

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED.
....15 April 2020....

DATE

SIGNATURE

A handwritten signature in black ink, appearing to be "S. Mwa", is written over a dotted line.

CASE NO: 2018/18147

In the matter between:

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Applicant

and

OLYMPIA TRADE CENTRE (PTY) LIMITED

First Respondent

BARRADAS, BAP

Second Respondent

JUDGMENT

SOUTHWOOD, AJ:

A. INTRODUCTION

1. The applicant seeks to enforce what it contends is a contravention of its outdoor advertising by-laws. The following relief is sought in the Notice of Motion:

- 1.1 a declarator that the erection of and/or allowing and/or causing to allow the erection of a certain advertising sign (**'the sign'** or **'board'**), on erf 204, known as stand number 66, corner Kliprivier Road and Van der Hoven Street, Glenanda, Johannesburg, Gauteng (**'the property'**) is unlawful because it contravenes and/or fails to comply with section 3 of the Outdoor Advertising By-Laws of the applicant (**'the by-laws'**), in that the said sign/board was erected by the respondents or their appointed agents without the applicant's prior written approval;
- 1.2 a declarator that the applicant's prior approval was required prior to the said erection of the sign and that failing such approval, the erection was, a contravention of the by-laws and therefore unlawful;
- 1.3 an order directing the respondents to remove the said sign and restore the property to its original '*status*' in which the property

was prior to erecting the said sign, thereby ceasing the unlawfulness complained of;

1.4 an order that the relief sought in terms of prayers 1.1 to 1.3 in the notice of the motion be given effect to within 30 days from the date of the order, failing which, the Sheriff of this court or his/her deputy, be authorised to carry out the court order, and to do whatever is legally and reasonably necessary and to take all reasonable and lawful steps to carry out and give effect to such court order;

1.5 an order directing the respondents to pay the costs of this application on the scale as between the attorney and the client, jointly and severally, the one paying and the other to be absolved.

2. On 2 November 2018, the applicant withdrew the application against the second respondent.

3. The applicant persisted with the relief sought in the notice of motion.

4. During the hearing, Ms *Martin*, who appeared for the first respondent indicated that at the previous hearing of this matter, the court had granted leave to the parties to file further affidavits in order to address the issue of

whether someone could obtain *ex post facto* consent for the erection or use of the sign.

5. No such order is indicated in the court file but Mr *Kela* who appeared for the applicant did not dispute this.

B. BACKGROUND

6. The first respondent is the owner of the property. The sign is located on the property.
7. The applicant's complaint is that the '*the respondents in erecting the advertising sign or board on the property owned by the first respondent, contravenes or the effect of contravening (sic) the applicant's by-laws since the said erection was effected without the applicant's prior consent in writing.*'
8. The first respondent purchased the property in or around 2014. The sign in question had already been erected by the previous landowner, albeit that it was smaller. The sign had been on the property for a number of years. The applicant did not allege when the sign was erected. In or around 2015, the first respondent extended the existing sign and made it larger. The presence of the sign is one of the reasons why the first respondent bought the property. The first respondent derives a monthly rental income through the advertising sign.

C. OBJECTIONS IN LIMINE

9. In its answering affidavit, the first respondent raised a number of objections *in limine*, namely:

9.1 the incorrect citation of the court;

9.2 the misjoinder of the second respondent;

9.3 the inadmissibility of certain annexures;

9.4 a failure to establish that the by-laws were in existence when the sign was erected.

10. Save for the fourth objection, dealt with as part of the argument on the merits, these objections were not dealt with in argument.

D. THE MERITS

11. The relief sought is premised on the erection of the sign by the respondents without the applicant's consent.

12. Nowhere in the founding affidavit is the relevant section in the by-law which has allegedly been contravened referred to nor have its provisions been

reproduced. In the notice of motion, prayer 1.1 refers to section 3 of the Outdoor Advertising by-laws as the relevant provision which has been contravened.

13. The by-laws are not attached to the founding papers. This was a deliberate choice on the part of the applicant. It deigned to attach two sets of by-laws to its replying affidavit.
14. In paragraph 13 of the applicant's replying affidavit, the applicant's deponent indicates that the by-laws are those attached to the replying affidavit as "COJ1". "COJ1" is not an extract from the Provincial Gazette but a document entitled Outdoor Advertising By-Law, 2017. As proof that these by-laws had been adopted, the applicant attached "COJ2". "COJ2" is an extract from the Provincial Gazette Extraordinary, dated 18 December 2009, which evidences publication of the Outdoor Advertising by-laws, 2007. This is not proof that the 2017 bylaws have been adopted.
15. In the applicant's heads of argument, reference is made to the 2007 by-laws (instead of the 2017 by-laws) and to sections 3 and 29 thereof.
16. The respondents allege that they did not erect the sign. This is not disputed. Despite this undisputed fact, Mr *Kela* indicated that the applicant was still pursuing the relief sought in the Notice of Motion (which seeks relief against the '*respondents*' despite the application having been withdrawn against the second respondent).

17. Mr *Kela* argued that the continued use of the sign or the failure to remove the sign constituted the allowing of the erection of the sign or causing the erection to the sign to be allowed, without the necessary consent.
18. In neither version of the by-laws is there any reference to the allowing of the erection of a sign or causing erection of a sign to be allowed without the necessary consent.
19. Furthermore, as a matter of fact, there is no basis for concluding that the first respondent allowed the erection of the sign or caused the erection of the sign to be allowed at the time it was erected. Given that the erection of the sign is an historical act i.e. not a continuing act, permission for or causing the sign to be erected could only have occurred prior to or at the time that the sign was erected.
20. Accordingly, I do not agree with Mr *Kela*'s contention that the use of the sign thereafter constitutes the *ex post facto* permission for or causing of the erection of the sign.
21. For all the reasons indicated above, the relief sought in prayer 1.1 of the notice of motion must be refused.
22. Insofar as prayer 1.2 is concerned, the applicant failed to establish when the 2017 by-laws, which it relied upon in its affidavits, came into operation.

Presumably, it was on or after 2017. This is after the erection of the sign. Accordingly, there is no basis for granting the relief sought in prayer 1.2 of the notice of motion.

23. Even on a robust approach, taking the 2007 by-laws into consideration, there is no evidence to establish that the sign was erected during the time that the 2007 by-laws were in operation.
24. Prayer 1.3 is couched in the form of a mandamus, i.e. an order requiring the first respondent to act.
25. The applicant was required to establish a clear right, a breach of the right (in the context of a mandatory interdict) and the absence of an alternative remedy.
26. Mr *Kela* contends that the applicant has a clear right in that the by-laws require the prior written consent of the applicant for the alteration, removal, re-erection or upgrading of an advertising sign, other than for maintenance work.
27. The first difficulty with this contention is that the relief sought is directed at the erection of the sign and not the alteration, removal, re-erection or upgrading of the sign.

28. The second difficulty with the contention is that no right to the relief sought i.e. the removal of the sign, is contemplated by this contention.
29. Furthermore, neither the application nor the applicant's heads of argument refer to any by-law in the 2017 by-laws which provides for the removal of the sign.
30. In response to questions in this regard, Mr *Kela* referred me to section 29(3) of the 2007 by-laws. Given that these were not the by-laws relied upon by the applicant in its papers, the reference is irrelevant.
31. In any event, section 29(3) of the 2007 by-laws reads as follows:
- 'If an authorised official is of the opinion that an advertising sign constitutes an imminent danger to any person or property, he or she may without serving a notice in terms of section (2), or if such a notice has been served but not complied within the period specified therein, he or she may remove that advertising sign or take other steps which he or she may consider necessary.'*
32. The applicant would have had to establish that the section was applicable. The applicant would have to show that an authorised official had formed the view that the advertising sign constitutes an imminent danger to any person or property.

33. The applicant has, thus, failed to establish a clear right to the relief sought. Simply on this basis, no order should be made.
34. Insofar as a breach of any right is concerned, in particular a contravention of any by-law, the relief sought was based, in the founding affidavit, on the erection by the respondents of a sign without the applicant's consent. There being no dispute that the respondents had not erected the sign, the applicant has failed to establish a breach of the alleged right.
35. In the applicant's heads of argument, reliance was placed on the fact that the respondents had alleged that the respondents had had the sign enlarged during 2015 without the applicant's prior approval which was a contravention of section 3(2) of the by-laws, presumably the 2007 by-laws.
36. This is not the applicant's case in the papers. Nor is the relief sought in prayer 1.3 premised on the enlargement of the sign without consent.
37. It is trite that an applicant in motion proceedings has to make out his or her case in the founding affidavit unless there are special circumstances why that has not been done.¹ A totally defective application cannot be rectified in reply.²

1 *NK v KM* 2019 (3) SA 571 (GJ) at [22]

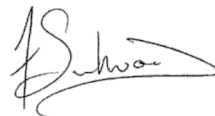
2 *Poseidon Ships Agencies (Pty) Limited v African Coaling and Exporting Company CO (Durban) (Pty) Limited and Another* 1980 (1) SA 313 (D) at 315 H to 316A

38. In the circumstances, the applicant has failed to establish the contravention of any by-law.

ORDER

Accordingly, I make the following order:

- 1 The relief sought in prayers 1.1 and 1.2 of the notice of motion is refused.
- 2 No order is made in relation to the relief sought in prayer 1.3 of the notice of motion.
- 3 The applicant is directed to pay the first respondent's costs of the application.



**F SOUTHWOOD
ACTING JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

Appearances:

Date of Hearing: 30 January 2020

Date of Judgment: 15 April 2020

For the Applicant: DZ Kela
Instructed by: Tshiqi Zebediela Inc

For the First Respondent: SJ Martin
Instructed by: Dogulin Shapiro Dermatintis Inc.