



CONSTITUTIONAL COURT OF SOUTH AFRICA

Telkom SA SOC Limited v City of Cape Town and Another

CCT 287/19

Date of hearing: 12 March 2020

Date of Judgment: 25 June 2020

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 25 June 2020, the Constitutional Court handed down judgment in an application for leave to appeal against the decision of the Supreme Court of Appeal which dismissed with costs an appeal by Telkom SA SOC Limited (Telkom). This application concerned the question whether the exercise of the rights held in terms of section 22 of the Electronic Communications Act (Act) is subject to compliance with municipal bylaws and policies. Differently put, whether a holder of those rights must comply with municipal bylaws before exercising those rights.

During 2015, Telkom wanted to improve its infrastructure so as to supply better services in the area of Cape Town. It decided to build 135 cellular phone masts and rooftop stations. It identified a property situated in the suburb of Heathfield in Cape Town that belonged to the estate of Mr Birch Kalu. However, under the bylaws of the City of Cape Town, the property was zoned as single residential zone 1 which did not allow the construction of cellular masts. In January 2016, Telkom applied for the rezoning of a portion of the property so as to permit the construction of a mast. Two weeks later, Telkom went ahead and built the mast even though it had not received the City's approval for rezoning. Local residents objected to the mast and complained to the City. The City responded by imposing an administrative penalty on Telkom and put its application for rezoning on hold pending payment of the penalty.

Aggrieved by the City's decision, Telkom launched an application in the High Court in which the validity of the City's bylaw and the policy were impugned. Two grounds were advanced as basis for attacking the bylaw and the policy. First, Telkom contended that the bylaw and the policy were not competent. Second, Telkom argued that both the bylaw and the policy were in conflict with section 22 of the Act and thus invalid. Telkom also argued that the National Building Regulations and Building Standards Act (Building Standards Act) did not apply to it because it was part of the state. The City opposed the relief sought and lodged a counter-application. The City sought an order declaring that Telkom had built the masts unlawfully in

breach of the Building Standards Act which required that the City's consent be obtained before the mast was erected.

The High Court rejected Telkom's submissions and dismissed its application but the City's counter-application was successful. The High Court declared that the construction of the mast on the Kalu property was unlawful.

Dissatisfied with the outcome, Telkom appealed to the Supreme Court of Appeal which summarily dealt with the issues that arose from the counter-application. Telkom accepted the authority of the decisions of both the Supreme Court of Appeal and the Constitutional Court which interpreted "municipal planning" as it appears in Part B of Schedule 4. However, it argued that cross municipal boundary networks were not subject to municipal planning regulation, as these fall under the competence of the provincial and national spheres. Relying on *Habitat Council* and the Spatial Planning and Land Use Management Act, the Supreme Court of Appeal rejected the argument advanced by Telkom and held that the impugned bylaw regulates municipal planning and not telecommunications matters.

The Supreme Court of Appeal was satisfied that the argument regarding the Building Standards Act was abandoned in the High Court and rejected Telkom's attempt to resuscitate it. The Court proceeded to consider the constitutional attack mounted by Telkom against the bylaw and the policy which was taken as the only issue which arose on appeal. The Supreme Court of Appeal traced the City's competence to section 156(1) of the Constitution read with Part B of Schedule 4.

In the Constitutional Court, Telkom raised two main arguments relating to competence and conflict points. On the issue of competence, Telkom argued that the City had no legislative power to regulate telecommunications, and to the extent that the impugned bylaw, read with the policy, regulates telecommunications, it is invalid. Telkom urged the Constitutional Court to construe that planning as not encompassing the control and use of land for laying down telecommunications infrastructure. It argued that such infrastructure extends beyond the boundaries of a particular municipality and as a result, a licensee like Telkom ought not to be required to comply with bylaws of each municipality on whose jurisdiction it seeks to establish infrastructure. Telkom further argued that compliance with different bylaws is unworkable and that the solution to this constitutional conundrum is to assign a restrictive meaning to the phrase "municipal planning".

On the issue of conflict, with reference to section 156(3) of the Constitution, Telkom submitted that the impugned bylaw was invalid because it was in conflict with section 22(1) of the Act. In terms of section 156(3), a bylaw that is in conflict with national legislation like the Act is invalid. Telkom argued that the conflict stems from the requirement in the bylaw which demands that a licensee under the Act must first obtain municipal approval before exercising the right to erect telecommunications infrastructure.

A unanimous judgment penned by Jafta J (Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring) held that there is nothing in the text of the relevant Schedule which suggests that provincial planning and national planning carry a meaning that includes zoning and subdivision of land. On Telkom's approach, each sphere is competent to zone and subdivide land for the use of that land to achieve purposes which form part of the sphere's competence. This is not only unworkable but it is also not consonant with the Constitution and its scheme of establishing wall-to-wall municipalities with powers to

control and regulate land use within their areas of jurisdiction. The Constitutional Court thus held that the interpretation advanced by Telkom lacks merit. The Constitutional Court further held that its jurisprudence on the interpretation and application of section 22 of the Act illustrates that licensees must comply with municipal bylaws when they exercise the right conferred on them by that provision. Therefore, it held that the Supreme Court of Appeal cannot be faulted for applying that interpretation of section 22.

The Constitutional Court held that leave to appeal must be refused as it was not in the interests of justice to grant it. The effect of the refusal was that the order issued by the High Court remains extant and Telkom should pay costs including costs of two counsel.