IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 9410/2010

THE CITY OF CAPE TOWN	Applicant
v	
BOULEY PROPERTIES (PTY) LTD	Respondent
(Registration number: CK 1998/09904/07)	

JUDGMENT HANDED DOWN TUESDAY, 21 DECEMBER 2010

CLEAVER J

[1] This is an application by the City of Cape Town ("the City") for the grant of an order that Bouley Properties (Pty) Ltd ("Bouley") be directed to remove outdoor advertising signage which it has unlawfully affixed to a building on its property situated at 6A Marine Drive, Paarden Island (Erf 173335) because Bouley has not obtained the approval of the City for the erection of the sign in terms of the City of Cape Town Outdoor Advertising and Signage By-Law No 10518 ("the By-Law").

[2] Bouley opposes the application on the basis that the City had available an alternative remedy to the relief which it seeks. In a counter-application Bouley seeks orders declaring the By-Law, alternatively certain sections of it, to be inconsistent with the Constitution of the Republic of South Africa 1996 ("the Constitution") and therefore invalid.

[3] In recording the history of the matter, I rely heavily on the heads of argument submitted by the City's counsel, the provenance of which I acknowledge.

* In an exchange of correspondence between Bouley and the City from 29 July 2009 to 7 August 2009 the City repeatedly indicated to Bouley that the erection of signage on the property was not permitted without the approval of the City and that to do so would constitute a criminal offence.

* After it became apparent during an inspection by the City on 28 April 2010 that Bouley had erected scaffolding on the building, correspondence ensued between the City and Bouley in which the City repeatedly requested undertakings that Bouley would not erect signage without approval. By letter dated 26 April 2010, Bouley informed the City that no decision had been taken by it in respect of signage on the property and that it would make an application for approval if it should decide to erect any signage. Bouley contended that the City's call for an undertaking was without foundation.

* An inspection on 5 May 2010 by officials of the City revealed that a sign-frame was being erected on the building which resulted in further correspondence between the parties with the City again requesting undertakings that Bouley would not erect signage without approval. By letter dated 10 May 2010 Bouley again indicated that it had not taken any decision in regard to signage on the property and that the frame was being erected *'to enhance the façade of the building'*. Bouley further gave an *'assurance that we will most definitely make the relevant application should we decide to proceed with signage'*.

* Continued preparations to erect the signage resulted in the City bringing an urgent application on 10 May for an order restraining Bouley from erecting unlawful signage. The application came before Hlophe JP who declined to hear it for what the applicant terms *'procedural reasons'* and the application was then adjourned.

* In further correspondence, Bouley declined to provide a written undertaking that signage would not be erected at the property without the prior written approval of the City.

* On 2 July 2010 Bouley submitted an application to erect signage at the property. In the covering letter to the application Bouley recorded that it was subject to a commercial constraint in that the terms of an agreement which it had concluded with the party whose advertisement was to appear on the sign, required Bouley to secure approval of the sign *'within the next fourteen days'.* In the letter Bouley recorded being aware of the maximum period in which the City might consider its application (90 days) and submitted that nothing prevented the City from considering the application within a shorter period. It expressed the view that there was no reason why its application could not be considered within the time frame proposed by it.

* The City responded on 16 July by advising that the application had been submitted to the City's traffic engineers and its environmental branch for assessment of the Traffic Impact Assessment and Visual Impact Assessment included in Bouley's application. Bouley was advised that the traffic engineer would require a possible two weeks to complete a comprehensive assessment of the traffic impact submitted and was told that the engineer had a number of other applications which had been submitted and which would enjoy his prior attention. In conclusion it was pointed out that in terms of By-Law 49, the City had 90 days to deliver a decision and Bouley's attention was drawn once again to the fact that a criminal offence would be committed if a sign was erected without the required written approval of the City.

* Bouley responded on 19 July by pointing out that *'it is in the nature of co-ordinating the advertising of a new product or service that the timing of the advertisement is critical. Once an advertiser has finalised its artwork for the product to be advertised, it is simply unworkable for any advertiser to be told that they may have to wait anything from a day to three months whether or not an advertisement may or may not be flighted'.* The view was

expressed that the 14 days which Bouley had given the City to deal with the application was more than generous *'but being told that we have to wait for anything between another 14 days and the balance of the 3 months is simply unacceptable.'*. Bouley also indicated that it was not surprised at the attitude of the City *'given the history of this matter, and the obfuscation and prevarication that we have come to expect from your department in respect of any application that emanates from any property owner or outdoor advertiser that does not enjoy the favour of your department'.* Bouley then went on to record that it had no option but to flight the sign, *'given the enormous financial losses that we would suffer if we don't'* and that in terms of the professional reports which it had submitted, it was clear that there was no prejudice or risk to the City, *'whereas there is enormous prejudice to all the private entities involved in this project and insofar as the City considers itself prejudiced in that a sign is erected without its final approval, this prejudice is of its own making, and can be easily remedied by giving our application proper and timeous approval'.*

* When the council received information on the afternoon of 19 July that signage was being erected on Bouley's property, an application was launched on the following day for an interdict to prevent Bouley from erecting the sign.

* The matter was set down for hearing on 29 July 2010, but by that date, the sign had been erected.

[4] On 4 August 2010 the City served a notice on Bouley calling on it to remove the sign within 21 days as it had been erected without the written approval of the City. The notice was issued pursuant to the provisions of s 75 of the By-Law.

Sections 75 and 76 which appear under the heading of ENFORCEMENT AND REMOVAL OF SIGNS read as follows:-

'75. 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 alternation thereto or do such work as may be specified in such request or notice, within a time frame 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 agreement, by the service of a further notice.

76. 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 sign is erected or displayed on property belonging to the Municipality, prior to removal or alteration thereof.'*

It is common cause that Bouley did not adhere to the instruction to remove the sign and relies on the defences raised to the application and the prayers set out in its counter-claim.

[5] Bouley contends that the City had an alternative remedy available to it, namely the steps which it could have taken under ss 75 and 76 of the By-Law. In fact, the City is criticised for not mentioning the By-Law in its founding papers and also for not mentioning that in the *Dormell*[1] matter, heard it this division, the court had come to the conclusion that By-Law 75 did provide an alternative remedy to the City in its application for an interdict similar to that which is sought in the present matter. When the matter was reinstated by the City for hearing on 29 July 2010, a short supplementary affidavit was filed on behalf of

[1] *City of Cape Town v Dormell Properties 142 (Pty) Ltd and Others* case no 18167/2008, judgment dated 13 November 2008.

the City relating the sequence of events which led to the City ascertaining that Bouley was in the process of erecting a sign at the property. The affidavit dealt principally with the urgency of the matter. No reference was made in it to any alternative remedy which might have been in existence; that issue had been dealt with in the founding papers which had previously been filed. In those papers the City recorded that inasmuch as it sought to prevent the erection of the sign, the alternative remedy of the criminal sanction prescribed in the By-Law had proved to be singularly ineffective in deterring signage companies and property owners from persisting with unlawful conduct without the City's approval. A subsequent criminal prosecution can not in my view be regarded as an alternative remedy to a prayer to interdict Bouley from erecting the sign, nor can a claim for damages be a satisfactory alternative.

[6] It was also contended on behalf of Bouley that having resorted to the provisions of s 75 of the By-Law the City had effectively shown that an alternative remedy was available to it. Bouley's counsel submitted that the time to judge whether an alternative remedy is available is at the time of the hearing of the application and not at the time of the institution of proceedings. On that basis it was submitted that in effect the applicant was seeking to enforce two remedies simultaneously, i.e. its prayer for an interdict as initially framed and its prayer for relief following on the implementation of steps in terms of s 75.

[7] Although the City has not formally abandoned its prayer for an interdict as initially framed and has also not formally indicated that it is relying solely on its rights in terms of s 75 of the By-Law, counsel for the City submitted that in the exercise of my discretion to grant or refuse an interdict, an important fact to be borne in mind is that the situation in

which the City finds itself has been brought about solely by Bouley's conduct. There is much to be said for this view. The City initially instituted proceedings to prevent the erection of an illegal sign because of its concerns about the activity on the site and Bouley's failure to satisfy the City that it would not erect a sign without obtaining the City's approval. That application was not entertained because of procedural difficulties. After Bouley had assured the City that it would apply for permission to erect the sign, thus giving the impression that it would secure approval for the erection of the sign before putting it up, Bouley lodged an application and requested the City to deal with it within an arbitrarily imposed period of 14 days. The justification relied upon by Bouley for its decision to erect the sign without obtaining the consent of the City, that of commercial constraints, is totally unwarranted.

[8] The City's decision to serve a notice in terms of s 75 muddied the waters to an extent, but this step should not in my view debar the City from obtaining relief. The City seeks relief by means of an interdict which

'.... is an order of Court. It enjoins a party (respondent or defendant) to refrain from doing something, or orders such party to do something. The first type of order is referred to as a prohibitory interdict and the second as a mandatory interdict. The distinction has little practical value except that a Court, when exercising its discretion, whether or not to grant an interdict will have regard to the fact that it is more difficult to enforce a mandatory interdict than to enforce a prohibitory interdict. Otherwise the requirements are the same.'[2]

When the City enrolled its application its main prayer was for a prohibitory interdict and although Bouley erected the sign before the application could be heard, I consider that the issue of an alternative remedy should be decided on the papers as at the time of the enrolment of the application in July. Although counsel for Bouley submitted that the time of

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[2] Joubert (ed) *The Law of South Africa* (2 ed) vol 11. Interdicts (LTC Harms) para 390.

the hearing was the relevant time for making such a decision, neither he nor counsel for the City was able to refer me to any authority on this point. By erecting the sign, Bouley effectively altered the playing-field, but I am of the view that it should not be allowed to utilise that step to the City's disadvantage. As to the submission that *Dormell*'s case is authority for the proposition that the City had an alternative remedy when it applied, the facts in *Dormell*'s case are distinguishable from the facts before me. In *Dormell* the respondent had already erected a sign when the City applied for the interdict and for that reason the court concluded, although its conclusion did not form part of the *ratio* for the judgment, that the City had the alternative remedy of proceeding in terms of s 75 available to it. (The application failed because the City had failed to establish grounds of urgency.) Although the City did not refer to s 75 in its founding papers, a full copy of the By-Law was included with the papers. When the City re-enrolled its application, the purpose of which was to prevent the erection of the sign or signs, an adequate alternative remedy available to it would have had to grant similar protection to the City i.e. the prevention of the sign being erected. Clearly no such alternative remedy was available at the time.

[9] What then must be made of the City's decision to implement the procedure as set out in s 75 by serving on Bouley a notice requiring it to remove the sign which had been erected without its approval, and to which Bouley did not respond. It is not clear why the City embarked on this course, but the reason may well be that it wished to avoid finding itself in a situation similar to that in which it was in the *Dormell* matter once the sign had been erected. I am of the view that because of Bouley's conduct, it should not be expected of the City to withdraw the application and thereafter to proceed afresh on the strength of the notice already given to Bouley to which it did not respond. As counsel for the City

pointed out, everything that could or would have been placed before the court had the court been approached in terms of s 76 of the By-Law is before me. Counsel for Bouley did not suggest otherwise. An order granted pursuant to s 76 of the By-Law would of course be for the City to remove the sign, whereas prayer 3 of the notice of motion is for an order for Bouley to remove the sign. However, an order granted pursuant to s 76 of the By-Law could be accommodated in the prayer for alternative relief.

[10] The situation which has now been reached is not unlike that which pertained in *Huisamen and Others v Port Elizabeth Municipality*.[3] In that matter the appellants had permitted a property to be utilised for purposes which contravened the applicable zoning scheme. In responding to what was nothing more than a plea *ad misericordiam* the court held that the use of the property in contravention of the zoning scheme constituted a criminal offence and in deciding on whether or not to confirm the temporary interdict which had been obtained, the exercise of its discretion in favour of a respondent whose conduct amounted to a criminal offence under a statute would in effect sanction the criminal conduct. An order non-suiting the City on the grounds advanced by Bouley's counsel would bring about a similar result in that Bouley would be able to maintain the sign, but would still be subject to criminal prosecution. Such a situation can hardly be tolerable.

[11] I am accordingly of the view that the City has established that no satisfactory alternative remedy was available to it.

[12] Bouley's attack on the By-Law as a whole is advanced under four headings, namely:-

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[3] 1998 (1) SA 477 (ECD).

a) The City does not have the competence to regulate third party signage on buildings on private property and the By-Law is accordingly inconsistent with s 156(1) of the Constitution.

b) The By-Law is impermissibly vague and over-broad.

c) The By-Law contains a blanket criminalisation of all contraventions of the By-Law and is thus inconsistent with s 12 (the right not to be deprived of freedom without just cause) of the Constitution.

d) The distinctions in the By-Law between first and third party advertising are arbitrary and inconsistent with s 9(1) (the right of equality) of the Constitution.

[13] The main challenge to the unconstitutionality of the By-Law concerns the interpretation to be placed on the term 'public places'. The power of the City to regulate signage is derived from s 156(1)(*a*) of the Constitution in terms whereof a municipality has executive authority in respect of and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. Amongst the matters referred to in Part B of Schedule 5 is

'Billboards and the display of advertisements in public places.'

Bouley's sign is an example of 3rd party advertising which is defined in the By-Law as:-

'...the advertising of goods or services that are not made, procured, sold or delivered from the property on which the sign and/or sign advertising of those goods or services is fixed or placed, and includes advertising which is not locality bound as well as the display of a sign which is made, procured or sold from the property but advertises goods or services which are not made, procured, sold or delivered from that property.'

First party advertising is described in the By-Law as

'locality bound advertising' which means *'any sign displayed on a specific Erf, premises or building.....which sign refers to an activity, product, service or attraction; located, rendered or provided on or from that Erf or those premises.'*

On behalf of Bouley it was submitted that the phrase *'advertisements in public places'* does not include advertisements on private property, since the words *'in public places'* can not be interpreted to mean on private property. Since the vast majority of third party signs are erected on private property which is visible to the general public, acceptance of the submissions on behalf of Bouley would result in the entire By-Law being struck down. In my view the interpretation placed on *'advertisements in public places'* by Bouley's counsel cannot be correct. Both counsel referred me to different reported cases in which the meaning of *'public place'* was considered, but guidance to the problem is to be found in the *Sithonga*[4] judgment in which the following was said in relation to the term *'public place'*:

'It is a fluctuating term and it is neither possible nor desirable to define a public place so as to cover all offences or statutory provisions. The particular meaning to be attributed to the phrase is derived from the context in which it is used. The interpretative context includes the purpose the legislature intended to achieve or the mischief it intended to prevent with the particular legislation under consideration. It also includes the legislative history of the scheme and the Act and the function in the statutory scheme of the particular phrase in dispute...'

It is noteworthy that in addition to listing billboards and the display of advertisements in public places in Part B of Schedule 5 to the Constitution, 'public places' is also listed as a local government matter. 'Public place' is defined in the By-Law as meaning:-

'...any public road, public street, thoroughfare, bridge, subway, footway, foot pavement, footpath, sidewalk, (or similar pedestrian portion of a Road Reserve), lane, square, open space, garden, park or enclosed place vested in the Municipality, or other state authority

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[4] *Sithonga v Minister of Safety and Security and Others* 2008 (1) SACR 376 (TK) at para 15.

or indicated as such on the Surveyor General's records, or utilized by the public or zoned as such in terms of the applicable zoning scheme.'

Since the City already has authority over public places in terms of Part B of Schedule 5, there would clearly be no need for it to be granted a separate authority to regulate advertisements in public places. Consequently, the meaning of the term in relation to advertising must be different from the meaning of 'public place' as generally understood and as defined. There is a further reason why the phrase should not be interpreted in the manner proposed by Bouley's counsel. Since the phrase 'in public places' qualifies the display of advertisements only and does not apply to billboards, the interpretation proposed by Bouley would result in the City having authority to regulate billboards on private property, but not signs on private property. This could clearly not have been intended. A further result of accepting Bouley's interpretation would be that the City would not have the authority to regulate outdoor advertising on property owned by the City, as the definition of 'public places' in the By-Law includes land which is vested in the City or other state authority.

[14] Inasmuch as dictionary definitions may be of assistance, the word 'public' means

'open to general observation, sight or knowledge; existing or done openly'[5],

'exposed to general view'[6] and

'open to the knowledge or view of all'[7].

[15] Lastly, reference may be had to the work of Professor Steytler and others who in the work compiled to assist municipal councils supply a definition of the competency

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[5] *Shorter Oxford Dictionary* 5 ed (2002).
[6] *Free Merriam-Webster Dictionary* www.merriam-webster.com/dictionary.
[7] *Webster's Online Dictionary* www.websters-online-dictionary.org.

bestowed on municipalities in terms of Schedule 5 B of the Constitution in respect of billboards and the display of advertisements in public places, namely

'Display, regulation and control of billboards and the display of advertisements in public places.
Includes signs erected or situated on private property but visible from public spaces.'[8]

[16] In the final analysis, regard must be had to the purpose which the drafters of the Constitution intended to achieve when construing the phrase in question. The City considers the purpose to be the prevention of visual pollution and road safety hazards presented by the distracting effect of such advertising. This view is supported by Dr Jordaan, a transportation engineer, who submitted an affidavit on behalf of Bouley. Both in the *Ad Outpost*[9] and *Roundabout Outdoor*[10] judgments, it was accepted that this is the purpose of the regulation of outdoor advertising. That these objectives would be negated if the City did not have the authority to regulate outdoor advertising displayed on private property in the view of the public is clear. The City's deponent to its founding papers indicates that without adequate supervision by the City, an uncontrolled proliferation of outdoor advertising with residual pollution and potential road safety hazards which would be to the detriment of the local community would arise.

[17] In *Ad Outpost*[11] and *Roundabout Outdoor*[12] it was accepted that the purpose of the regulation of outdoor advertising is to prevent visual pollution and road safety hazards

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8 *Making Law a Guide to Municipal Councils* Prof Nico Steytler, Jaap de Visser, Johann Mettler, a publication of The Community Law Centre, University of the Western Cape.
9 *City of Cape Town v Ad Outpost (Pty) Ltd and Others* 2000 (2) SA 733 (C).
10 *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and Others* 2002 (2) SA 625 (D).
11 *City of Cape Town v Ad Outpost (Pty) Ltd and Others* (*supra*).
12 *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and Others* (*supra*).

presented by the distracting effect of such advertising. These objectives would be negated if the City were to be denied the authority to regulate outdoor advertising on private property in full public view as the uncontrolled proliferation of outdoor advertising would then ensue to the detriment of the local community. Such a result would be absurd and could not have been contemplated by the drafters of the Constitution. I am therefore of the view that the phrase should not be interpreted in the manner proposed by Bouley's counsel, but must mean advertising in places which exist in open view and are visible to the public.

Vagueness and Overbreadth

[18] On behalf of Bouley it was contended that since the By-Law *'comprehensively criminalizes certain forms of constitutionally protected expression'* (original emphasis), a greater level of clarity is required in respect of any limits imposed by the By-Law. It is not entirely clear what is meant by this. To start with, save for two situations[13], the By-Law does not regulate the content of outdoor advertising. In dealing with outdoor advertising it may be useful to have regard to reported Canadian cases dealing with the issue where outdoor advertising has been held to be *'content neutral'*[14] and to regulate only the *'time, place and manner'*[15] of outdoor advertising.

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13 The only limit placed on the City to control the content of a sign is that to be found in s 10(8)(2) which provides that *'no sign or advertisement may be designed or displayed that will display any material or graphic which, whether in form, content or both, may reasonably be expected to cause offence to the public or to an identifiable class of persons'.*

14 *Vancouver (City) v Jaminer* 2001 BCCA 240 (CanLII), relying on *Committee for the Commonwealth of Canada v Canada* 1991 CanLII 119 (SCC).

15 *Peterborough (City) v Ramsden* 1993 CanLII 60 (SCC).

[19] These phrases were approved in the *Roundabout Outdoor* case[16]. In that case the facts were similar to the facts before me in that the municipal authority sought an order directing parties who had been responsible for erecting advertising signage on private property without the prior consent of the municipal authority to remove the sign. One of the grounds on which the application was resisted was the contention that the By-Law constituted a contravention of the right to the freedom of expression. The court explained, as had been done in *Ad Outpost*, that outdoor advertising concerns *'commercial expression'* and that most commercial speech in South Africa is regarded as being of peripheral value.[17] In support of this view, the following extract from Chaskalson et al *Constitutional Law of South Africa* was cited.

'Commercial expression has been defined as speech which proposes a financial transaction. This area of expression relates primarily to commercial advertising of goods or services for profit, but is wide enough to include expression in the context of unlawful competition, including disparagement and economic trade boycotts. Most, but not all, commercial expression is at some remove from the core of freedom of expression and is best located within the protected periphery of the guarantee. In America a reduced level of Constitutional protection is extended to commercial expression. The test for valid statutory regulation of commercial advertising is set out in Central Hudson Gas v Public Services Commission.*'*[18]

After referring to the United States and certain United States authorities, the court concluded *'It is therefore apparent that the value which is to be attached to the form of speech that is restricted plays an important role in the recognition which is afforded to the particular type of speech. And further the value which society places on the particular form of speech is a factor of substantial importance in determining whether the right has been infringed. Furthermore, as it has been shown hereinbefore, commercial speech is*

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16 *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and Others* (*supra*).

17 *City of Cape Town v Ad Outpost (Pty) Ltd and Others* (*supra*).

18 *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and Others* 2002 (2) SA 625 at D-F (*Constitutional Law of South Africa* at 20-50 – 20-51).

considered to be entitled to lesser protection than that accorded to other constitutional guaranteed forms of expression.'[19]

The court also concluded that the By-Law attack did not seek to regulate the nature of the information sought to be imparted, but only the location of the billboards. In coming to its final conclusion that the applicant was entitled to the order sought, the court in fact had regard to the provisions of s 36 of the Constitution for it concluded that the limitation of the respondent's rights in terms of s 16(1)(*b*) of the Constitution (the freedom to receive or impart information or ideas) was reasonable and justifiable in an open and democratic society.

[20] In this division a different view was expressed as to the value to be attached to commercial speech in *Ad Outpost* where the following was said:-

'The tendency to conclude uncritically that commercial expression bears less constitutional recognition than political or artistic speech needs to be evaluated carefully. So much speech is by its very nature directed towards persuading the listener to act in a particular manner that artificially created divisions between the value of different forms of speech requires critical scrutiny. Whatever the role of such speech within a deliberative democracy envisaged by our Constitution, it is clear that advertising falls within the nature of expression and hence stands to be protected in terms of s 16(1) of the Constitution. To the extent that its value may count for less than other forms of expressions, account of this exercise in valuation can only be taken at the limitation enquiry as envisaged in s 36 of the Constitution.'[20]

In my view it is clear that the By-Law does not limit the right to freedom of expression in s 16 of the Constitution, but in any event, should I be wrong in that regard, I am satisfied that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.

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19 At 635B-C.

20 *City of Cape Town v AD Outpost (Pty) Ltd and Others* (*supra*) at p 749D-F.

[21] When considering the attack on the alleged overbreadth of the By-Law, the approach to interpretation when the constitutionality of legislation is challenged in *Hyundai Motor Distributors* applies.

'The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.'[21]

This approach was confirmed by the Constitutional Court in *Bertie van Zyl* wherein it was held that when the constitutionality of legislation is challenged a court must first determine *'whether, through "the application of all legitimate interpretive aids", the impugned legislation is capable of being read in a manner that is constitutionally compliant'*[22]

and wherein the court once more confirmed that a purposive approach to statutory interpretation is required.

As to the test for vagueness, it was explained in *Affordable Medicines* that although the law requires that laws be written in a clear and accessible manner, what is required is reasonable certainty and not perfect lucidity[23] and that where it is contended that the regulation under consideration is vague for uncertainty, a court should first construe the regulation by applying the normal rules of construction by including those required by constitutional adjudication and then establish whether so construed the regulation

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21 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para 22.

22 *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at para 20.

23 *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 108.

indicates with reasonable certainty to those who are bound by it what is required by them.[24]

[22] The key proscription in the By-Law challenged which is said to be vague and overbroad is that in s 1 which provides

'Other than those signs referred to in Section 55 to 62 hereinbelow, no person shall display any advertisement or erect or use any sign or advertising structure for advertising purposes without the Municipality's approval in terms of this By-Law and any other applicable legislation.'

All the terms contained in this section are defined in Part A of the By-Law which contains definitions. The following definitions are relevant:-

' "Sign" means 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.'

' "Advertisement" means any representation of a word, name, letter, figure or object or an abbreviation of a word or name, or any symbol; or any light which is not intended solely for illumination or as a warning against any dangers and "advertising" has a similar meaning.'

' "Advertising structure" means any physical structure built or capable of being used to display a sign.'

On behalf of Bouley it was submitted that the supposed qualifier *'for advertising purposes'* does not limit the scope of the broadly formulated limitation on freedom of expression because in terms of s 1, the term 'advertising' has the same wide definition as the term 'advertisement'. I am not sure what to make of this submission since in my view it seems clear that what is proscribed is either the display of an advertisement (which is defined) or the erection or use of any sign or advertising structure for advertising purposes.

Other contentions on behalf of Bouley are:-

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[24] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 109.

1) That the definition of the sign is circuitous since it is defined to mean inter alia, any object used to display a sign or which is itself a sign. Therefore a sign is defined to mean any object; and

2) That the By-Law contains a criminal proscription of the display of any word, any object or any physical structure capable of being used to display an object.

In respect of these examples, it is also contended that the phrase *'for advertising purposes'* does not limit the scope of the By-Law and that accordingly the proscription is vague and overbroad. It is also submitted that this is aggravated since other sections do not deal consistently with *'advertisements, signs and advertising structures'.* So,

* Section 2(1) refers only to a sign in respect of the information required for applications submitted.

* Section 10 refers to a *'sign'* and an *'advertisement'* in respect of the factors to be considered in assessing applications.

* Section 44 refers to a *'sign'* when dealing with the approval of applications.

* Section 45 refers to both a *'sign'* and an *'advertising structure'* in relation to the withdrawal of an application.

[23] In dealing with the issue of vagueness, it has been held that the doctrine of vagueness does not require absolute certainty of law, but that the law must indicate with reasonable certainty to those who are bound by it and what is required of them so that they may regulate their conduct accordingly.[25] After recording the need for intelligible criminal prohibitions so that both citizens and law enforcement officers can identify with

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[25] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 108.

reasonable certainty what conduct is prohibited, O'Regan J in her minority judgment in *Bertie van Zyl* said the following:

'Of course "(w)hat is required is reasonable certainty and not perfect lucidity". Language is often imprecise and in many cases it will not be possible to draw with complete certainty the boundaries of a legislative prohibition. Setting the test as one of "reasonable certainty" accepts that some imprecision is unavoidable. It recognises that in most criminal provisions there will be a core of certainty about the meaning of a provision, and a limited penumbral sphere of uncertainty. Where the penumbral sphere of uncertainty is limited, it will not fall foul of the constitutional standard. However, where a provision has no certain core meaning at all, or where it has a significant penumbral scope of uncertainty, it will probably be constitutionally impermissible .... The key questions to determine vagueness will be whether the provision provides "fair warning" to citizens of what constitutes unlawful behaviour and whether it impermissibly delegates the power to determine whom should be prosecuted to law enforcement officers with the attendant risks of arbitrary application.'[26]

To start with, I am of the view that the core meaning of the By-Law is clear and that it provides fair warning to all citizens of what will constitute unlawful behaviour, namely that the display of an advertisement or the erection or use of a sign or structure for advertising purposes without the municipality's prior approval is prohibited.

[24] While broad definitions are provided for the terms 'sign', 'advertisement', 'advertising' and 'advertising structure', these definitions are not in my view inappropriate since the City records that it needs to be able to regulate all outdoor advertising, including new forms of advertising which may arise. The fact that there is no reference to outdoor advertising in the definition does not mean that someone wishing to erect a sign or an advertisement will be in any doubt as to the fact that he or she may not do so without the permission of the City. I do not agree with the submission that the definition of a sign is

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[26] *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at para 103.

circuitous. While their may be some overlapping in the definition, the words 'or which is in itself a sign', do not result in the definition being vague in the sense advanced by Bouley. As counsel for the City pointed out, in order to avoid absurdity, all that needs to be done is to apply the normal meaning or the dictionary definition of the word 'sign' when it appears in the body of the By-Law's definition. I am accordingly of the view that on a proper purposive interpretation and in the context of the text as a whole, the By-Law is not impermissibly vague or overbroad.

[25] Bouley contends that the signage By-Law is so vague that it is open to manipulation and allows the City to achieve any result it desires. Its deponent alleges that there are *'many instances of practical difficulties with the application of the By-Law'* and points to nine instances which he contends to evidence uncertainty by the City in the use of its discretionary power regarding the application of the By-Law. In my view it is not necessary to deal with the various instances relied on which Bouley's deponent says he gleaned from information supplied to him by other parties. To start with, the specific matters referred to surface for the first time in Bouley's replying affidavit in the counter-application and do not form part of the counter-application itself. Secondly, all the allegations are denied in a supplementary affidavit filed on behalf of the City on whose behalf it is contended that the alleged difficulties are all of a minor nature and were to be expected with regard to the practical implication of legislative provisions. As to the contention that the administrative decision making is not sufficiently guided, the fact is that the By-Law contains extensive provisions in respect of the factors which are to be taken into account when an application for the approval of signage is considered. Section C of the By-Law which bears the heading 'Charges and General Factors in Considering

Approval and / or Amendments/Conditions to Approval' gives clear guidance as to the factors which the City must have regard to when considering applications and s D details factors relating to specific signs, areas of control and commercial sponsored signs. Section E contains the standard conditions for approval. There is accordingly in my view no merit in this attack.

[26] Bouley's counsel did not pursue the initial objection to the effect that since the By-Law does not indicate which one of the English, Afrikaans or Xhosa texts is to prevail in the case of a conflict between them, a fatal oversight results and also that the isiXhosa version is incomprehensible. As explained in the *Drop-Inn Group* case where one meaning clearly does accurately express the intention of the law giver, that version is plainly the version which must be adopted.[27] Should there be an incomprehensible version in the isiXhosa version, the court will apply the English version of the text.

Deprivation of Freedom without Good Cause

[27] This objection concerns s 68 (1) of the By-Law which provides that any person who contravenes or fails to comply with any provision of the By-Law shall be guilty of an offence and on conviction shall be liable to a fine or imprisonment as set out in the By-Law. The submission on behalf of Bouley is that, properly interpreted, imprisonment may follow a failure to comply with a minor procedural requirement of the By-Law such as a failure to submit the information required for an application in duplicate. A similar provision is to be found in the North West Gambling Act No 2 of 2001. Section 82(1)(i) of that act provides that a person who *'contravenes or fails to comply with any provision of this Act or*

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[27] *Drop-Inn Group of Liquor Supermarkets (Pty) Ltd v Chairman, Liquor Board and Ano* 1986 (4) SA 1042 (C) at 1046C-F.

any provision made under Section 84 .... is guilty of an offence and on conviction .... liable to a fine or to be imprisoned for a period not exceeding ten years or to both a fine and such imprisonment'. In *Magajane v Chairperson, North West Gambling Board and Others*[28] the Constitutional Court recorded with apparent approval the applicant's acknowledgement that the section could be read so as not to create an offence for the failure to answer questions. This judgment was cited by the City's counsel as support for his submission that it is only a contravention of or a failure to comply with those sections of the By-Law which concern the activities prohibited by the By-Law, such as s 1 thereof which constitute an offence. In the heads of argument submitted by the City's counsel, it is recorded that a search of the phrase *'any person who contravenes or fails to comply with any provision of this Act'* in 'South African Statutes' on Jutastat produced 33 positive results in support of his submission that many laws contained a provision similar to that under attack. Since imprisonment can only follow on a trial the submission that the By-Law is invalid because is deprives offenders of freedom without good cause cannot be sustained. This is confirmed by Currie and De Waal. [29]

In my view, the criminal sanctions for contraventions of sections of the By-Law providing for prohibited activities are essential for the enforcement of the By-Law and a legitimate means of enforcement.

Differentiation between First and Third Party Advertising

[28] Bouley's counsel cited a number of examples in the Signage By-Law which differentiate between first and third party advertisements and submitted that since the deferential treatment permeates the entire By-Law, the By-Law should be struck down as

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[28] 2006 (5) SA 251 (CC).

[29] *The Bill of Rights Hand Book* Iain Currie and Johan de Waal 5th ed (2005) p301.

a whole. I do not consider it necessary to deal with the various examples of differential treatment which have been identified, for in my view the City has given a satisfactory explanation as to the need to differentiate between the two forms of advertising. Briefly stated these are:-

* It would be a more extensive limitation of rights to restrict a person from advertising his or her own product, service or business on that person's property than it would be to restrict a person from advertising a third party's product, service or business on his or her property.

* First party advertising fulfils a useful and necessary community information function as source of the advertisement is immediately identified by its location.

* The need to regulate outdoor advertising in Cape Town is important because of its natural beauty and cultural historical significance.

* In the need to curb the total amount of visual 'clutter' more limits are imposed on third party signage as this makes a greater contribution to visual pollution due to the size and scale of the advertising, that it is located in the most visible locations and because of the greater incidence of illumination on such signs.

* Traffic safety concerns justify stricter controls on third party signs.

[29] Other distinctions which have a particular rational and legitimate purpose are said to include:-

* Only third party advertising is subject to a limited period of approval (five years), whereas approval for first party advertising is limited only when the business on a particular property changes. The limitation in the time period allowed for third party

signage enables the City to reassess the continued appropriateness of a sign in the light of a possible change in circumstances.

* Only third party signs are subject to linear spacing requirements from other road signs or from signs larger than a certain area. First party signs are exempted from these requirements so as to allow owners to advertise their businesses wherever their businesses are located.

[30] In *Ad Outpost*[30], this court found that there is a rational distinction between third party and own party advertising. That finding was made pursuant to a challenge based on s 9 (1) of the Constitution (the Equality Clause). That decision is binding on me and it has not been suggested that it is clearly wrong.

Attack on Specific Provisions of the Law

[31] When dealing with these attacks, it is necessary to have regard to important principles which apply to constitutional challenges, namely that a consideration of constitutional issues *in vacuo* is typically entrusted to the legislature and that such issues are best decided in the context of a live controversy.[31]

Bouley contends that ss 75 -79 are inconsistent with PAJA and s 33 of the Constitution. Sections 75 and 76 are quoted in para [4]. Section 77 provides for compensation to be paid to any person for unreasonable loss or damage caused by the removal or alteration of a sign by the City. Any costs incurred by the City in removing signs or in doing alterations or other works required in terms of a notice may be recovered from the person on whom the notice was served in terms of s 78. Section 79 makes provision for the City

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30 *City of Cape Town v Ad Outpost (Pty) Ltd and Others* (*supra*) at 744A-F.

31 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) at paras 221 and 222.

to remove a sign without the need of a court order in circumstances where the sign is reasonably considered to be a danger to life or property.

[32] Bouley's challenge is to the effect that s 75 (which is recorded in full in para 4) makes no provision for a hearing after the notice has been served but before any steps are taken. This was the stance initially adopted by Bouley, but in reply it appears to contend that such a party must be given a hearing before the notice is issued. In my view the notice is not hit by s 33 of the Constitution which affords everyone the right to administrative action that is lawful, reasonable and procedurally fair; nor is PAJA applicable. Administrative action in terms of s 1 of PAJA applies to the exercise of a public power or the performing of a public function in terms of legislation by an organ of state which adversely affects the rights of any person and which has a direct, external legal effect. The notice does not affect the rights of a person who has erected signage unlawfully. It also does not have any direct legal effect. The notice also does not have any direct legal effect for it does not require finality in the determination of rights. De Ville[32] explains that decisions which have an effect on an individual's rights would normally exclude notifications and that *'direct effect'* would require finality in the determination of rights *'which would exclude preliminary steps in multi-staged decisions'.*

It has also been held that the decision to recommend the prosecution of a person or a decision to sue does not prejudicially impact on a person's right.[33]

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[32] J. de Ville *Judicial Review of Administrative Action in South Africa* revised 1st ed (2005) at p 54. See also *Registrar of Banks v Regal Treasury Private Bank Ltd (under curatorship) and Another (Regal Treasury Bank Holdings Ltd intervening)* 2004 (3) SA 560 (W) at 567G-H.

[33] *Park-Ross v Director: Office for Serious Economic Offences* 1998 (1) SA 108 (C) at para 15. *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) at para 14.

[33] The submission by the City's counsel that a person receiving a notice could, if he or she wished, make representations to the City, is not in my view a submission that a right to a hearing after receipt of the notice should be read into the By-Law as Bouley's counsel would have it. The By-Law does not prohibit anyone from making representations and since it provides that a notice may be withdrawn or varied by the City, by agreement with the person served, an interaction with the person served is implied. For the reasons I have given I am of the view that neither PAJA nor the constitutional right to administrative justice affords a party who has received the notice the right to a hearing. As to the institution of criminal proceedings, s 1(b)(ff) of PAJA provides that a decision to institute a prosecution is not administrative action.

[34] Three other sections are challenged on the basis that they are inconsistent with the provisions of the Constitution. These are:-

1) Section 67 which provides that

'The Municipality shall be entitled, through its duly authorized officers, and following prior written notification to the owner or occupant of a property, to enter into and upon any premises, at a reasonable time for the purpose of carrying out any inspection necessary for the proper administration and enforcement of the provisions of this By-Law.

2) Section 74 provides for three presumptions in respect of persons charged with an offence under the By-Law. These are

2.1) A presumption that a person who organised or controlled an event knowingly displayed (or caused or allowed to be displayed) unlawful signs or posters in connection with the event.

2.2) A presumption that a person whose name appears on or whose product or services are advertised on an unlawful sign knowingly displayed (or caused or allowed to be displayed) such sign.

2.3) A presumption that an owner of land or a building upon which an unlawful sign was knowingly displayed (or caused or allowed to be displayed) such sign.

Bouley contends that this section violates the presumption of innocence contained in s 35 (3) (h) of the Constitution.

3) Finally, Bouley contends that the fines provided for in s 71 of the By-Law extend the criminal jurisdiction of the magistrates' court impermissibly and that s 81 of the By-Law which reads:-

'Notwithstanding anything to the contrary contained in any law relating to Magistrates' Courts, a Magistrate shall have jurisdiction, on the application of any Local Authority, to make an Order for the enforcement of any of the provisions of this By-Law or of any approval, refusal or condition granted or applicable in terms thereof.'

is therefore invalid.

[35] None of these challenges is in respect of a live issue before the court and the court is being asked to decide on the constitutionality of the provisions *in vacuo.* I am accordingly of the view that it would not be proper to embark on the further enquiries which Bouley proposes. Insofar as the reference to s 81 of the By-Law is concerned, I should however record that the City has conceded that the phrase *'notwithstanding anything to the contrary contained in any law relating to the Magistrates' Court'* does impermissibly seek to extend the criminal jurisdiction of the magistrates' court.

[36] The requirements for the final interdictory relief which is sought are well-known. They are that the applicant must establish a clear right, that an actual injury has been committed or is reasonably apprehended and that there is no other satisfactory remedy available to it. As indicated, the only submissions for Bouley in this regard related to the availability of an alternative remedy in respect of which I have found for the City. I am also satisfied that the City established the other requirements. The clear right flows from the City's statutory obligations to enforce the By-Law and its right to apply for an interdict for such purpose was recognised in *Huisamen and Others v Port Elizabeth Municipality*.[34] Unlawful conduct is an injury of the right of the City which is charged with enforcing the proscribed conduct.

[37] While my discretion is more limited when deciding whether or not to grant final relief, Bouley's conduct must weigh heavily against it for it chose to erect the sign well knowing that the City's permission for such erection had not been obtained.

[38] I have indicated that in my view the application is to be decided on the situation which pertained when the papers were served on Bouley. On this basis the City would be entitled to an order in terms of prayer 3 of the notice of motion, namely that Bouley be directed to remove the signage. Since the machinery of s 75 of the By-Law has in effect been employed, the City would be entitled in terms of s 76 to remove the sign. I do not think it is of great importance as to who should remove the sign, but it may be more suitable for Bouley to do so. I accordingly propose to merge the two orders which might have been made so as to provide that the City may remove the sign if Bouley does not do so within a stated time.

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[34] (*supra*) at 483I-484B.

[39] The following orders will issue:-

1) The application succeeds and the respondent is directed to remove the unlawful signage erected or affixed to its property at Erf 173335 Paarden Eiland in contravention of the City of Cape Town's Outdoor Advertising and Signage By-Law 2001 within 14 (fourteen) days from the date of this order, failing which the City of Cape Town may effect such removal.

2) The respondent is to pay the applicant's costs.

3) The respondent's counter-application is dismissed with costs.

4) The costs referred to in 2) and 3) above include the costs of two (2) counsel.

R B CLEAVER