REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 25622/09

DATE: 18 DECEMBER 2009

In the matter between:

WIDEOPEN PLATFORM Applicant

and

CITY OF CAPE TOWN Respondent

JUDGMENT

DAVIS, J:

This is an application for a spoliation order. The application concerns certain change rooms which were constructed, it appears from photographs attached to the papers, from advertising boards erected by the applicant on the Camps Bay beachfront. The respondent maintains that it owns the land on which the advertising structures have been erected. Respondent has removed the advertising structures, purporting

to act in terms of Section 76 of the City of Cape Town: Outdoor Advertising and Signage By-law no 10518 of 5 December 2001 ('the Signage By-Law').

Applicant contends that it has been in peaceful and undisturbed possession of the advertising structures and that respondent's removal of the structures constitutes an unlawful deprivation of its possession. Applicant has accordingly sought an order in terms of which the respondent is ordered to return possession of the advertising structures, and, perhaps even more significantly, to reinstate them to their original location on the Camps Bay beach front.

The application depends, to a large extent, on applicant showing that it was in peaceful and undisturbed possession of the advertising structures and that the applicant was unlawfully deprived of such possession by the respondent. Respondent contends that the applicant has met neither of these requirements for the spoliation order which thus should be dismissed.

I briefly turn to the factual complex. Applicant is a signage company with experience in outdoor advertising. During August 2009 applicant, by way of a representative Ms Julia Parsonage, communicated with Ms Nihaad Ajam, who was

employed at respondent's Department for Sport Recreation and Amenities with regard to what was referred to "as an event", consisting of the erection of the particular structures to which I have made reference. Pursuant thereto, applicant paid a hiring fee of R50 761,50 to respondent. On 16 October 2009 Ms Ajam issued a permit to the applicant for the event, the permission being entitled "permission to utilise Camps Bay Beach for "dressbox" promotion".

The permit was designed to last for a period of 92 days from the beginning of November 2009 to the end of January 2010. It stated that there was "in principle .... no objection for the utilisation of the ... area". Permission was then granted subject to a number of conditions. The structures were erected by applicant on 4 November 2009.

Ms Debbie Evans, the respondent's chief environmental control officer at its Environmental Control Section, Environmental Management Branch, was then informed of the erection of these structures. Following upon a number of complaints having been lodged with her office, she proceeded to investigate the matter. On 17 November 2009 Ms Evans addressed an e-mail to Ms Parsonage, in which she informed the latter that the advertising structures were subject to the signage by-law, that they had to be removed by 20 November

2009, failing which respondent would remove them at the cost of applicant.

On 19 November 2009 Ms Evans caused a notice to be served on the applicant in terms of section 75 of the Signage By-law. The notice required the structures to be removed within 24 hours, failing which the respondent would remove them. The noticed further informed applicant that in terms of section 76 of the Signage By-law the removal was permitted without first obtaining a Court order because the unlawful structures were located on land which was owned by the respondent.

On 20 November 2009, Ms Evans addressed a letter to the applicant's attorneys, in which the provisions of the City of Cape Town Events By-law, promulgated on 22 May 2009, (the Events By-law), relevant to the event for which the permit had apparently been granted were described. That read thus;

> "I wish to draw your attention to clauses 6 and 7 of the Events By-law approved in March 2009.
>
> 6. Criteria. The events permit officer must ensure that applications for staging an event are considered in accordance with the following criteria where applicable;

(g) the event complies with all application legislation and;

7. Holding of an event. Event organisers whose applications are being approved in terms of this by-law are responsible for the event and must ensure that (a) the event is held in compliance with the provisions of this by-law and does not contravene any other law. The advertising structures with third party advertising have not got the approval in terms of the outdoor advertising and signage by-law as required in terms of the above. The event organiser (Wideopen Platform) has failed to obtain an approval in terms of the outdoor advertising and signage by-law and has therefore committed an offence. The structures are erected on City owned land and are unlawful. Should the structures not be removed by 14h00 today the City will have no option but to remove such structures.'

On 25 November 2009, a compliance notice in terms of section

8 of the Events By-law was served on applicant, and it was again requested to remove the structures, this time by 08h00 on 26 November 2009. Applicants did not respond to these notices.

Based upon these reasons, on 26 November 2009 respondent commenced removing the structures. On 1 December 2009 applicant was informed by the Director – Sport and Recreation of the respondent, that the permit which had been issued had been revoked. On 4 December 2009, applicant launched these proceedings.

The Applicability of the Signage By-law

The case, as it was argued in Court, essentially turned on a series of initial questions; in particular, whether sections 75 and 76 of the Signage By-law could be applied to the facts as I have set them out. In the event that the By-law applied, a further argument was raised by applicants, which could be described as an argument based on estoppel. In the event that the sections, to which I have made reference, were inapplicable, then further arguments were raised with regard to spoliation, and the law applicable to whether spoliation proceedings could be justified in the present dispute.

I turn therefore to deal firstly with the applicability of the

Signage By-Law. Respondent avers that the Signage By-Law applies to the particular structures. Mr Kantor, who appeared on behalf of the applicant, submitted that this was not correct, because the structures were "street furniture" which the Signage By-Law defines to mean "public facilities and structures which are not intended primarily for advertising and includes, but is not limited, to seating, benches, planters, bins, pole mounted bins, bus shelters, sidewalk clocks, drinking fountains, Telkom boxes, traffic signal controllers, electricity boxes, post boxes and telephone booths, but excludes road traffic signs, traffic signals, street lights, or any other road related structure.

The change rooms, in Mr Kantor's view, were open to the public for its use and therefore stood to be classified as street furniture in terms of this definition. Furthermore, he submitted that the relevant provisions of the Signage By-Law did not apply to street furniture. The reasoning behind this submission was that respondent does not require a formal application process for signs for the inclusion of advertising on street furniture. It was argued that the structures were "public facilities", being "structures which are not intended primarily for advertising." The intention of permitting advertising on street furniture was to provide a public facility in a manner in which the public authority does not have to incur expenditure.

An advertising company provides the public facility at its cost in return for the right to place advertisements on the structures. Respondent would not require advertising companies who provide street furniture to submit applications in terms of its outdoor advertising by-laws, for the advertising which is integrated into a structure which fulfils a public function.

Mr Kantor submitted therefore that the consequence of respondent's approach to the Signage By-Law was that, based on the provisions of Schedule 16, no street furniture would be permitted on land belonging to the respondent. In his view this would be an absurdity. No examples of an application forwarded and approved of the street furniture advertising had been provided by respondent (an averment which was hotly contested by respondent in its answering affidavit). Mr Kantor therefore submitted that the Signage By-Law did not apply to the structures and that respondent was not entitled to act in terms of section 76.

Schedule 16 *inter alia* provides as follows;

> "Other than as is set out herein below, no signs other than locality bound signs,

> temporary signs, including loose portable signs, estate agents signs, newspaper headline posters and posters (the erection of which must comply with the appropriate schedules pertinent there) shall be erected on municipal owned land."

Mr Fagan, who appeared together with Ms Van Huyssteen on behalf of the respondent, referred to a series of definitions in the Signage By-Law, which indicated that the provisions of Schedule 16 clearly applied to street furniture, which was therefore not excluded from the scope of the Schedule. I recall that Schedule 16 refers to the word "signs". In Section 1 of the Signage By-Law it is provided that:

> "No person shall display any advertisement, or erect or use any sign or advertising structure for advertising purposes without respondent's approval."

Sign is defined as "any object, product, replica, advertising structure, mural device or board which is used to publicly display a sign or which is in itself a sign and includes a poster and a billboard".

Advertising structure is defined as:

"Any physical structure built or capable of being used to display a sign."

In Mr Fagan's view, an examination of the photographs attached to the papers, revealed clearly that the change rooms erected by the applicant on the Camps Bay beachfront were no more than "advertising structures" and therefore fell within the definition of sign within the meaning of the Signage By-Law. In turn Schedule 16 of the Signage By-Law therefore applied, because it provides that, other than particular types of signs and other than according to the specific provisions of that Schedule, "no signs .... shall be erected on (respondent) owned land". The land on which the advertising structures are erected was owned by the respondent and the signs therefore had to comply with the provisions of Schedule 16.

Referring to applicant's contention that the advertising structures were street furniture and that such street furniture was exempt from the provisions of the Signage By-Law, Mr Fagan submitted that the change rooms in this dispute were not street furniture as defined, for public facilities and structures qualify as street furniture only if they are "non intended primarily for advertising". Even if they were to be categorised as street furniture he submitted there was simply

no indication in the Signage By-Law that street furniture was exempt from provisions which applied to all signs as defined.

He contended further that the applicant had itself on occasion applied for approval for advertising on street furniture in terms of the Signage By-Law. This is an averment made in the answering affidavit. Although for the sake of accuracy I should add that Mr Kantor strenuously contended that this particular averment was inaccurate and that applicant had not applied for approval for advertising on street furniture.

Mr Fagan contended that it was inconceivable that the large advertisements which adorned bus shelters should be regarded as exempt from the Signage By-Law merely because bus shelters fall within the definition of street furniture.

Significantly Schedules 9, 10, 11 and 12 all refer to street furniture as defined. In this connection Schedule 12 has some relevance as it regulates the use of street furniture in a particular case. Paragraph 2 of Schedule 12 provides that estate agent signs are to be attached only to municipal electric light poles, where available, and only with stout string or plastic ties. No securing material with metal content shall be permitted. Signs may not be affixed to trees, traffic signal poles, or other poles which carry road traffic signs, walls,

fences, rocks and other natural features or landscaped areas, street furniture or other municipal property unless its display is authorised by the municipality in writing.

It is clear that, in this case, street furniture falls within a similar regulation to other forms of advertising. There is nothing in the By-Law that expressly provides that street furniture is exempt from the provisions of Schedule 16. To the contrary, the definition of sign read together with the definition of advertising structure, supports respondent's contention that street furniture falls within this definition.

But even if this is an incorrect analysis, an examination of the series of changing rooms displayed on the photographs, which contain huge advertising boards, and which adorned the beach from one side to the other, supports the conclusion the structure was really no more than an advertising structure which was constructed in a way to provide for changing facilities. In essence it is an advertising structure which contained a changing room, rather than a changing room which had ancillary advertising attached thereto. A purposive construction of the By-Law dictates that these structures be included within the regulatory scope of the By-Law, given their potentially detrimental effect on the environment.

In essence, were the construction of the By-Law as contended for by Mr Kantor to be followed, the regulatory effect of the by-law would be gutted. One would simply have to put up some form of public facility in order to ensure that the entire City would be strewn with unseemly advertising billboards to the considerable environmental detriment of the most gloriously naturally beautiful parts of this spectacular city; an intention that could surely never have laid at the core purpose of the By-Law.

For this reason, I am satisfied that street furniture, to the extent that these structures may be contended to be street furniture, falls within the regulatory scope of the By-Law.

This in turn raises the further question of the applicability of sections 75 and 76, the two sections of the By-Law which were utilised by respondent to remove the structures. Section 75 provides: "if any sign displayed is in contravention of this by-law the Municipality may serve a notice on the owner or lessee of the sign, or the land owner on whose land the sign is erected or displayed or person whose product or services are advertised, calling upon such person to remove such sign or carry out such alteration thereto, or do such work as may be specified in such request or notice within a timeframe specified therein. Notwithstanding the service of such notice, it may be

withdrawn or varied by the Municipality by agreement with the person so served, or failing such an agreement by the service of a further notice".

Section 76 provides: "Should the municipality's demands as set out in the notice not be carried out within the time period specified therein the Municipality may without further notice to the person upon whom the notice was served, and after obtaining relief from the appropriate court on an *ex parte* basis, remove or alter the sign or do such work as may be specified in such notice, provided that no court order shall be required, if the unlawful signs erected or displayed on the property belonging to the Municipality prior to removal or alteration thereof".

Mr Fagan submitted that, in terms of these provisions, respondent was entitled to remove the advertising structures from its property without first obtaining a court order once it had complied with the provisions of sections 75 and 76 read together. On respondent's papers, he submitted that all the steps prescribed by the sections were followed by the respondent, prior to the removal of the advertising structures.

Applicants aver that the applicable land did not belong to the respondent, and therefore section 76 was inapplicable. The

words which are required to do the work here are "is erected or displayed on property belonging to the municipality". Before I engage in an analysis of this contention, it is important to emphasize that applicant did not place these By-Laws in constitutional dispute. There was no constitutional attack on the validity of the By-Laws, or upon the mechanism by which respondent can on, an *ex parte* basis, remove or alter the sign. The entire argument was based on the submission that as the land did not "belong to the municipality", section 76 was inapplicable and therefore the steps taken by respondent were invalid.

I turn therefore to deal with this argument. Mr Kantor submitted that, for section 76 to be applicable, a series of requirements had to be met. In particular the removal had to apply only to property belonging to the municipality. He submitted that the property in question vested in respondent. It did not belong to it in the usual sense. Therefore, as respondent simply was the custodial repository of such land, Mr Kantor submitted that the scope of section 76, a 'drastic section' which had to be interpreted narrowly, could not reach respondent's "land" in that it could only apply to land belonging to the respondent in the usual sense. Therefore the provision could not be extended to all land which simply vests in respondent by law, such as certain roads and streets in

terms of the by-laws applicable thereto.

The profound difficulty with this submission (I was entertained to an intricate *jurisprudential* argument regarding the differences between vesting and ownership) is that none of the submissions, notwithstanding the eloquence of the legal submissions, could be substantiated on the evidence. The distinction between "vests" and "belongs" had to be predicated on an averment that the land did not belong to the respondent in the sense that the land was not owned by the respondent. The only averment in applicant's papers to this effect was to be found in the replying affidavit: "the land in question is not actually "owned" by the respondent". Respondent in its answering papers strongly denies this. Ms Evans avers as follows;

> "In addition in this case the land adjacent to the Camps Bay beach (the grass area) is owned by the City and controlled by the City Parks Department. Its consent as the owner of the land, via that office, should have been obtained first. Whilst this land is administered by the City's Parks Department the adjacent beach however is not owned by the City, but is controlled by the City, for

example law enforcement on the beach when an event is to take place on the beach, eg a volleyball tournament."

It is to be noted that Ms Evans does not make a cavalier claim. She avers that the land which is owned by the respondent is the land adjacent to the Cape Town beach (the grass area) on which I might add the advertising structures are located. There is no basis in an application of this kind for this court to simply reject this averment and substitute it for a far vaguer averment, which only emerged in the replying papers, but not in the founding papers on which applicant's case was predicated on the first place.

On these papers, therefore it cannot be said that the land on which the structures were built did not "belong to the municipality". For this reason, and given that there is no constitutional attack on section 76, this Court has no alternative other than to conclude that the section was property invoked.

This, in effect, disposes of all the different arguments which were raised in Court, save for the question of estoppel, to which I now turn.

Estoppel

In support of an argument based upon estoppel, Mr Kantor referred to the following facts;

1) Applicant's experience was that matters of this kind did not require approval in terms of the signage by-law.
2) In his view this is in accordance with the respondent's approach in practice.
3) Applicant was referred to the Sports and Recreation Department of respondent by Mr Hunter and it was dealt with by Ms Ajam.
4) Applicant had been informed by respondent that the Events Department could not handle the matter and the appropriate department to deal with this matter was the Sports and Recreation Department.
5) The permit for the structures was granted by the Sports and Recreation Department without any references to signage approval.
6) Applicant paid the requisite fee of R50 761,50 to respondent.
7) Nothing was further required by respondent.
8) Ms Ajam argued in writing that the signage by-laws did not apply.

9) After the structure had already been erected, Ms Evans of respondent opined to Ms Ajam that the signage by-law applies.

10) Respondent avers that what Ms Evans regards as Ms Ajam's incorrect view of the applicability of the signage by-law is irrelevant.

11) Based on her experience of "street furniture type applications", Ms Parsonage was satisfied that the procedure employed was correct.

12) It is not for the applicant to tell respondent which of its departments should administer which applications or proposals. Applicant is entitled to rely on the representations made to it by Ms Ajam in the Sports and Recreation Department.

13) Respondent only reacted negatively to the change rooms after having received complaints from persons in the area.

In the circumstances, Mr Kantor submitted that respondent had negligently represented to applicant the signage by-law application was not required and it was upon this representation that applicant had relied to its detriment.

This submission raises two separate questions, namely the applicability of administrative estoppel and secondly whether a

representation was made sufficient to bring this case within the ambit of estoppel. Briefly stated the doctrine of estoppel in the present circumstances operates in circumstances where A, the representor, makes a representation of a fact to B, the representee, and the latter believes in the truth of the representation and acts on it to its prejudice. A can then be precluded or estopped from denying the truth of that representation. See in general LAWSA Vol 9 at para 449.

Professor Hoexter in her excellent textbook, Administrative Law in South Africa, at 38-41 provides a careful analysis of this doctrine. It is on this particular treatment and given the expedition which this judgment requires, that I have relied almost exclusively.

Professor Hoexter submits that a particularly important consideration in the applicability of the doctrine of estoppel to a case such as the present is that, by the application of this doctrine, administrators could acquire powers that have not been vested in them either by the Constitution or applicable legislation. If the representation turned out not to be so authorised or *ultra vires,* the application of estoppel would have the effect of "ratifying" decisions that an administrator was not legally allowed to make. This would conflict with the basic principle that lawful authority is required for all actions

and decisions of public bodies. In other words, to allow this doctrine to be invoked in this case would permit public authorities to allocate powers to themselves which they do not possess.

It was this particular approach which commended itself to the Supreme Court of Appeal in Eastern Cape Provincial Government v The Contract Props 25 (Pty) Ltd 2001(4) SA 142 (SCA). In this case the Court refused to apply the principle of estoppel. A provincial government department had entered into certain leases without engaging in the appropriate tender board, as required by the applicable law. Marais, JA said;

> "If the leases are in effect 'validated' by allowing estoppel to operate the Tender Board will have been deprived of the opportunity of exercising the powers conferred upon it in the interests of the taxpaying public at large .... The fact that the respondent is misled into believing that the Department had the power to conclude the agreements is regrettable, and its indignation at the stance now taken by the Department is understandable. Unfortunately for it those considerations cannot alter the fact that leases were

concluded which were *ultra vires* the powers of the Department, and they cannot be allowed to stand as if they were *ulra vires*."

paras 12 to 13.

This *dictum* appears to be the predominant approach. There is however an exception. It is to be found in the judgment, which was relied upon in argument before me, of Boruchowitz, J in Eastern Metropolitan Sub-structure v Peter Klein Investments (Pty) Ltd 2001(4) SA 661 (W). In this particular case, the learned judge found that the Constitution had substantially changed the legal context, particularly since it required the evolution of common law in accordance with constitutional principles. In the learned judge's view, there was a basis to invoke the doctrine of estoppel.

The defendant, the owner of a block of flats, had relied on the correctness of an administrator's invoice for some years, and, all of a sudden, he was confronted with a claim for a significant sum of money in arrears rates and service charges that the administrator had previously neglected to claim. Defendant sought to estop plaintiff from claiming the charges. While the plaintiff accepted on the basis that to allow estoppel would effectively prevent it performing to the statutory duty.

Boruchowitz, J held that the right to reasonable administrative action, including proportionality and the culture of justification of which it formed a part, would not countenance immunity from estoppel where this would be of minimal benefit to the plaintiff and cause considerable hardship and injustice to the defendant. The Court concluded that the proper approach of this doctrine would be "to balance individual and public interest at state and decide on that basis whether the operation of estoppel should be allowed in a particular case." Para 40.

The justification for this approach is captured in the following passage of the judgment at para 37 to 39:

> "A rule of law which permits an organ of State through its own carelessness or neglect to deprive the defendant of the statutory right of recourse and then to render itself immune from a defence to that deprivation which estoppel would offer the defendant is, in my view, inconsistent with the culture of justification of which the right to reasonable administrative action is an important part. To permit the plaintiff to take advantage of the established rule against the raising of

> estoppel where there is no alleged or minimal countervailing benefit to the plaintiff would, to my mind, be inconsistent with the entrenched constitutional values of reasonable public administration .... To allow the doctrine of estoppel in the limited and peculiar circumstances of the present case would, to my mind, prevent hardship and injustice and give content to the arguments of the Constitution and basic values underlying it.
>
> It should not be forgotten that estoppel is after all an equitable doctrine which is pertinently concerned with questions of fairness in particular contexts. One of its functions is to protect relationships of trust and confidence in the sense that it will hold parties to their representations to one another where there has been detrimental reliance."

This *dictum* has been firmly rejected in City of Tshwane Metropolitan Municipality v R P M Bricks 2008(3) SA 1 (SCA) at para 23, in which the approach of Boruchowitz, J was described as 'fallacious'. Ponnan, JA held that, to allow the doctrine to operate in this particular fashion, would be to sanction illegality. Illegality did not depend on harshness of

the consequence.

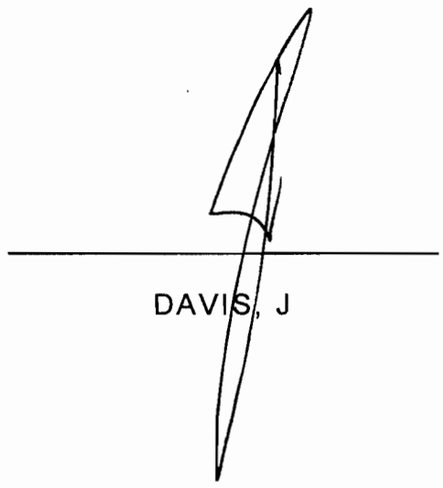
In this case, there could be no question that to allow estoppel to operate would mean to gut the regulatory scope of the by-law. Whatever the statements about the culture of justification as contained in the Peter Klein judgment may be, the rule of law insists that public authorities act legally. If an administrator makes a mistake, to suggest that the City and its inhabitants should suffer major environmental detriment, which would have been caused by otherwise illegal activity, surely is itself so antithetical to the integrity of the Constitution as to be a powerful basis by which to reject the approach adopted in the Peter Klein judgment, and which was, in essence, the reason why it was rejected in City of Tshwane *supra*.

In this case, I remain uncertain as to whether a representation was made to the applicant, to the effect that the structures proposed for construction fell outside of the regulatory scope of the by-law. If the submissions by Mr Kantor are carefully analysed, there is no clear evidence as to the content of these representation, certainly not with sufficient clarity to conclude that applicant was entitled to rely on them for the purposes of constructing what is no more than an advertising structure.

I leave aside the further inference as to whether somebody,

who is as supposedly as experienced as Ms Parsonage, would not have known that this was in many ways an opportunity to be seized upon, as opposed to a representation to be relied upon. But, assuming on behalf of the applicant that there was such a representation, for a Court to allow an illegal structure to remain, notwithstanding the potential environmental consequences of this kind, would be to lift illegality into law by way of a particular administrative error. That is surely not a sufficient basis for the relief sought by applicant.

In the circumstances, the APPLICATION IS DISMISSED WITH COSTS, including the cost of two counsel.



DAVIS, J