

SOUTH AFRICA / JUDGMENT

Ethekwini Municipality v Swish Property Eight (Pty) Ltd (1071/2012) [2013] ZAKZDHC 15 (29 April 2013) [2013] ZAKZDHC 15

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Vahed

CASE / FILE NUMBER
1071/2012

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IN

THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC

OF SOUTH AFRICA

Case

No: 1071/2012

In

the matter between:

eTHEKWINI
MUNICIPALITY Applicant
and
SWISH
PROPERTY EIGHT (PTY) LTD First
Respondent
WIDEOPEN
PLATFORM (PTY) LTD Second
Respondent

JUDGMENT

Delivered on 29 April 2013

Vahed J:

[1] The applicant municipality seeks an Order directing the respondents to remove certain advertising signage and related structures erected on immovable property situate at 37 Bram Fischer (Ordinance) Road, Durban. The immovable property is owned by the first respondent and the signage and related structures were erected, and are owned, by the second respondent. Additional interdictory relief is also sought with regard to the erection of advertising signage and supporting structures in the future in the absence of the applicant's permission first being sought and obtained. The respondents oppose the relief sought.

[2] The applicant's advertising bylaws provide for advertising signage to be erected in any public place within the city's

precincts only upon written permission being granted therefor and only after written application had been made for such permission upon payment of prescribed fees. These provisions are contained in, inter alia, sections 2 and 4 of the applicant's advertising bylaws.

[3] It is common cause, alternatively not in dispute, that:

- a. the advertising signage and related structures concerned were erected without the authority of the applicant;
- b. the applicant has the requisite constitutional capacity and authority to make the relevant bylaws;
- c. the relevant bylaws and the applicant's advertising signage policy are applicable to the matters at hand;
- d. the respondents derive financial benefits from the erection and display of the advertising signage erected on the immovable property.

[4] Although the respondents initially raised a number of defences, all but one were abandoned or not persisted in at the hearing of the opposed application. The only defence argued related to the respondents' right to freedom of expression (ie. free

commercial speech) and the manner in which this was curtailed or impacted upon by the applicant's bylaws.

[5] A number of cases relating to outdoor advertising have come before the Courts. In them varied challenges to a local authority's

right to regulate advertising signage have been launched. It now seems clear that advertising is regarded as commercial speech and that it is worthy of constitutional protection but in addition local authorities are free to regulate outdoor advertising. See *City of Cape Town v Ad Outpost (Pty) Ltd & Ors* 2000 (2) SA 733 (CPD), *North Central & South Central Local Council v Roundabout Outdoor (Pty) Ltd & Ors* 2002

[2] SA 625 (DCLD), *City of Cape Town v Bouley Properties (Pty) Ltd* [2010] ZAWCHC 650 (21 December 2010) and *Independent Outdoor Media (Pty) Ltd & Ors v City of Cape Town*

[2012] ZASCA 46 (28 March 2013).

[6] The respondents claim that their right to commercial expression has been limited by the bylaws in that in order to seek permission for the erection of the relevant signage the payment of certain fees is expected of them. They contend that their rights are limited to the extent that the payment of the fee is required of them. Thus they contend that the bylaws, in that regard, constitute an unwarranted limitation of their right and are accordingly unconstitutional.

[7] In dealing with this aspect in its answering affidavit it appears plain that the respondents' complaint is not concerned so much with the levying of fees per se, but with the quantum of the fees charged by the applicant for the size and class of the signage concerned. This they do in broad terms, employing a number of adjectives like exorbitant and excessive but no attempt is made to explain those concepts against the backdrop of the revenue generated by the signage. Indeed, the revenue earned by the respondents is not disclosed at all. In this regard the reliance by the respondents on *Dawood & Ano v Min of Home Affairs & Ors*; *Shalabi & Ano v Min of Home Affairs & Ors*; *Thomas & Ano v Min of Home Affairs & Ors*

[2000] ZACC 8; 2000 (3) SA 936 (CC) is misplaced. There the Constitutional Court visited with invalidity the application fees imposed on foreign spouses for residence permits because the quantum thereof, when compared with the applicants' means, was found to be prohibitive.

[8] In the present case the bylaws themselves prescribe no particular fee. The fees themselves are determined elsewhere by regulation.

[9] The respondents have urged me to find that the applicant needs to justify its tariffs as being a justifiable limitation to the exercise of the respondents' rights in terms of section 36 of the Constitution and to find that it has failed to discharge the onus imposed upon it in that regard. For that proposition they rely on *NDPP v Phillips & Ors* 2002 (4) SA 60 (WLD).

[10] It seems to me that if the respondents' real complaint is one of affordability they have to make out a genuine case in that regard. The only way, in my view, that that can be achieved is by way of a review of a decision refusing to consider an application for permission linked directly to the question of affordability of the applicable tariffs. That is not the case that is before me.

[11] That approach renders it unnecessary to decide whether the imposition of a tariff per se requires justification.

[12] Thus I am of the view that the applicant is entitled to the relief sought.

[13] I grant the following Order:

- a. The first and second respondents are directed to forthwith remove all outdoor advertising signs and supporting structures erected and installed at the property located at 37 Braam Fischer (Ordinance) Road, Durban, KwaZulu-Natal ("the property").
- b. In the event of the respondents failing to comply with paragraph (a) above within twenty one (21) days hereof, the Sheriff of this Court is authorised and directed to take such steps as may be necessary, including utilising the services of the applicant or of its agents, to give effect thereto.
- c. The respondents are interdicted and restrained forthwith from erecting or permitting or causing the erection and installation of any advertising signs and supporting structures on the property without the applicant's permission therefor first being sought and obtained.
- d. The respondents are directed to pay the costs of this application, such costs to include:
 - i. those incurred consequent upon the execution of the Order foreshadowed in paragraph (b) above;
 - ii. those costs incurred consequent upon the employment by the applicant of two counsel; and are to borne by the respondents jointly and severally, the one paying, the other to be absolved.

Vahed J

CASE INFORMATION

Date of Hearing: 18 February 2013

Date of Judgment: 29 April 2013

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