THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 121/11

In the matter between:

KOUGA MUNICIPALITY Appellant

and

MARK BELLINGAN First Respondent
THE MEXICAN CC Second Respondent
RAPICORP 118CC Third Respondent

Neutral citation: *Kouga Municipality v Bellingan* (121/11) [2011] ZASCA 222 (30 November 2011).

Coram: BRAND, CLOETE, HEHER, THERON and WALLIS JJA

Heard: **10 November 2011**

Delivered: **30 November 2011**

Summary: **Administrative law**: distinction between direct and defensive challenge to legislation, discussed; person charged for contravening allegedly invalid legislation can bring application for declaratory order that legislation is invalid.

The provisions of **s 160(4)(*b*) of the Constitution of the Republic of South Africa Act, 1996, and s 12(3)(*b*) of The Local Government: Municipal Systems Act, 32 of 2000**, discussed and applied.

Kouga Municipality Liquor (Trading Hours) By-law published in the *Eastern Cape Provincial Gazette Extraordinary* of 27 December 2006 and relating to registrations under the **Eastern Cape Liquor Act 10 of 2003**, declared invalid for purposes of prosecution of respondents.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Eksteen J sitting as court of first instance):

1 The appeal is dismissed, with costs.

2 Paragraphs 1, 2 and 3 of the order of the court a quo are deleted and the following order is substituted:

'It is declared that the Kouga Municipality Liquor (Trading Hours) By-law published in the *Eastern Cape Provincial Gazette Extraordinary* on 27 December 2006 is invalid for the purposes of a prosecution of any of the first, second and third applicants for contravening the by-law.'

JUDGMENT

CLOETE JA (BRAND, HEHER, THERON and WALLIS JJA concurring):

Introduction

[1] The appellant is the Kouga Municipality. The three respondents are registered under the Eastern Cape Liquor Act 10 of 2003 to sell liquor for consumption on their premises. Those premises are situated within the area of jurisdiction of the Municipality. In 2006 the Municipality passed a by-law regulating liquor trading hours and caused it to be published in the *Eastern Cape Provincial Gazette Extraordinary* of 27 December 2006.

[2] The court a quo (Eksteen J) at the suit of the respondents, who were the first to third applicants and to whom I shall refer as the applicants, granted the following relief:

'1. The decision of the Council of the Kouga Municipality to pass the Kouga Municipality Liquor (Trading Hours) By-Law in accordance with section 12(3) of the Local Government: Municipal Systems Act, 32 of 2000, is hereby reviewed and set aside.

2. The Kouga Municipality Liquor (Trading Hours) By-law published in the

Provincial Gazette Extraordinary on 27 December 2006 is declared to be invalid.

3. The declaration of invalidity of the Kouga Municipality Liquor (Trading Hours) By-law is suspended for a period of twelve (12) months from the date of this order',

and ordered the Municipality to pay the applicants' costs of the application.

The fourth applicant was found by the court a quo not to have locus standi to bring the application and was accordingly non-suited. The court a quo subsequently granted the Municipality leave to appeal to this court. No cross-appeal was brought by the fourth applicant and it accordingly does not figure in the appeal.

[3] The principal issue in these proceedings is the validity of the by-law. It is also necessary to consider whether the order made by the court a quo was appropriate.

[4] The Municipality contended that the applicants' application to review and strike down the by-law should have been dismissed, because:

(a) of the delay between the date when the by-law was promulgated on 27 December 2006, and the date on which the applicants' application was brought in April 2009;

(b) the prescripts of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') were ignored;

(c) the applicants failed to exhaust internal remedies;

(d) the Municipality had indeed complied with the relevant legal requirements in passing the by-law;

(e) the applicants and the public had adequate opportunity to comment on the by-law; and

(f) the setting aside of the by-law was not in the public interest.

The validity of the by-law

[5] The legal position is governed by s 160(4)(*b*) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and s 12(3)(*b*) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). Both require that a proposed by-law be published for public comment; but the Systems Act goes further and adds 'in a manner that allows the public an

opportunity to make representations with regard to the proposed by-law'.

[6] The relevant facts are these. The by-law was passed by the Council of the Municipality on 7 September 2006 and, as I have said, was promulgated in the *Eastern Cape Provincial Gazette Extraordinary* of 27 December 2006. Prior to these two events, the Council had apparently resolved to advertise the by-law for comment. Publication in fact took place on two dates:
(a) on 24 December 2004 in the *Herald* and *Die Burger* newspapers and (according to the Municipality) the *Eastern Cape Provincial Gazette*; and
(b) on 24 February 2006 in a local newspaper, *Our Times*.

[7] The first publication in 2004 read:

'KOUGA MUNICIPALITY

NOTICE NO 157 / 2004

DRAFT BY-LAW FOR LIQUOR TRADING HOURS

NOTICE IS HEREBY GIVEN that the Council proposes to make a by-law in terms of the Eastern Cape Liquor Act, 2003 (Act No. 10 of 2003) which shall regulate the hours of liquor trading and sets out matters connected therewith.

Copies of the draft by-law are available free of charge from the Municipal Office at 33 Da Gama Road, Jeffreys Bay, during office hours.

Enquiries herein or requests for assistance may be directed to the Manager: Legal Services during office hours at 042-293111.

Comment, if any, must be submitted to the undersigned in writing by or before 12:00 at 24 January 2005.'

The copies of the draft by-law referred to in the published notice provided:

'5. **TRADING HOURS**

i) The Council has determined the trading [sic] of the different types of registrations listed in the first column of Schedule 1 as the trading hours listed in the second column of the said Schedule.

ii) A departure from the hours stipulated in Schedule 1 shall be upon application and approval by the Council.

iii) The Council reserves the right to depart from the stipulated trading hours in

the interest of the community.'

Schedule 1 listed the different types of registration permitted by s 20 of the Eastern Cape Liquor Act in the first column and the applicable trading hours in the second column. In the case of the applicants, the relevant provisions were, in column 1:

'Sec. 20(b) ─ Registration in terms of the Liquor Act for the retail sale of liquor for consumption on the premises where liquor is sold (e.g. restaurants, night club, sports club, pool bar, hotel, pub)';

and in column 2:

'Monday ─ Saturday 10:00 to 24:00 Sunday 10:00 to 22:00.'

[8] The second publication in 2006 read (I quote only the English part):

'KOUGA MUNICIPALITY ─ NOTICE NO 40/2006

DRAFT BY-LAWS : INVITATION

FOR PUBLIC COMMENT

Notice is hereby given that the Kouga Local Municipality intends to adopt by-laws for its area of jurisdiction. Copies of these draft by-laws are available for inspection at the following venues and any comments or submissions must be submitted in writing to the undersigned by no later than 12:00 on 31 March 2006.

Jeffreys Bay Library

St. Francis Bay Municipal Offices

Humansdorp Municipal Offices

Hankey Municipal Offices

Patensie Municipal Offices.'

The copies made available of the draft by-law, which in fact related to liquor trading hours, provided:

'5. **Hours of trading**

(1) The trading hours, as listed in Column 2 of Schedule 1 to this By-law of the different kinds of registrations, as contemplated in section 20 of the Act, as listed in Column 1 of the Schedule, have been determined by the Council and may be reviewed by the Council from time to time.'

The schedule annexed again specified, in column 1, the types of registration for which the Eastern Cape Liquor Act provides. Column 2, headed 'TRADING HOURS', was left completely blank. Apart from this, there were other significant differences between the draft by-law referred to in the first

publication in 2004 and the draft referred to in the second publication in 2006, which the court a quo summarised as follows:

'The new draft provided for the establishment of liaison forums in the community for the purposes of securing community involvement in matters dealt with in the by-law. The first draft contained no reference to this phenomenon. The new draft law provided for persons, on application, to be granted exemption from certain provisions of the by-law. The first draft was silent in this regard. The new draft provided for an appeal procedure to dissatisfied persons whose rights had been affected by any decision of the respondent in terms of the by-law. This right was not provided for in the first draft. The first draft provided for the respondent to authorise "officials" to see to the enforcement of the by-law and created various offences relating to unwarranted conduct towards such officials. The new draft abandoned all of this. In the first draft the actual trading hours form part of the by-law. In terms of the new draft the respondent is granted the power to determine times for trading which would be published, presumably from time to time.'

The by-law passed by the Council of the Municipality was the proposed by-law advertised in 2006, with the addition of column 2 from the proposed by-law advertised in 2004.

[9] These facts lead to the inevitable conclusion that the Municipality did not comply with the provisions of the Constitution or the Systems Act referred to above. The Municipality contended that the 2004 and 2006 publications were part of one continuous process. But the changes to the draft by-laws made available pursuant to the first publication in 2004 were far-reaching. As the court a quo correctly held, not every change has to be advertised otherwise the legislative process would become difficult to implement; but here the two sets of proposed by-laws were so markedly different that republication of the revised draft was necessary to meet the legislative requirements of the Constitution and the Systems Act. That did not happen. The second publication in 2006 could not have served to alert the public that the Municipality intended to adopt an amended by-law to regulate liquor trading hours. A Municipality is entitled to make by-laws in respect of a considerable number of matters.[1] For all a reader of the second publication would know, the proposed by-laws could have referred to dog licences or

1 As appears from s 156 of the Constitution.

funeral parlours. Nor, if a particularly cautious holder of a liquor licence were to have obtained a copy of the draft by-law at one of the places listed in the second publication, would he or she have been any the wiser as to the times fixed for trading hours in respect of any registration possible under the Eastern Cape Liquor Act.

[10] The Municipality relied on two meetings held subsequent to the second publication in an attempt to show that the inhabitants of the area governed by the Municipality knew of the proposed amended by-law. But the requirements of the Systems Act are not satisfied by showing that some persons had such knowledge. That Act requires publication in a manner that allows the public an opportunity to make representations. Interested members of the public who did not attend the meetings might have failed to do so or might have failed to make representations in another way precisely because they were unaware of the provisions of the proposed amended by-law.

[11] The by-law passed by the Council of the Municipality was therefore invalid for want of compliance with the procedure prescribed for its adoption, and the court a quo was correct in coming to this conclusion. The next question is whether the court a quo should have granted relief to the applicants and if so, whether the relief it granted was appropriate.

The relief

[12] In my view, the correct approach to the relief sought by the applicants would have been to recognise that the application was in form a direct challenge, but in substance a defensive or collateral challenge, to the validity of the by-law. The two are different; as this court held in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 36:

'It is important to bear in mind . . . that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and *ex hypothesi* the subject may not then be precluded from challenging its validity. On

the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review [ie a direct challenge] has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.'

[13] The Municipality appreciated the true nature of the proceedings. In the answering affidavit deposed to on its behalf by its Director: Corporate Services, the latter said:

'At the outset it should be stated that the [Municipality] contends that this application has been brought solely to serve the self-interests of the applicants, who have been charged for criminal transgressions and who now seek to extricate themselves from such criminal proceedings in this roundabout way, by belatedly seeking to challenge the validity of the applicable by-law which was duly promulgated nearly three years ago, namely on 27 December 2006.'

[14] But the Municipality misunderstood the legal position. To quote again from *Oudekraal*:[2]

'When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases ─ where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act ─ that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has become to be known as a "defensive" or a "collateral" challenge to the validity of the administrative act. (A challenge to the validity of the administrative act that is raised in proceedings that are not designed directly to impeach the validity of the administrative act.)'[3]

That is precisely what the applicants sought to achieve. The first applicant says, for example:

'[D]uring the festive period of 2007 those trading in liquor were permitted to do so

2 Para 32.
3 The passage in parenthesis is contained in a footnote.

beyond the hour stipulated in the by-law and in the new year I was issued with a Summons for having sold liquor after 24h00. I defended the charge and it was eventually withdrawn.

Nothing much changed thereafter until the 5th of August 2008 when I was visited by a member of the South African Police Service who advised me that the Respondent's by-law would be enforced in the future. Notwithstanding this advice and in the light of the history of the matter and the substantial financial losses I would suffer if I curtailed my hours of trade in accordance with the by-law I continued to trade beyond 24h00.

On the 17th of August 2008 I was again issued with a written notice to appear in Court upon a charge of having contravened the trading hours stipulated in the Respondent's by-law. The criminal proceedings stand postponed until the 15th of April 2009 and in consequence whereof I have sought further legal advice. That advice has prompted the present application.'

[15] However, the applicants misconceived their remedy. They brought a direct challenge to have the decision of the Council of the Municipality to promulgate the by-law in question reviewed and set aside. This was inappropriate and led to the order of the court a quo which, far from assisting the applicants, prejudiced them. I shall expand on each aspect.

[16] The direct challenge was inappropriate because in a review application, whether based on PAJA[4] or a constitutional challenge to legality based on s 160(4)(*b*) of the Constitution and s 12(3)(*b*) of the Systems Act,[5] the court would have a discretion to refuse the relief sought ─ in particular,

4 There is a dispute as to whether PAJA applies.
5 *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan & others* 1999 (1) SA 374 (CC) para 58.

because there was a delay in bringing the application: see s 7(1) of PAJA,[6] *Camps Bay Ratepayers' & Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) and the cases quoted in paras 56 to 62, and also the decision of the Constitutional Court on appeal reported in 2011 (4) SA 42 (CC) para 53. It is that discretion which the Municipality asked the court a quo to exercise in its favour by dismissing the application and the court a quo's failure to do so is a cornerstone of the Municipality's appeal. But it would be inexplicable to a layman were the applicants to fail in civil proceedings the avowed purpose of which was to avoid their prosecution under the by-law, but succeed in defending criminal proceedings on the same facts.

[17] So far as the appropriateness of the order of the court a quo is concerned, the suspension of the order declaring the by-law invalid not only had the effect that the applicants could be prosecuted during the period of suspension ─ which is precisely the result they sought to avoid ─ but also meant that they were precluded during that period from mounting a collateral challenge to the validity of the by-law ─ which means that although they were successful, they were in a worse position than they would have been in had they brought no proceedings at all. That is a result which would also be inexplicable to a layman.

[18] The problems associated with the relief sought by the applicants in their notice of motion and the order granted by the court a quo would be avoided if a declaratory order were to be granted that the by-law in question is invalid for the purposes of a prosecution of any of them based thereon. A collateral challenge to the validity of a piece of legislation can be mounted at any time and a court has no discretion to disallow such a challenge, as appears from para 36 of *Oudekraal* quoted in para 12 above.

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6 '(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without reasonable delay and not later than 180 days after the date ─
(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
(b) 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.'

[19] I can conceive of no reason why a collateral challenge to the validity of a piece of legislation cannot be brought in civil proceedings for a declaratory order by a person who has been charged with contravening such legislation. Indeed, this court has allowed precisely such a procedure to be followed: *Attorney-General of Natal v Johnstone & Co Ltd* 1946 AD 256; and there seem to be distinct advantages in it:

(a) The question would be dealt with by a court better versed in administrative law than a specialist criminal court. That should exclude both the possibility of persons being wrongly convicted for contraventions of an invalid by-law, and also the possibility of persons being wrongly acquitted for contraventions of a valid by-law.

(b) The matter could be brought to a head, and delay (with concomitant uncertainty and expense) avoided ─ in the present matter, for example, the prosecution of the first applicant was withdrawn and then later reinstituted.

(c) The true protagonists ─ in this case, the applicants and the Municipality ─ would be before the court and the Municipality, the author of the legislation impugned, would be directly involved in defending it.

(d) Those against whom the legislation is sought to be enforced, could recover costs, if successful.

[20] I expressly leave open the question whether a collateral challenge by way of a declaratory order may be brought by a person who is merely liable to prosecution and who has not been charged, and therefore whether some of the remarks of this court in *Johnstone's* case especially at 260-2 should be reconsidered in view of the now clearly established distinction between a direct and a collateral challenge: cf *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others (Bengwenyama ─ ye ─ Maswati Royal Council intervening*) 2011 (3) BCLR 229 (CC) para 85 where reference is specifically made, in a footnote, to para 36 of *Oudekaal* quoted above.

[21] A declaratory order given by a high court in a matter such as the present would have this effect:

'Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has

the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instruments purported to declare' – per Lord Diplock in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 365. That means a declaratory order in favour of the applicants would render all prosecutions still-born and leave the inhabitants of the Municipality without a by-law regulating hours of trading in liquor. But this result follows from the failure by the Council of the Municipality to pass the by-law in accordance with the empowering legislation. As Lord Irvine said in *Boddington v British Transport Police* [1999] 2 AC 143 at 156D, [1998] 2 All ER 203 at 211h (a case quoted with approval in *Oudekraal* para 32), after setting out the passage from the judgment of Lord Diplock above:

'Thus, Lord Diplock confirmed that once it was established that a statutory instrument was ultra vires, it would be treated as never having had any legal effect. That consequence follows from application of the ultra vires principle, as a control on abuse of power; or, equally acceptable in my judgment, it may be held that maintenance of the rule of law compels this conclusion.'

Order

[22] The following order is made:

1 The appeal is dismissed, with costs.

2 Paragraphs 1, 2 and 3 of the order of the court a quo are deleted and the following order is substituted:

'It is declared that the Kouga Municipality Liquor (Trading Hours) By-law published in the *Eastern Cape Provincial Gazette Extraordinary* on 27 December 2006 is invalid for the purposes of a prosecution of any of the first, second and third applicants for contravening the by-law.'

T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	M G Swanepoel SC
	Instructed by Neville Borman & Botha, Grahamstown Naudes Attorneys, Bloemfontein
RESPONDENTS:	R W N Brooks
	Instructed by Netteltons Attorneys, Grahamstown Honey Attorneys, Bloemfontein