 22 could notionally allow BKT to bypass the wayleave policy, the papers make no case that it is the holder of an electronic communications network service licence. BKT is described in the founding papers as “*a fibre network construction specialist contracted to prepare and deploy aerial fibre broadband infrastructure in Kwa-Thema Wards 77, 78 and 80*”. Thus, BKT cannot avail itself of rights conferred on section 22 licensees whatever the content of these rights may be.
- [27] The inevitable conclusion is that the resolution's validity as a self-standing issue had become academic when BKT's wayleaves expired. A court ought not to entertain “abstract, academic or hypothetical” questions.⁹
- [28] In these premises, the application falls to be dismissed.

⁹ *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd and others* 2020 (4) SA 409 (CC) at [47]

[29] I make the following order:

Part B of the application is dismissed with costs.

H M VILJOEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Date of hearing: 11 October 2022

Date of judgment: 13 February 2023

Appearances:

Attorneys for the applicant: SCHINDLERS ATTORNEYS

Counsel for the applicant: ADV S BUDLENDER SC WITH ADV P OLIVIER

Attorneys for the respondent: DDV ATTORNEYS

Counsel for the applicant: ADV E SITHOLE