



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1139/2015

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LTD

APPELLANT

and

CARL HENRICUS BEEKMANS NO

FIRST RESPONDENT

STEPHEN MARSHALL NO

SECOND RESPONDENT

TIMOTHY LISTER MAUGHAN NO

THIRD RESPONDENT

CITY OF CAPE TOWN

FOURTH RESPONDENT

Neutral citation: *Mobile Telephone Networks v Beekmans NO* (1139/2015)
[2016] ZASCA 188 (1 December 2016)

Coram: Leach, Petse, Dambuza, Mathopo and Van der Merwe JJA

Heard: 17 November 2016

Delivered: 1 December 2016

Summary: Local authority: building plans: national building regulations: temporary building: must be determined by objective assessment of its nature and purpose: cellular communications base station and mast not a temporary building: building plans wrongly approved.

ORDER

On appeal from Western Cape Division of the High Court, Cape Town
(Rogers J sitting as court of first instance):

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

JUDGMENT

**Van der Merwe JA (Leach, Petse, Dambuza and Mathopo JJA
concurring):**

[1] The appellant, Mobile Telephone Networks (Pty) Ltd (MTN), applied to the fourth respondent, the City of Cape Town (the City), for approval of the erection of a cellular communications base station and mast (the base station) on erf 10762, Dalham Road, Constantia. In terms of the application the base station was to be a temporary building and the application was approved by the City on that footing. The first, second and third respondents are the trustees of the Stemar Trust (the Trust). The Trust is the owner of erf 10764, which adjoins erf 10762. The Trust applied in the Western Cape Division of the High Court, Cape Town for the review and setting aside of the decision of the City to approve the erection of the base station. That court (per Rogers J) granted the relief claimed by the Trust, but granted leave to MTN to appeal to this court. The central issue in the appeal is whether the City correctly regarded the base station as a temporary building.

[2] The issue arose in the circumstances set out below. MTN is a licenced cellular network service provider. As a result of a number of complaints, MTN ascertained that the cellular phone reception in the area of Constantia was poor. In order to improve the cellular phone coverage, MTN decided to erect a

base station in the area. Its research indicated that erf 10762 was ideally suited for this purpose.

[3] In terms of the relevant zoning scheme, however, erf 10762 was zoned as 'Single residential'. This zoning did not allow the erection of the base station. Accordingly, during 2008 MTN applied to the City for approval of a temporary departure of land use for a period of five years in terms of s 15(1)(a)(ii) of the Land Use Planning Ordinance 15 of 1985 (LUPO). At all relevant times MTN acted for or on the authority of the owner of erf 10762. Despite having received objections thereto, the City granted the application during October 2010. In a letter dated 4 November 2010, the City advised MTN that the approval would run for a period of five years from its final notification letter. It appears, from the papers, that the final notification letter was sent on 5 March 2013, after the determination of unsuccessful internal appeals against the decision to allow the temporary land use departure. The five year period of the land use departure thus commenced on 5 March 2013. The conditions of approval included the following:

'After 5 years, or if the site is decommissioned before such time, the applicant must remove all site infrastructure and the site must be rehabilitated, within one month, to its former state or to a condition that is in line with the land use and character of the area at the time, as required by Council. (If the communication structures are still required to be operational after this time, a new application to Council must be made for its consideration and approval.)'

[4] The conditions also provided that MTN would not be exempted from applicable regulations. MTN consequently had to obtain approval of the building plans of the base station in terms of the National Building Regulations and Building Standards Act 103 of 1977 (the Act) and the National Building Regulations made in terms of s 17(1) of the Act and published in GN R2378, GG 12780, 12 October 1990 as amended (the regulations). During April 2013 MTN submitted the building plans in respect of the base station to the City in terms of s 4 of the Act. After the submission of the building plans, a senior official of the City made the following recommendation in an on site inspection report:

'It is highly recommended that a rigorous public participation process transpires with all the relevant parties, as there has been public outcry in the media some time ago in that particular area.'

As a result of a public participation process that then took place, 21 property owners in the area, including the Trust, objected to the building plans, mainly on the basis that their adjoining and neighbouring properties' values would be negatively affected. In the normal course of events the approval of the building plans would have had to be considered in terms of s 7 of the Act.

[5] However, a memorandum written by an official of the City dated 2 October 2013, caused a significant turn of events. In this memorandum the following was stated:

'Application 01461/2013, to erect a cellular mast and communication base on Erf 10762 Constantia.

The application is to be returned to the applicant unapproved in its current form.

The applicant is to submit a written application in terms of Regulation A23(1) promulgated under s 17(1) of the National Building Regulations and Building Standards Act, 103 of 1977. The period to be applied for as a temporary building (cell mast) is to be for a maximum of five (5) years. This is to bring it in line with the Temporary Land Use Departure that has been granted for this property.

This will then replace the s 4 application and Ipos is to indicate it as a temporary building.'

In a letter dated 3 October 2013, the City informed MTN that the application for approval of the building plans had been evaluated in terms of the regulations and was refused in terms of s 7 of the Act. The last sentence of the letter read:

'The applicant must comply with the requirements as indicated on the attached memo[andum] from [the] Section Head.'

The letter had attached to it the aforesaid memorandum of 2 October 2013.

[6] As a result, on 10 October 2013, MTN submitted the same building plans to the City for approval of the construction of the base station as a temporary structure in terms of the regulations. On 17 October 2013 the City approved the application in the following terms:

'Provisional authorisation is hereby granted in terms of Regulation A23(1) promulgated under s 17(1) of the National Building Regulations and Building Standards Act, 103 of 1977 as amended (the Act) to proceed with the erection of the Temporary Cellular Communication Base Station as proposed on building plan application number 01461/2013 subject to the following conditions:

1. The period it may remain on the property is five (5) years from the granting of the Temporary Land Use Departure (granted in March 2013). It will then be demolished and all material removed from the property. One or more extensions may be considered on request of the owner as contemplated in Sub-regulation A25(4) provided that the Land Use Departure is further extended.
2. The Building Development Management Section reserves the right to order you to remove the temporary structure should it be deemed necessary for health or safety reasons or on non-compliance with any of the conditions imposed in granting this authorisation.
3. All conditions set out in the granting of the Temporary Land Use Departure remain and are to be adhered to.'

[7] MTN commenced construction of the base station during July 2014 at the location indicated on the building plans. On 31 July 2014, the Trust launched an application in two parts against MTN. In the first part the Trust sought an urgent interdict restraining MTN from proceeding with the construction of the base station pending the determination of the second part, namely the review and setting aside of the approval of the building plans. The second part of the application was eventually determined by Rogers J.

[8] In the correspondence that followed on the issue of the application, MTN acknowledged that the construction of the base station in terms of the building plans took place at a location on erf 10762 that differed from the location thereof indicated on the site plan submitted as part of the application in terms of LUPO. MTN stated that it would cease construction at the incorrect location, rehabilitate that location and commence construction at the correct location. As a result, the first part of the application was removed from the roll. However, presumably in terms of advice to MTN that the approval it had received in terms of LUPO provided that the location of the base station had to be 'generally in accordance with' the site plan and that the location of the

base station on the building plans complied with that requirement, MTN resumed construction of the base station at the location indicated on the building plans. The Trust learned of this on 27 October 2014, and on 31 October 2014 it launched a second application for an urgent interdict pending the review application. This application was dismissed by Allie J on the ground that it lacked sufficient urgency. In the event, when the review application came before Rogers J on 21 May 2015, the construction of the base station had been completed. The court a quo correctly said that the construction could not have progressed far by the time that the original application was launched by the Trust on 31 July 2014 or when the urgent application was launched on 31 October 2014.

[9] In the court a quo the Trust essentially relied on two review grounds. The first was that given the nature of the base station, it ought not to have been approved as a temporary building. The second review ground, as I have indicated, related to the alleged divergence in respect of the exact location of the base station. The court a quo upheld the first review ground and, in the event, found it unnecessary to decide the second.

[10] It follows from what I have said that the interpretation of the definition of 'temporary building' in the regulations and the provisions of regulation A23 is central to the determination of this appeal. In terms of the regulations, a temporary building is defined as: 'any building that is so declared by the owner and that is being used or is to be used for a specified purpose for a specified limited period of time, but does not include a builder's shed.'

Regulation A23 further reads as follows:

'TEMPORARY BUILDINGS

(1) On receipt of any application to erect a building which the applicant has declared to be a temporary building, the local authority may, subject to the provisions of subregulations (2), (3) and (4), grant provisional authorisation to the applicant to proceed with the erection of such building in accordance with any conditions or directions specified in such authorisation.

(2) Before granting such authorisation the local authority may require the submission of—

- (a) a statement of the period for which authorisation is required;
 - (b) a site plan;
 - (c) layout drawings in sufficient detail to enable the local authority to determine the general size, form, materials of construction and use of the proposed building; and
 - (d) any structural detail required by the local authority to determine the structural safety of the proposed building.
- (3) The local authority shall grant the authorisation contemplated in subregulation (1) for a limited period, to be determined with regard to the period specified by the applicant.
- (4) The local authority may at the request of the owner grant approval for one or more extensions of the period contemplated in subregulation (3): Provided that where it is intended that the public should have access to such building each such request shall be accompanied by a certificate signed by an approved competent person, indicating that the condition of the structural system is satisfactory.
- (5) The owner of such building may, not later than the last day of the period contemplated in subregulation (3), submit to the local authority such additional plans and details as required by the local authority in order to consider an application in terms of section 4 of the Act.
- (6) Where such local authority has granted approval in respect of an application contemplated in subregulation (5) the owner shall submit to the local authority an affidavit stating that any part of such building erected in terms of the provisional authorisation has been erected in accordance with the plans and details contemplated in subregulation (5).
- (7) If any plans and details contemplated in subregulation (5) have not been submitted to such local authority or if such local authority has refused to grant approval in respect thereof, the owner shall forthwith remove or demolish such building.'

[11] It is well established that the meaning of these provisions must be established by consideration of the words used, the statute as a whole and the context of the provisions. The context includes the apparent scope and purpose of the statute. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18. In terms of the definition of 'this Act' in s 1 of the Act, the Act includes the regulations. It follows that the regulations must be interpreted in the context of the Act.

[12] In ordinary parlance, the word 'provisional' means subject to some subsequent act or event. It is in this sense that the word is used in s 7(6) of the Act. It provides:

'The provisions of this section shall not be construed so as to prohibit a local authority, before granting or refusing its approval in accordance with subsection (1) in respect of an application, from granting at the written request of the applicant and on such conditions as the local authority may think fit, *provisional* authorization to an applicant to commence or proceed with the erection of a building to which such application relates.' (My emphasis.)

[13] I agree with the court a quo that this meaning (subject to some subsequent act or event) cannot be ascribed to the word 'provisional' in regulation A23. Regulation A23(5) provides that additional plans may (not must) be submitted in order to consider an application in terms of s 4 of the Act. Most temporary buildings, however, will not be superseded by a permanent building. I agree that the word 'provisional' in regulation A23 means 'temporary'. I also agree that it could not have been intended that a temporary building is simply a building which an applicant has declared to be a temporary building in terms of regulation A23. Such a formalistic interpretation ignores the context of the Act and the regulations and is rightly not relied upon by MTN. See *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 114. Regulation A23 is therefore applicable to a temporary building within the meaning of the Act and the regulations as a whole.

[14] Ordinarily a temporary building is a building that is not a permanent one. And whether a building is permanent or temporary is ordinarily determined by its objective nature, characteristics and purpose.

[15] The mast of the base station is 14,5 metres high. The court a quo meticulously analysed the building plans of the base station and said the following:

'Although there is no information before me about the cost of constructing the base station, it must be considerable. The mast and supporting equipment are no doubt

sophisticated and costly. The structure housing the equipment and on which the mast is to be installed has all the hallmarks of permanence, with specifications for foundations, external cavity walls, cement screed floors, rhino board ceilings, corrugated iron roofing and parapet walls at each end. The roofed building, with three rooms, is 7,98m length x 3,56m width x 2,5m height (with the parapets and roof extending above this). The external slab on which the mast stands is 7,98m length x 3,5m width surrounded by a 2,4m high wall.'

Counsel for MTN did not dispute any of this. He, in fact, fairly conceded that in terms of its objective nature, the base station is likely to last for an indefinite period of time.

[16] The purpose of the base station is to serve the telecommunication needs of the community in the area. The location of the base station was carefully selected to serve this purpose. MTN said that the base station 'shall result in an improved and sustained network service'. There is no evidence at all that these needs of the community will terminate within five years of 5 March 2013, that is by 4 March 2018. All indications are to the contrary. It is an objectively significant fact that MTN has never disavowed any intention to apply for the extensions expressly envisaged in the LUPO approval and regulation A23(4).

[17] There can be no doubt that upon an objective consideration of the nature and purpose of the base station, it is not a temporary building. This was not seriously disputed by counsel for MTN. The argument he advanced was that the base station falls squarely within the definition of 'temporary building' in the regulations and that thus it is a temporary building, irrespective of its physical structure. According to this argument the only requirements for a temporary building are those specifically mentioned in the definition of 'temporary building'. These are: that the building is so declared by the owner; that it is being used or is to be used for a specific purpose; that it is being used or is to be used for a specified limited period of time; and that it is not a builder's shed.

[18] The logical conclusion of this argument is that a building that according to its objective nature and purpose is decidedly permanent and not temporary, may nevertheless be regarded as temporary. According to the argument, a building may qualify as a temporary building simply by a declaration to that effect and the specification of a purpose and any limited period of time. For the reasons that follow, I am unable to agree.

[19] The long title of the Act proclaims that its purpose is to promote uniformity in the law relating to the erection of buildings and to prescribe building standards. The building standards are no doubt intended to promote the public interest, safety and health.

[20] In order to fulfil this aim, the Act provides for a clear procedure and strict requirements for approval of the erection of any building. Subject to the exceptions referred to in s 2 and in respect of minor works in s 13 of the Act, none of which are applicable here, s 4(1) provides that no person shall erect any building without the prior written approval of the local authority in question. The definition of 'building' in the Act is very wide. It includes:

'(a) any other structure, whether of a temporary or permanent nature and irrespective of the materials used in the erection thereof, erected or used for or in connection with—

- (i) the accommodation or convenience of human beings or animals;
- (ii) the manufacture, processing, storage, display or sale of any goods;
- (iii) the rendering of any service;
- (iv) the destruction or treatment of refuse or other waste materials;
- (v) the cultivation or growing of any plant or crop.'

Section 4(2) provides that the application must be in writing and on the prescribed form. Section 4(3) stipulates the information required in respect of an application in terms of s 4(1). Section 4(4) provides that any person that erects any building in contravention of the provisions of s 4(1), shall be guilty of an offence.

[21] Section 5 obliges a local authority to appoint a building control officer. A building control officer must have the qualifications prescribed in the

regulations. This is dealt with in regulation A16. The minimum qualification for a building control officer is the equivalent of a senior certificate plus three years of tertiary education at an accredited educational institution in either civil engineering, structural engineering, architecture, building management or building science. In terms of s 6(1)(a) a building control officer must make recommendations in respect of all building plans submitted to the local authority in terms of s 4(3).

[22] Section 7(1) provides as follows:

'(1) If a local authority, having considered a recommendation referred to in section 6(1)(a)—

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

(b) (i) is not so satisfied; or

(ii) is satisfied that the building to which the application in question relates—

(aa) is to be erected in such manner or will be of such nature or appearance that—

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(bb) will probably or in fact be dangerous to life or property,

such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal:

Provided that the local authority shall grant or refuse, as the case may be, its approval in respect of any application where the architectural area of the building to which the application relates is less than 500 square metres, within a period of 30 days after receipt of the application and, where the architectural area of such building is 500 square metres or larger, within a period of 60 days after receipt of the application.'

[23] This section has been interpreted to mean that a local authority may only approve an application in terms of s 4 if, after having considered a recommendation of the building control officer in terms of s 6(1)(a), it is

satisfied both that the application complies with the requirements of the Act and any other applicable law in terms of s 7(1)(a) and that the proposed building will not bring about any of the disqualifying factors referred to in s 7(1)(b)(ii). See *Walele v City of Cape Town & others* 2008 (6) SA 129 (CC) paras 55-56 and *Turbull-Jackson v Hibiscus Coast Municipality & others* [2014] ZACC 24; 2014 (6) SA 592 (CC) paras 51-95 (in which the Constitutional Court overruled the decision of this court in *True Motives 84 (Pty) Ltd v Mahdi & another* [2009] ZASCA 4; 2009 (4) SA 153 (SCA)).

[24] The Act does not distinguish between temporary buildings and other buildings. However, in terms of s 17(1)(o) the Minister of Economic Affairs and Technology may make regulations to regulate, restrict or prohibit the erection of temporary buildings and the occupation or use thereof or access thereto. Regulation A2(1) details the plans and particulars that must be submitted to the local authority in respect of an application in terms of s 4 of the Act. In terms of the proviso to regulation A2(1), in the case of a temporary building only such plans and particulars as are contemplated in regulation A23 shall be submitted. This constitutes an exception to the carefully designed structure of the Act in respect of approval of buildings. In context this provides a strong indication that the relaxation was only intended to apply to buildings that are truly temporary. This informs the ambit and purpose of regulation A23.

[25] The definition of 'temporary building' and regulation A23 must also be read with regulation A1(7). Regulation A1(7) contains two important considerations. First, it provides that before granting provisional authority in terms of regulation A23, the local authority must, inter alia, assess the building in relation to the intended use and life thereof. This clearly requires an objective assessment. Second, it indicates the type of building that should be regarded as temporary, such as an exhibition stall (regulation A1(7)(b)) or a building for experimental, demonstration, testing or assessment purposes (regulation A1(7)(c)).

[26] In my judgment it is necessarily implicit in the regulations that an objective assessment of the nature and purpose of a building must determine

whether it is a temporary building or not. For these reasons, the court a quo correctly concluded that the City materially erred in regarding the base station as a temporary building. It follows that the appeal must be dismissed. As the judgment of the court a quo suggested, MTN may apply to the City for approval of the building plans of the base station in terms of s 4 of the Act. For this reason it is not only unnecessary, but undesirable to express an opinion on the Trust's second review ground.

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

C H G van der Merwe
Judge of Appeal

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