

SOUTH AFRICA / JUDGMENT

Spilhaus Property Holdings (Pty) Ltd and Others v MTN Mobile Telephone Networks (Pty) Ltd and Others (13621/2014) [2016] ZAWCHC 215 (3 November 2016)

[2016] ZAWCHC 215

COURT

Western Cape High Court, Cape Town

BEFORE

RT Williams

CASE / FILE NUMBER

13621/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO.: 13621/2014

In

the matter between:

SPILHAUS

PROPERTY HOLDINGS (PTY) LTD

AND

19

OTHERS Applicants

and

MTN

MOBILE TELEPHONE NETWORKS (PTY)

LTD First

Respondent

ALPHEN

FARM ESTATE IN CONSTANTIA (PTY) LTD Second

Respondent

VODACOM

(PTY)

LTD Third

Respondent

JUDGMENT

DELIVERED ON 3 NOVEMBER 2016

WILLIAMS, AJ:

[1] This is an application for a mandatory interdict in which the applicants seek the following substantive relief, together with an order for costs of suit:

"2. Directing the first respondent to remove the cellular network base transceiver station which has being installed on the roof of the Mill Range building in Sectional Title Scheme New Court at Alphen, registered under Scheme number 449/2006, situated at remainder erf 377, Constantia, together with associated infrastructure, cabling and support structures (collectively, "the cell phone mast installation) and to have completed such removal, including the making-good of the Mill Range building, within four weeks of the date of any order granted;

3. Directing the second respondent to cooperate to the extent necessary in the removal of the cell phone mast installation;"

[2] The application was instituted against the first and second respondents. However, and at the behest of the first respondent, Vodacom (Pty) Ltd was joined as a third respondent. The applicants were represented by Mr Manca and Ms Reynolds, and the first and second respondents by Mr Basslian. At the commencement of the hearing I was handed a draft order by agreement between the applicants and the third respondent in which it is recorded that:

2.1 Vodacom would disconnect its cellular services presently installed on the roof of the Mill Range building ("the premises") within seven days from the date of the order;

2.2 Vodacom would remove all its equipment, infrastructure, cabling and support structures associated with the cellular network base transceiver station installed on the roof of the premises at its own expense;

2.3 Vodacom would remove the equipment referred to in paragraph 2.1. above within 60 calendar days from the date of the granting of the order, subject to Vodacom being given access to the premises to give effect thereto;

2.4 The applicants and Vodacom would each bear their own costs.

[3] I granted an order in terms of the draft and the application proceeded only as against the first and second respondents.

[4] For ease of reference I shall refer to the first and second respondents collectively as "the respondents" and to the third respondent as "Vodacom". In light of the fact that a settlement has been reached between the applicants and Vodacom, it is unnecessary to decide the applicants'

condonation application for the late filing of their replying affidavits to Vodacom's answer.

[5] The issues in this matter are largely undisputed. The second respondent owned the whole of the immovable property known as the remainder of erf 377, Constantia, Western Cape ("the property"). In or about 1998 rooftop 2G cellular antennae were installed on the Mill Range building by the first respondent and Vodacom, both of whom entered into lease agreements with the second respondent. Subsequent thereto and in terms of the Sectional Titles Act, No. 95 of 1986 (the Sectional Titles Act; the property was subdivided into sectional title units with two precincts, more particularly:

5.1 An historical precinct comprising sections 1 and 2 of the Sectional Title Scheme which remains owned and registered in the name of the second respondent; and

5.2 A residential precinct comprising sections 3 to 19 of the scheme which are owned and registered in the names of various private individuals and/or entities such as trusts, companies or close corporations.

[6] The scheme is for mixed use with the residential precinct containing three blocks of residential units whereas the historic precinct is operated for commercial purposes and contains the original Alphen Hotel and commercial office buildings. The rooftops of all the sections comprising the historic and residential precincts constitute common areas in terms of the scheme. Of particular relevance to this application is the rooftop of the Mill Range building which is located within the historical precinct.

[7] On 10 October 2012 the trustees of the historic precinct obtained the consent of the trustees of the residential precinct for the first respondent and Vodacom to upgrade the existing cellular installations on the Mill Range building from a 2G to a 3G installation, and to combine the two existing antennae. When the application was instituted, the residential precinct trustees at the time were Mr Vincent Edward Murphy and Jan Arseen Joris de Decker. The historic precinct trustees were Alexander Cloete-Hopkins and Dudley

Cloete-Hopkins.

[8] Mr Murphy explained in the founding affidavit how it came about that permission was sought to upgrade the said installation as aforesaid, which was granted on the same date. The relevant emails exchanged between the parties are appended to the founding papers.

[9] On or about 1 November 2013 the new 3G antennae enclosed in an artificial chimney was installed on the roof of the Mill Range building. It was hoisted onto the roof with a large crane and the base station situated in the basement of the historic precinct was also upgraded. Cabling was also installed which traversed common property. Mr Murphy explained his and the concerns of the other applicants as follows in the founding papers:

"44. The physical changes resulting from the upgrade, particularly on the Mill Range roof, were far more extensive and visually intrusive than De Decker, I and the other applicants had originally appreciated when consent was sought for the upgrade in 2012. The applicants also had health concerns regarding the cell phone mast installation, particularly its proximity to their residential units. (There is a gap of less than 11 meters between the Mill Range building and the nearest residential block, New Court C Block.)

45. Furthermore, the applicants learned in late 2013 and early 2014 that the cell phone mast installation is unlawful, because it breaches both (i) the City of Cape Town's Zoning Scheme Regulations ("the zoning scheme") and (ii) certain restrictive title deed conditions. (Had the applicants known this in October 2012, De Decker and I would not have consented to the upgrade.)"

[10] The City of Cape Town ("the City") conducted an inspection at the Alphen Hotel on 14 November 2013 and issued a notice to the second respondent dated 21 November 2013 enjoining it to obtain written approval for the unauthorised building work. The City issued this notice in consequence of the erection of the cell phone base station and pointed out that the work was in contravention of section 4(1) read with section 4(4) of the National Building Regulations and Building Standards Act No. 103 of 1977. The notice highlighted that a failure to comply therewith constitutes a criminal offence in terms of regulation A25(11) of the National Building Regulations. The notice also pointed out that the submission of building plans in compliance with the notice did not place any obligation on the City to approve such building plans and further, should written approval not be granted, the second respondent would be required to either rectify or demolish the unauthorized building work.

[11] At a trustees meeting held on 19 February 2014 various items were discussed, including the MTN mast. The minutes record inter alia in paragraph 7:

"The Residential Trustees confirmed that they withdraw their consent to have the existing Alphen Cell Phone installation upgraded from 2G to 3G, as significant new issues have come to the fore, which they were not aware of at the time. A C-H [Mr A Cloete-Hopkins] stated that this may place them personally liable to MTN and Vodacom. The Historic Precinct Trustees do not accept this withdraw (sic) of the approvals."

[12] The respondents opposed the application and brought an application for the postponement/ stay of the main application pending the final outcome of:

12.1 the application lodged by the first respondent and Vodacom for consent use lodged with the City of Cape Town; and the amendment of the Title Deeds in respect of erf 377, Constantia lodged with the Department of Environmental Affairs and Development Planning;

12.2 the criminal action against the second respondent represented by Mrs Anna Cloete-Hopkins;

12.3 the approval of any required building plans in respect of the electronic telecommunications infrastructure / equipment installed on the roof of the Mill Range building and associated equipment at erf 377, Constantia.

I interpose to mention that Vodacom had been joined as a party at that stage and paragraph 1.4 of the respondents' application was consequently not proceeded with.

- [13] The respondents have also challenged the proceedings on other grounds including that the individual owners of the sectional title units in the scheme lacked locus standi and that in terms of the Sectional Titles Act it is only the Body Corporate "through the trustees who has the requisite locus standi to act for and on behalf of the body corporate and the owners of units in a sectional title scheme in proceedings involving, amongst other things and in relation to the current matter in connection with, any common property."
- [14] Allied to the alleged lack of locus standi, the respondents submitted that two units in the sectional title scheme have been sold. The respondents have also joined issue with whether the applicants have made out a proper case for an interdict and contend that they have failed to do so.
- [15] I have carefully considered the arguments presented and am satisfied that while the Sectional Titles Act makes provision for the body corporate to sue, this does not preclude other affected persons from doing so. Where one deals with fragmented property ownership schemes such as the one here in issue, it is convenient to sue in the name of a body corporate but this would not prevent anyone else with a direct and substantial legal interest in any order that the court may make, from joining in as a party to the proceedings. It is clear from the documents filed of record that the respective trustees of the residential and historic precincts are not ad idem as regards the installation of the 3G antennae on the roof of the Mill Range building. Under these circumstances, it is unlikely in the extreme that the requisite quorum would be achieved in terms of rule 57(2) of the amended management rules of New Court at Alphen. Moreover, the trustees of the historical precinct have also taken issue with the revocation of authority for the installation of the 3G antennae. The validity of the consent granted in 2012 is questionable

to say the least. The conduct rules handed up by Mr Basslian at the hearing expressly records in paragraph 33 that notwithstanding any approval granted by the trustees, "no alteration, addition ... to the exterior of a section may be undertaken until any permit or approval required from any authority has been obtained. It is the duty and responsibility of the owner or occupiers of the section concerned to obtain any such necessary permit or approval."

- [16] There are no approved plans for the installation, the City has not approved a consent use nor have the Title Deed restrictions been amended. The installation is unlawful since it is in breach of the zoning scheme regulations. The Mill Range building is situated on property zoned general residential subzone II and consequently a cellphone mast such as the one

erected at the building would constitute a consent use in terms of section 6.2.1 of the zoning scheme regulations. This is common cause between the parties. Section 18.8.2 of the zoning scheme regulations also require the City to give its prior approval where such an installation extends more than three meters above the part of the building to which it is attached. As Mr Manca correctly pointed out, although the respondents deny any contravention of the zoning scheme regulations, no factual allegations or legal submissions are made to support that denial. On the contrary and from the correspondence exchanged between the City and Warren Petterson Planning, there have clearly been breaches inter alia of the zoning scheme and the Title Deeds restriction. This is borne out by Mr Petterson's letter addressed to the City of Cape Town dated 12 June 2014 and received on 19 June 2014 where he asserts:

"This application therefore comprises of the following:

- Councils (sic) consent in terms of Section 2.3.1 of the Cape Town Zoning Scheme to permit rooftop cellular communications on a building that is situated on Erf 377, Constantia;
- Council's approval in terms of Section 18.8.2 of the Cape Town Zoning Scheme for rooftop cellular communications infrastructure exceeding the permitted height of 3m above the part of the building that is attached to by 2.55m (total height of 5.55m);
- The Administrator's approval in terms of Title Deed Condition 1.0 (ii) of SS449/2006 for works affecting the external appearance of an existing building of Erf 377, Constantia
- Amendment of Title Deed Condition 1.0 (i) of SS449/2006 to include the use of the property for the specific cellular communications infrastructure (see Annexure "C" attached for condition to be amended)."

[17] To my mind the applicants have correctly relied on cases such as BEF (Pty) Ltd v Cape Town Municipality & Others 1983 (2) SA 387 (C) at 4018-H and Chapman's Peak Hotel {Pty} Ltd & Another v Jab & Annalene Restaurant CC t/a O'Haqans [2001] 4 All SA 415 (C) at paragraphs [18] and 119]. It would be absurd that a person living some 11 meters from an unlawful installation should be precluded from asserting his or her rights whereas a neighbour living some distance away, can do so. In the circumstances, I am satisfied that the challenge to the applicants' locus standi is without merit and rejected.

[18] The City has also made it plain in its correspondence with Mr Petterson dated 9 May 2014 that one of Its requirements is a power of attorney signed by all the sectional title unit owners since "the proposal" i.e. the cell phone mast installation is located on common property.

[19] In light of the opposition to the mast and the fact that no less than 20 applicants have sought a mandatory interdict, strongly suggests that the power of attorney required by the City will not be forthcoming. Under these circumstances it is an exercise in futility to postpone the main application or to stay it sine die since this will do no more than to perpetuate an unlawful and irregular state of affairs.

- [20] The requirements for a final interdict are trite. I am satisfied that the applicants have a clear right to enforce compliance with the relevant zoning scheme (see Chapman's Peak Hotel *supra* at paragraph [12]). The court correctly emphasised in that matter that a zoning scheme "is promulgated in the interests of the inhabitants of an area. It is legislative in character and is binding not only on owners and occupiers of land subject to the scheme, but also on the administering local authority" (*ibid*).
- [21] The applicants have also demonstrated an injury actually committed. There can be no doubt that there has been an interference with their rights and resultant prejudice (See Erasmus Superior Court Practice, Second Edition at 06-13). I am also satisfied that the applicants have no other suitable remedy (Erasmus *op. cit.* at 06-14). The characteristics of an alternative remedy are adumbrated upon in paragraph [17] of the Chapman's Peak Hotel case. They are all present in *casu*.
- [22] In light of the submissions made on behalf of the applicants, I am satisfied that the only effective remedy in the circumstances is to grant the interdict. This conclusion is fortified by the agreement concluded between the applicants and Vodacom.

[23] I accordingly make the following order:

23.1 The first respondent is ordered to remove the cellular network base transceiver station which has being installed on the roof of the Mill Range building in Sectional Title Scheme New Court at Alphen, registered under scheme number 449/2006, situated at remainder erf 377, Constantia, together with associated infrastructure, cabling and support structures (collectively, "the cellphone mast installation") and to have completed such removal, including the making-good of the Mill Range building by 3 December 2016;

23.2 The second respondent is ordered to cooperate to the extent necessary in the removal of the cellphone mast installation;

23.3 The respondents' application for a postponement/stay is dismissed with costs;

23.4 The respondents are ordered to pay the applicants' costs of suit in respect of both the main application and the respondents' application

for a postponement/stay thereof, such costs to include the costs attendant upon the employment of two counsel;

23.5 The respondents' liability for costs shall be joint and several, the one paying, the other to be absolved.

RT WILLIAMS, AJ

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