"C2"

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D9017/2018

In the matter between:

M MOORE
AND EIGHT OTHERS — First Applicant

and

MOBILE TELEPHONE NETWORKS — First Respondent

ETHEKWINI MUNICIPALITY — Second Respondent

ORDER

The application is dismissed with costs.

JUDGMENT

Delivered on: 30 October 2020

Ploos Van Amstel J

[1] This is an application for the review and setting aside of a decision allegedly taken by the Head of Disaster Management of the eThekwini Municipality, Mr Vincent Ngubane, in terms of which he 'absolved the first respondent from the usual requirements and regulations that were set down (sic) in the city's Town Planning

Schemes and other regulations and law and unilaterally took the administrative decision to entered (sic) into an infrastructure sharing agreement with the first respondent'. The order sought in the notice of motion states that the decision was taken in or about 2015 or 2016.

[2] The eight applicants are residents of Glenwood, a suburb of Durban. The first respondent is Mobile Telephone Networks (Pty) Ltd ('MTN') and the second respondent the eThekwini Municipality. The first respondent did not participate in the proceedings, while the municipality opposed the application.

[3] The matter relates to the erection of a mast in Glenwood and the installation on it by MTN of cellular phone technology. The municipality says the mast was intended for security cameras, but admits that pursuant to a written agreement it allowed MTN to install cellular phone technology on it.

[4] The applicants' real complaint is that the cellular technology on the mast has affected their health and should be removed. However, the application before me is not about the alleged effect of the technology on nearby residents, or whether or not the use of the technology on the mast is lawful; or whether it should be allowed in terms of the Town Planning Scheme. The application before me is for the judicial review of the decision by Mr Ngubane to which I have referred. The applicable statute is the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[5] The municipality raised two main points. The first was that the review proceedings were not instituted without unreasonable delay; and the second was that the alleged decision was not taken, alternatively is not reviewable on any of the grounds specified in PAJA.

[6] Section 7(1) of PAJA provides that any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date on which any proceedings instituted in terms of internal remedies have been concluded; or where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[7] The first part of the alleged decision can be disposed of swiftly. Mr Ngubane says he at no stage purported to absolve MTN from complying with the Town Planning Scheme or any other legislation. He says he initially thought MTN did not have to apply for special consent because the mast belonged to the local authority. A senior colleague later corrected him and explained that special consent was required for the installation by MTN of its cellular equipment. It should be noted that the 'Short Term Tenancy Agreement' relating to the use of the mast by MTN requires it to obtain special consent from the municipality in terms of its town planning scheme regulations. In those circumstances counsel for the applicants conceded that there was no evidence of a decision in terms of which MTN was absolved from complying with the applicable legislation.

[8] The second target of the review is stated in the notice of motion to be a unilateral 'administrative decision to entered (sic) into an infrastructure sharing agreement' with MTN. Counsel for the applicants submitted that the decision to enter into such agreement was reviewable because it did not involve any public participation.

[9] The first question to be considered is whether the review was brought within the prescribed period of 180 days. Counsel for the applicants submitted that it could not be said that the review was out of time because it was not known when the applicants became aware of the decision.

[10] The mast was erected in 2016. The agreement to which I have referred was signed on behalf of MTN on 11 August 2016. Annexed to the founding affidavit is a copy of an article which was written by the first applicant and published in the City Press newspaper on 22 May 2017. The first paragraph reads as follows: 'eThekwini residents are livid after discovering that their municipality has secretly signed an agreement with cellphone giant MTN to erect cellphone antennae in Durban, bypassing public participation planning regulations.' Also annexed to the founding affidavit is a printout of an article dated 29 June 2017, the opening paragraph of which reads as follows: 'MTN South Africa said on Thursday that it has completed a major network upgrade in the greater Durban area, which it started 18 months ago, while addressing criticism from residents of the city about the way it has managed the roll- out. The company's chief technology and information officer Giovanni Chiarelli said in a statement that it entered into an infrastructure sharing agreement

with the eThekwini municipality's disaster management and emergency control unit to utilise its camera poles to provide enhanced coverage. Use of those poles has, however, attracted criticism from some Durban residents'.

[11] The review application before me was launched on 6 August 2018, more than a year after the articles to which I have referred were published. The review was therefore hopelessly out of time. There was no application for the period to be extended, with the result that the application cannot be considered on its merits. See in this regard Mostert NO v The Registrar of Pension Funds 2018 (2) SA 53 (SCA) para 34, and the cases referred to there.

[12] I should add that the review would have failed on the merits in any event. The agreement to which the applicants object was signed on behalf of MTN on 11 August 2016. The copy in the record reflects that it has not been signed on behalf of the municipality. The agreement is headed 'Short Term Tenancy Agreement' and refers to the 'CCTV mast situated at the corner of Z K Matthews and Rick Turner'. It provides for the use by MTN of a portion of the mast and the site to erect transmission and receiving equipment for cell phone signals and to occupy the site for use as a base telecommunication station for cellular telephones. The agreement provides for termination by either party on three months' notice and is conditional on special consent being granted by the municipality in terms of its Town Planning Scheme Regulations. In the event of special consent being refused the agreement would fall away.

[13] Counsel for the municipality submitted that the application for special consent would involve public participation and that therefore there is no merit in the applicants' complaint. This is plainly correct.

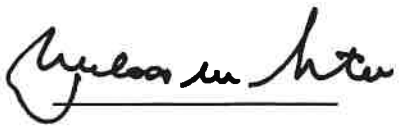
[14] It is rather unfortunate that the efforts by the residents have resulted in an opposed application of nearly 400 pages. Their papers reveal a profound lack of understanding of the law relating to judicial review. It should have been obvious to the applicants' legal representatives after the municipality's answering affidavit was delivered that the review had no prospects of success.

[15] With regard to the question of costs, the Constitutional Court held in Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC) that the general point of

departure in a matter where the state is shown to have failed to fulfil its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should pay the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door – at the end of the day, it was the state that had control over its conduct. However, the court also said, in para 24, that if the application is frivolous or vexatious, or in any way inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.

[16] The matter before me is not one where it was the failure of the municipality to fulfil its constitutional and statutory responsibilities that obliged the applicants to bring the application for review. The first decision complained of was never taken. The second one was unobjectionable as the agreement required MTN to apply for special consent. The application for a review was ill-conceived and bound to fail. It was also hopelessly out of time, and there was no application to extend the period within which it had to be brought. In those circumstances I do not consider that the municipality should be deprived of its costs.

[17] The application is dismissed with costs.



Ploos van Amstel J

Appearances:

For the Applicant	:	C Viljoen
Instructed by	:	Chelin & Associates
	:	Durban
For the Respondent	:	A J Boulle
Instructed by	:	Linda Mazibuko & Associates
	:	Durban
Date Judgment Reserved	:	23 October 2020
Date of Judgment	:	30 October 2020