

TELKOM MASTS ONLY WITH MUNICIPAL APPROVAL

Telkom SA SOC Limited v City of Cape Town and Another (CCT287/19) [2020] ZACC 15 (25 June 2020)

The Constitutional Court sent a clear message in this matter: Telecommunication networks in South Africa cannot ride roughshod over municipal by-laws. Here the municipal by-law required that the relevant land may not be used for masts unless it was appropriately zoned, a provision to which Telkom argued it was not bound. The Court struck their defences down, upholding the authority accorded to municipalities in the Constitution in respect of their designated list of municipal planning functions.

The Judgment can be viewed [here](#).

FACTS

During 2015, Telkom sought 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. During this process, it identified a property situated in the suburb of Heathfield.

Under the by-laws of the City of Cape Town (the City), the property was zoned as single residential zone 1 which did not allow the construction of cellular masts. Therefore, 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 by-law and the policy were attacked. It argued that: (i) the by-law and the policy were not competent; (ii) both the by-law and the policy were in conflict with section 22 of the of the Electronic Communications Act (the Act) and thus invalid; and (iii) 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, seeking an order declaring that Telkom had built the mast 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 property in Heathfield was unlawful.

Telkom then unsuccessfully appealed to the Supreme Court of Appeal. An application for leave to appeal followed to the Constitutional Court. Here Telkom argued firstly that the City had no legislative power to regulate telecommunications, and to the extent that the impugned by-law, read with the policy, regulates telecommunications, it was invalid. Telkom urged the Constitutional Court to construe that municipal planning did not encompass 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 by-laws of each municipality on whose jurisdiction it seeks to establish infrastructure. Telkom further argued that compliance with different by-laws is unworkable and that the solution to this constitutional conundrum is to assign a restrictive meaning to the phrase "municipal planning". In addition, it argued that, with reference to section 156(3) of the Constitution, the impugned by-law was invalid because it was in conflict with section 22(1) of the Act. (In terms of

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section 156(3), a by-law that is in conflict with national legislation like the Act is invalid.) Telkom argued that the conflict stems from the requirement in the by-law which demands that a licensee under the Act must first obtain municipal approval before exercising the right to erect telecommunications infrastructure.

HELD

- The matter therefore concerned the question whether the exercise of rights held in terms of section 22 of the Electronic Communications Act is subject to compliance with municipal by-laws and policies. Differently put, whether a holder of those rights must comply with municipal by-laws before exercising those rights. In terms of section 22, a licensee under the Act is entitled to enter upon any land in the Republic for purposes of constructing and maintaining an electronic communications network or facility. The licensee may also enter such land for purposes of altering or removing the network or facility it had constructed. But the exercise of these rights is subject to the condition that the licensee pays due regard to applicable law and the environmental policy of the Republic.
- There is nothing in section 156(1) of the Constitution read with Part B of Schedule 4 that suggests that provincial planning and national planning carry a meaning that includes zoning and subdivision of land, as argued by Telkom. Our courts have interpreted “municipal planning” as it appears in Part B of Schedule 4 to mean that “municipal planning” usually defines the control and regulation of the use of land, including zoning and the establishment of townships. The City was therefore within its powers to issue the by-law in dispute in this matter.
- In addition, neither does cross-municipal projects which form part of regional, provincial or national planning displace municipal planning which is the sole preserve of municipalities. The zoning and subdivision of land remains the competence of municipalities, regardless of whether the land in question is to be used for provincial or national purposes.

CONCLUSION

Leave to appeal was therefore refused.

[The Minister of Communications and Digital Technologies has recently gazetted a new policy on the deployment of communications networks in South Africa. The policy aims to accommodate the accelerated deployment of electronic communications networks, such as LTE and 5G networks. If you want to read more or comment, [visit this link](#). This is national policy and cannot override municipal powers.]