

SOUTH AFRICA / JUDGMENT

Bells Trust v Canvas Outdoor Pty (Ltd) and Another (A5065/2022) [2023] ZAGPJHC 630 (5 June 2023)

[2023] ZAGPJHC 630**COURT**

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson, Windell, Mia

CASE / FILE NUMBER

A5065/2022

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

Case**No. A5065/2022****NOT****REPORTABLE****NOT****OF INTEREST TO OTHER JUDGES****NOT****REVISED****In the matter between:**

**THE
BELLS TRUST
Appellant
and
CANVAS
OUTDOOR (PTY) LTD
First
Respondent
CITY
OF JOHANNESBURG METROPOLITAN MUNICIPALITY
Second
Respondent**
**Neutral citation: The
Bells Trust v Canvas Outdoor (Pty) Ltd (A5065/2022) [2023] ZAGPJHC
630 (5 June 2023)**

JUDGMENT

WILSON J (with whom WINDELL J and MIA J agree):

1 On 24 May 2023, we upheld this appeal. We substituted the order of the court below with an order granting the appellant, the Bells Trust, leave to intervene in an application to review and set aside an administrative decision taken by the second respondent, the City. That decision held in abeyance an application lodged by the first respondent, Canvas, for approval to erect a billboard on a property Canvas controls near William Nicol Drive in Sandton. We indicated that we would give our reasons in due course. These are our

reasons.

The billboards

2 The Bells Trust owns Erf 125 Glenadrienne Township, Johannesburg. On 24 February 2017, the Trust applied to the City for permission to erect a billboard on its property. Canvas controls an adjacent property, Erf 127, on which it, too, sought permission to erect a billboard. Canvas applied for permission to erect its billboard in 2016, well before the Bells Trust lodged its application.

3 The City did not process either application with alacrity. It appears at some point to have decided to hold Canvas' application in abeyance. Aggrieved by this, Canvas applied to this court to review and set that decision aside. It also sought an order substituting the decision for one approving the erection of the billboard it wanted to put up. On 6 September 2017, Thobane AJ granted that application.

4 Meanwhile, however, the City processed the Bells Trust's application. That application was finally approved on 5 August 2019. By that time, Canvas had erected its own billboard on Erf 127, on a spot within 100 metres of the site of the Bells Trust's proposed billboard, and, the Trust says, less than 50 metres from the centre of the nearest intersection. Section 6 (2) (a) of the City's Outdoor Advertising Bylaws prohibits the erection of freestanding billboards within 100 metres of each other. Section 6 (3) (c) (iii) prohibits the erection of a freestanding billboard within 50 metres of the centre of an intersection.

5 Having been ordered by this court to approve Canvas' application, it stood to reason that the City could not also approve the Bells Trust's application. To do so was in breach of its own bylaw. On or before 16 January 2020, the City withdrew its approval of the Trust's billboard, principally on the basis that it was bound, by this court's order on Canvas' review application, to approve Canvas' own billboard application over that of the Trust.

6 Still, the City was itself aggrieved by the order directing it to approve Canvas' application. On 21 February 2020, the City instituted an application to rescind the order. The rescission application was advanced on the basis that the court had not in fact been asked to determine the merits of the review application. It had only been asked to determine two points in limine. A hearing on the merits of the application was, by agreement between Canvas and the City, to be postponed sine die.

The intervention application

7 Seeing that the only way to get its own billboard approved was to set aside the court order under which Canvas had obtained permission to erect its sign, the Bells Trust sought leave to intervene in the review application. Such leave would also have allowed it to participate in the rescission proceedings, those proceedings being interlocutory to the review.

8 On 20 July 2021, Noko AJ dismissed the Bells Trust's intervention application, holding that the Trust had no direct and substantial interest in the relief Canvas sought in the review application. Noko AJ approached the case on the basis that it was essentially a dispute between two competing advertisers. He reasoned that, notwithstanding the outcome of the review application, Canvas' billboard application would always be preferred to that of the Bells Trust, because Canvas' application was lodged before the Trust's application. By the equitable maxim *qui prior est tempore potior est* (very roughly "prior in time stronger in law"), Canvas' billboard application had to prevail.

9 Noko AJ also considered the Trust's allegation that Canvas' billboard had been erected in breach of the City's bylaw, because it was within 50 metres of the centre of an intersection, contrary to Section 6 (3) (c) (iii). It is not clear from Noko AJ's judgment whether he found that the breach of section 6 (3) (c) (iii) would not in itself have been sufficient to ground the Trust's interest in the review application, or whether the Trust's contention that section 6 (3) (c) (iii) had been contravened was a "mere allegation" that ought to have been "corroborated" by other facts or evidence (see the judgment of Noko AJ at paragraph 22). Either way, however, Noko AJ concluded that the intervention application had to be refused.

10 Noko AJ refused leave to appeal against his judgment, but the appeal came before us with the leave of the Supreme Court of Appeal.

The Bells Trust should have been given leave to intervene

11 A party is entitled to intervene in a matter in which they have a direct and substantial interest. The intervening party has such an interest if the relief sought in the proceedings cannot be implemented without prejudicing that party's rights (see *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A), p 653A, citing *Bekker v Meyring, Bekker's Executor* 2 Menzies 436). Once the intervening party shows an interest of this nature, they must be joined to the proceedings (*SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC), paragraphs 10 and 11).

12 The relief sought and granted in the review application was the substitution of the City's decision to hold Canvas' application in abeyance with an order approving that application. Although it seems on the record that Canvas' billboard was erected, apparently without the City's consent, before judgment on the review application was given, the relief Thobane AJ granted was carried into effect when it rendered lawful the continued placement of Canvas' sign on Erf 127.

13 This plainly affected the Bells Trust's rights. In the first place, the Trust is a neighbouring property owner. Forgetting for a moment its status as a competing advertiser, if the Trust alleged that the sign constituted an unlawful nuisance, in that it had been put up in breach of the bylaws, the Trust clearly had an interest in proceedings that led to an order directing the City to approve Canvas' application to erect it (see, for example, *River Gate Properties (Pty) Ltd v Asmal NO* [2018] ZAGPJHC 89 (29 March 2018)).

14 The Trust did more than enough in its papers to substantiate its allegation that Canvas' sign was erected in breach of section 6 (3) (c) (iii) of the bylaw. What it needed to do was allege facts that, if proved, would establish its interest in the review application. It does not matter whether those facts are disputed. At the intervention stage, a court is required to assume that the facts alleged in the intervenor's founding papers are true. No "corroboration" is required. If Canvas' billboard does breach the bylaw, then, in addition to its interest as a neighbour, the Trust also has an interest as a competing advertiser, because Canvas' sign will have to come down, clearing the way for the Trust's sign to go up. In other words, the "prior in time stronger in law" principle, even if it is applicable in this legal context, will no longer constitute a bar to the success of the Trust's billboard application under the bylaw.

Mootness

15 It was contended that the appeal is moot, because Canvas' right to erect its billboard under the approval embodied in Thobane AJ's order will expire on 6 September 2023, at which time both the review application and the rescission application will become moot. Even if the Bells Trust is granted leave to intervene, the argument went, it is unlikely that the Trust will be able to do anything meaningful in the review or rescission applications before that date. It was argued that any order we make would therefore have no practical effect or result.

16 We rejected this submission for two reasons. The first is that the argument entails a concession that the appeal is not, in fact, moot, because the event that will allegedly render the dispute between the parties academic has yet to occur. Everything is moot in the long run. The question is whether, at the time the court is asked to render a decision, there exists a live controversy. If there is, the court must decide it. It is not entitled to peer into the future, and to speculate on whether and when the dispute between the parties will cease to matter (see, in this regard, *Lehana's Pass Investment CC v Africa Campus Trading 300 (Pty) Ltd*

[2023] ZAGPJHC 111 (13 February 2023), paragraph 8).

17 Secondly, the practical effect of our order is the mere fact that the Bells Trust is now a party to the review application, and, by extension, to the rescission application. That practical effect does not inhere in what the Trust might in future do with its rights as a newly minted party to the litigation. It is impact enough that the Bells Trust is now a party to a case to which it was not joined before we made our order.

18 For all these reasons, we concluded that the Trust's intervention application should have been granted, and we upheld the appeal on the terms embodied in our order of 24 May 2023.

S D J WILSON

Judge of the High Court

This judgment was prepared by Judges Wilson, Windell and Mia. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 5 June 2023.

HEARD ON: 24 May 2023

DECIDED ON: 24 May 2023

REASONS: 5 June 2023

For the Appellant: M De Oliveira Instructed by KWA Attorneys For the First Respondent: W Krog Instructed by Smit Sewgoolam Inc

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