

SOUTH AFRICA / JUDGMENT

eThekweni Municipality v Brand IQ (Pty) Ltd and Others (D5464/2024) [2024] ZAKZDHC 47 (12 July 2024) [2024] ZAKZDHC 47

COURT

Kwazulu-Natal High Court, Durban

BEFORE

P J Combrinck

CASE / FILE NUMBER

D5464/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

No.: D5464/2024

In

the matter between:

ETHEKWINI
MUNICIPALITY
APPLICANT
and
BRAND
IQ (PTY) LTD
FIRST RESPONDENT
MILDRED
NELISIWE ZANELE KHOZA
SECOND RESPONDENT
BHEKISISA
BETHUEL KHOZA
THIRD RESPONDENT
ORDER

The

following order is granted:

1.
The first and second respondents are directed to forthwith dismantle and remove the advertising structure, together with the mast, located on Erf 3[...], B[...] W[...], Ext 4, eThekwini, Province of KwaZulu-Natal, held under Title Deed No T[...], which has as its street address 8[...] R[...] Avenue, B[...] W[...], Westville, Durban.

2.
In the event that the first and second respondents fail to comply with the order in paragraph 1 above, within 72 hours of the grant of

the order, then the sheriff of the high court is directed to:

(a)
do all things necessary, including, but not limited to, the hiring of riggers and crane operators to dismantle and remove the metal advertising structure and the mast located on the second and third respondents' property; and

(b)
claim the costs of such removal from the first and second respondents, jointly and severally, the one paying the other to be absolved.

3.
The first and second respondents are directed to pay the costs of the application on scale A, jointly and severally, the one paying the other to be absolved.

4.
The respondents' counter-application is dismissed with costs on scale A, such to be paid by the respondents jointly and severally, the one paying the other to be absolved.

JUDGMENT

P J COMBRINCK AJ

[1] In this application, the applicant seeks the dismantling and removal of a metal advertising sign and mast ('the structure'), on account of its unlawful construction, which is located on the immovable property owned by the second and third respondents.

- [2] The eThekweni Municipality: Outdoor Advertising By-law, 2018 ('the By-law'),[1] governs the display of outdoor advertising signs. Section 5(1) of the By-law prohibits such signs unless a permit has been applied for and granted by the applicant. The applicant alleges that the respondents erected the structure without a permit and without prior approval of building plans, and accordingly seeks the dismantling and removal of the structure.
- [3] The application is opposed by the first and second respondents ('the respondents'), who also delivered a counter-application. The third respondent was not involved as he is deceased.
- [4] In the counter-application, the respondents seek to restrain the applicant from further prosecuting the main application, pending the determination of the respondents' permit application to display an outdoor advertising sign on the second and third respondent's property ('the permit application'). The interim interdict is also sought pending 'the final determination of any further application as may be required under the National Building Regulations and Building Standards Act, No. 103 of 1977 ('the Act'), for the applicant's approval of any building plans in respect of the structure.'
- [5] It is common cause that the construction of the structure was in progress on 8 May 2024. It involved the sinking of a large concrete foundation as part of a concrete plinth extending 1 metre in height above the ground, to which a 7 metre high steel column is bolted. The column bears an advertising frame that is 4.5 metres in height and 18 metres in width. According to the affidavit of Mr Swart, put up on behalf of the respondents, the total height of the structure is 12.5 metres.
- [6] The structure is further located approximately 10 metres away from the house occupied by the second respondent, and faces towards the M13 highway. Outdoor advertising had been erected on the framework, which displays advertising for 'Naked Insurance'.
- [7] Contravention notices in terms of section 38(1) of the By-law, requiring the removal of the unauthorised display of the advertising sign, were served on the first and second respondents on 9 May 2024. On the same day, the applicant also delivered a notice in terms of section 21 of the National Building Regulations and Building Standards Act 103 of 1977 ('the Act'), requiring the demolition of the structure.
- [8] In a letter dated 14 May 2024, the applicant's attorneys notified all three respondents, and the first respondent's attorneys of the contravention of section 38(1) of the By-law, and requested copies of the outdoor advertising permit, the approved building permit, and the approved building plan for the structure. The letter warned that proceedings would be commenced for the removal or demolition of the structure should the requests not be complied with.
- [9] When no response was received, the applicant's urgent application followed on 20 May 2024.

- [10] On the same day, and not long after the service of the applicant's urgent application papers, the respondents submitted the permit application online on the applicant's website. This was done in accordance with section 7 of the By-law.
- [11] On 3 June 2024, the date when the application was first set down, an email was addressed by the applicant to the first respondent concerning further documents required in respect of the permit application. These were noted on a pre-acceptance scrutiny checklist which was attached to the email. The checklist drew attention to the need for a separate application for the approval of building plans, in terms of the Act, for billboard structures exceeding 4 metres in overall height.
- [12] Further emails passed between the applicant and the first respondent's representatives but, ultimately, there was no application made for the approval of building plans regarding the structure.
- [13] Curiously, the first respondent, in the respondents' answering affidavit, alleges, with reference to the email correspondence, that it was not required to, nor was it specified that delivery of any plans under the Act was required. This was clearly not the case.
- [14] In the result, and when the application was heard, the respondents' application for a permit was incomplete for want of the respondents providing approved building plans for the structure. Thus, the unlawful construction of the structure without a permit was common cause.
- [15] The applicant's case is a simple one:
- (a) Its powers and functioning are regulated by the Constitution, which affords it the power to make and administer by-laws. Billboards and the display of advertising in public places are further within the exclusive competency of local government;[2]
 - (b) The erection of outdoor advertising is made lawful by the granting of a permit, without which such outdoor advertising will be unlawful;
 - (c) The respondents did not obtain a permit before erecting the structure and belatedly made that application on the day that service of the application took place. Their application remains incomplete and the structure unlawful;
 - (d) The applicant is entitled to a demolition order in terms of section 21 of the Act, and it has both a statutory and a moral duty to approach the court for that order;[3] and
 - (e) The court has no discretion and must order a demolition once illegality is established.[4]
- [16] Mr Stewart's arguments, on behalf of the respondents, against the relief sought by the applicant were, primarily, threefold.

- [17] First, that the billboard forming the subject of the relief sought by the applicant does not fall within the definition of a 'building' in terms of the Act, and is therefore not subject to a demolition order in terms of section 21.
- [18] A related issue is that the applicant's requirement for building plans in relation to the structure, because it is a billboard that exceeds 4 metres in height, is not provided for in the By-law and such a requirement cannot lawfully be imposed by the applicant.
- [19] Second, that on the grounds of selective enforcement adopted by the applicant, it is precluded from obtaining the relief against the respondents.
- [20] Third, that the applicant's application seeking interdictory relief is brought in terms of the common law. The court has a discretion not to grant the interdict, alternatively, a discretion to suspend its operation.
- [21] To some extent, the respondents' first argument lost its force when Mr Stewart submitted from the bar that the respondents had, as required by the applicant, submitted building plans in further support of the permit application. According to him, those building plans had been submitted the day before the hearing of this application. However, there was no documentary proof of such submission before the court.
- [22] A 'building' is defined in section 1 of the Act.[5] When considering the subparagraphs to the definition, it is clear that the definition of a 'building' is intended to have a much wider meaning than its normal meaning.
- [23] The word 'includes', which prefates the definition, serves not to restrict 'building' to its normal meaning. A wide variety of concepts are introduced that fall within the definition. The word 'any' that prefates each of the subparagraphs of the definition further allows for a wide interpretation when applying the definition.[6]
- [24] Thus, that the structure erected by the respondents is not expressly identified in the definition is of no moment.
- [25] Mr Brester, appearing for the applicant, correctly in my view, pointed out that the structure would fall within paragraph (a)(iii) of the definition because the structure has, as its purpose, the provision of advertising services for third parties.
- [26] By virtue of the reference to third party 'outdoor advertising sign' in the definition of a 'billboard',[7] the requirements of the By-law concerning outdoor advertising signs find application in respect of billboards.
- [27] The By-law in section 1 defines an outdoor advertising sign to mean:
- '(a) any screen, fence, wall, structure or other object or device, whether freestanding, attached to any other wall or structure or in the air or the supporting structure, intended to display an advertisement;

- (b) an advertisement; or
- (c) a combination of (a) and (b)',

and "sign" shall have a corresponding meaning'.

[28] As to the structural requirements of an outdoor advertising sign, section 34(1) provides that an engineer 'is responsible for the design, supervision and certification of the display of the sign'. The involvement of an engineer is understandable given the nature of the structure as described in paragraph 5 above.

[29] The By-law further provides in section 34(7) that 'the supporting structure may only be erected once the municipality has granted its approval for the erection of the outdoor advertising sign in terms of the National Building Regulations'.

[30] Such approval must follow because an outdoor advertising sign is considered to be a building to which the Act applies.

[31] In the circumstances, the structure erected by the respondents, which is an outdoor advertising sign, falls within the definition of a 'building' and such structure, therefore, can be the subject of an order in terms of section 21 of the Act.

[32] Section 5(2) of the By-law provides that:

'An outdoor advertising sign may only be displayed or altered in accordance with conditions imposed in terms of the Municipality's

permit, this By-law and any other applicable law.'

[33] The applicant's provision for the approval of plans for the structure because it exceeds 4 metres in overall height, is a condition imposed by the applicant, authorised under section 5(2) of the By-law. It forms part of a number of conditions imposed by the applicant, identified on its pre-acceptance scrutiny checklist.

[34] Why the applicant imposed the particular height restriction is not apparent from the papers. The point was first raised in argument and the applicant has not had the opportunity to address that aspect. It suffices, for purposes of this judgment, to find that the applicant, according to the By-law, could lawfully impose conditions in relation to outdoor advertising signs, including the submission of building plans.

[35] The selective enforcement argument follows from the respondents' identification of a billboard ('the other billboard') located 100 metres north of the second and third respondents' property, which displays a 'We Buy Cars' advertisement near the national highway, and which has apparently been installed since April 2015.

[36] In respect of the other billboard, the respondents, through a notice in terms of Uniform rule 35(12) and (14), sought a copy of the interdict (application or court order) to demolish and remove it, and/or the approved application for it.

- [37] In the absence of the applicant suitably responding to the respondents' notice, the respondents contend that the other billboard is in breach of the By-law and that the applicant has taken no steps to enforce compliance against the owner of the land on which the other billboard has been erected, which then renders the main application a case of impermissible selective enforcement of the By-law, which militates against the granting of the demolition order.
- [38] In support of their argument, the respondents placed reliance on *Quick Drink Co (Pty) Ltd and another v Medicines Control Council and others*,^[8] in which *KoIlapen J* sets out a useful assessment of the law relating to selective enforcement, commencing with section 9(1) and (2) of the Constitution which guarantees equality.^[9] The assessment^[10] includes a reference to *Prinsloo v Van der Linde and another*,^[11] in which the Constitutional Court made it clear that the State is bound to function in a rational manner and that '[i]t should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose'.
- [39] Reference^[12] is also made to *AK Entertainment CC v Minister of Safety and Security and others*,^[13] where the court, in dealing with an inequality challenge with regard to the manner in which gambling laws were enforced, found that:
- '... a transgression of s 8(1) or (2) [of the interim Constitution] will arise only if the organ of state intends to apply the law unequally or if the law is enforced according to a principle which has a discriminatory effect due to some particular characteristic of the discriminatee.'^[14]
- [40] At the outset, there is much to be said for the following finding in *A K Entertainment CC*, albeit it perhaps obiter:
- 'I have grave doubt whether a person who admittedly contravenes a law is entitled to complain of unfair discrimination even if an organ of State selects him for special treatment but ignores all similar offenders. Policy considerations appear to me to dictate that an offender should not be allowed to claim the protection of s 8 where the very fact that he has committed an offence gives rise to the alleged discrimination against him.'^[15]
- [41] The respondents admittedly contravened the By-law and are seeking protection against the consequences of such contravention by relying on a selective enforcement argument. This arguably should not be allowed.
- [42] Adopting the approach taken in *Quick Drink*, it first must be determined if the facts establish that the proceedings concerning the respondents' outdoor advertising sign constitute selective enforcement of the applicant's By-law and, if so, then, secondly, if such selective enforcement provides grounds for the refusal of the relief sought by the applicant.

- [43] The applicant argued that the documents requested by the respondents in relation to the other billboard, were not documents identified in the applicant's founding affidavit, for purposes of rule 35(12) to apply,[16] nor had the respondents filed a proper rule 35(14) notice in respect of such documents. The respondents should have and did not proceed in terms of rule 30 and, accordingly, nothing further is to be made of the respondents' notice and the documents sought in terms thereof.
- [44] I am in agreement with that argument. Rule 35(14) is in any event not automatically applicable to applications, as rule 35(13) requires the court to direct that the provisions are applicable.[17] In respect of rule 35(12), it appears that such application is not necessary, as it is self-standing.[18]
- [45] In the result, there is simply insufficient information available in relation to the other billboard in order to conduct the enquiry necessary for purposes of the respondents' selective enforcement argument. In particular, no grounds exist for a finding that the other billboard is in breach of the By-law, and that the applicant has taken no steps to enforce compliance against the owner of the land on which the other billboard has been erected.
- [46] As to the respondents' third argument, the interdictory relief sought by the applicant is not relief sought in terms of the common law. The deponent to the founding affidavit makes reference to provisions of the Act, including section 21 thereof. The affidavit further makes specific reference to the statutory right to seek the demolition of any structure built without the prior approval by the applicant of the building plans associated with the structure. The third argument accordingly has no merit and must fail.
- [47] The respondents' counter-application now needs to be considered.
- [48] In seeking to meet the requirements for an interim interdict for purposes of the relief sought in their counter-application, the respondents rely on their right to seek permission under the By-law for the structure, so as to expunge any non-compliance with the By-law.
- [49] The right to seek permission follows from the provisions of section 5(1) of the By-law which, inter alia, prohibits the display of an outdoor advertising sign without a permit issued by the applicant. The permit legalises the construction of the outdoor advertising sign.
- [50] This is not the right relied upon by the respondents. The respondents have unlawfully constructed the structure and now seek to legalise it through the ex post facto application for permission for such construction.
- [51] To recognise such a right and to grant the respondents the interim interdict would involve ignoring the provisions of section 21 of the Act and ignoring that a court, according to *Lester v Ndlambe Municipality and another*,^[19] has no latitude not to order the demolition of the structure once the jurisdictional fact, namely that the structure was erected contrary to the Act, is established. This I cannot allow to happen.

[52] Although the Supreme Court of Appeal in *BSB International Link CC v Readam South Africa (Pty) Ltd and another*,^[20] placed in doubt the correctness of the findings made in *Lester* concerning the court's discretion when applying section 21, no firm

finding was made in that regard. In *Serengeti Rise Industries (Pty) Ltd and another v Aboobaker NO and others*^[21] it is stated that *Lester* is to be read in light of what was held in *BSB*, but, as I have indicated, *BSB* made no firm finding on the correctness of *Lester* in respect of the court's discretion when it applies section 21.

[53] Consequently, I remain bound by *Lester*.

[54] A further difficulty that the respondents, in any event, face, is that they do not have a proper application for a permit before the applicant. Their current application is incomplete for want of approved building plans for the structure.

[55] The merits of their application for a permit can therefore not be considered or adjudicated in determining the respondents' right to an interim interdict.

[56] For these reasons, the respondents' counter-application must fail and is dismissed with costs determined on scale A.

[57] In circumstances where I have no discretion, the grant of the relief sought by the applicant must follow.

[58] In the result, I make the following order:

12 July 2024

APPEARANCE DETAILS

Date of Hearing 21 June 2024 Date of Judgment 12 July 2024 Counsel for Applicant: Adv. JP Brester
Instructed by: Dwarika, Naidoo & Company Counsel for Respondents: Adv. ME Stewart Instructed
by: Kern, Armstrong & Associates

[1] eThekweni Municipality: Outdoor Advertising By-law, 2018, MN 88 of 2019, PG 2097, 4 July 2019.

[2] Section 156(1) and (2), and Part B of Schedule 5, read with section 155(6)(a) and (7) of the Constitution.

[3] *Lester v Ndlambe Municipality and another*

(2013) ZASCA 95; 2015 (6) SA 283 (SCA) para 27.

[4] *Ibid* para 20.

[5] The definition is as follows: "Building" includes- (a) any other structure, whether of a temporary or permanent nature and irrespective of the materials used in the erection thereof, erected or used for or in connection with- (i) the accommodation or convenience of human beings or animals; (ii) the manufacture, processing, storage, display or sale of any

goods; (iii) the rendering of any service; (iv) the destruction or treatment of refuse or other waste material; (v) the cultivation or growing of any plant or crop; (b) any wall, swimming bath, swimming pool, reservoir or bridge or any other structure connected therewith; (c) any fuel pump or any tank used in connection therewith; (d) any part of a building, including a building as defined in paragraph (a), (b) or (c); (e) any facilities or system, or part or portion thereof, within or outside but incidental to a building, for the provision of a water supply, drainage, sewerage, storm-water disposal, electricity supply or other similar service in respect of the building;'

[5] The definition is as follows: "Building" includes-

(a) any other structure, whether of a temporary or permanent nature and irrespective of the materials used in the erection thereof, erected or used for or in connection with-

(i) the accommodation or convenience of human beings or animals;

(ii) the manufacture, processing, storage, display or sale of any goods;

(iii) the rendering of any service;

(iv) the destruction or treatment of refuse or other waste material;

(v) the cultivation or growing of any plant or crop;

(b) any wall, swimming bath, swimming pool, reservoir or bridge or any other structure connected therewith;

(c) any fuel pump or any tank used in connection therewith;

(d) any part of a building, including a building as defined in paragraph (a), (b) or (c);

(e) any facilities or system, or part or portion thereof, within or outside but incidental to a building, for the provision of a water supply, drainage, sewerage, storm-water disposal, electricity supply or other similar service in respect of the building;'

[6] As to the normal meaning of 'building' see *Masonite (Africa) Ltd v Estcourt Municipality* 1955 (3) SA 88 (N).

[7] Section 1 of the By-law define billboard as follows: "Billboard" means any screen, board, hoarding, fence, wall or free-standing structure used or intended to be used for the purpose of displaying any third party outdoor advertising sign and which does not exceed 81m2 in area; and includes electronic and digital billboards.'

[8] *Quick Drink Co (Pty) Ltd and another v Medicines Control Council and others* 2015 (5) SA 358 (GP) ('Quick Drink').

[9] *Ibid* paras 20-26.

[10] *Ibid* para 21.

- [11] Prinsloo v Van der Linde and another
[1997] ZACC 5; 1997 (3) SA 1012 (CC) para 25.
- [12] Quick Drink para 26.
- [13] A K Entertainment CC v Minister of Safety and Security and others 1995
(1) SA 783 (E) ('A K Entertainment CC').
- [14] Ibid at 789I-J.
- [15] Ibid at 789E-G.
- [16] It was held in Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited
[2022] ZASCA 24; [2022] 2 All SA 299 (SCA) para 16 that'... to invoke the rule, the pleadings or affidavits of the other party must make reference to the document or tape recording concerned'.
- [17] FirstRand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd and others 2013 (5) SA 238 (GSJ) para 22.
- [18] Minister of Public Works and others v NMPS Construction CC and others 2023 (6) SA 314 (ECB) para 37.
- [19] Lester v Ndlambe Municipality and another
[2013] ZASCA 95; 2015 (6) SA 283 (SCA) ('Lester').
- [20] BSB International Link CC v Readam South Africa (Pty) Ltd and another
[2016] ZASCA 58; 2016 (4) SA 83 (SCA) paras 28-29 ('BSB').
- [21] Serengeti Rise Industries (Pty) Ltd and another v Aboobaker NO and others
[2017] ZASCA 79; 2017 (6) SA 581 (SCA) para 18.

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