

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

Case No.: 2037/2010
Date heard: 9 December 2010
Date delivered: 21 December 2010

In the matter between:

**TRACTOR OUTDOOR EASTERN CAPE (PTY)
LIMITED**

Applicant

and

**THE NELSON MANDELA BAY METROPOLITAN
MUNICIPALITY**

First Respondent

**CONTINENTAL OUTDOOR MEDIA (PTY)
LIMITED**

Second Respondent

**ADRAP ADVERTISING TECHNOLOGIES (PTY)
LIMITED**

Third Respondent

POLE-ADD PORT ELIZABETH (PTY) LIMITED

Fourth Respondent

SABELANI PROMOTIONS & MARKETING CC

Fifth Respondent

CENTURY MEDIA (PTY) LIMITED

Sixth Respondent

FUNITHUBA INVESTMENTS CC

Seventh Respondent

JUDGMENT

DAMBUZA, J:

1]In this application the applicant seeks an order that the sixth respondent be interdicted and prohibited from erecting signage which is not compliant with the provisions of the Outdoor Signs Bylaws and/or section 4 of the National Building Regulations and Building Standards Act, Act 103 of 1977 as amended (the Act). It also seeks an order that the sixth respondent be ordered to remove any signage which is not compliant with the

aforementioned Bylaws and/or Act, in particular, gantries and billboards erected on Allister Miller Road, William Moffet Expressway, Buffelsfontein Road and Uitenhage Road, Port Elizabeth. The order sought by the applicant has somewhat evolved from the original order sought when the application was launched.

2]The applicant is a company conducting business in the outdoor advertising sector (outdoor media), which involves leasing sites from property owners for the purposes of marketing them to advertisers and contracting with the advertisers for display of advertisements thereon. It then procures approval from the first respondent (the Municipality) for display of the advertisements. The second to seventh respondents conduct similar businesses.

3]On 16 July 2010 the applicant launched the application as a matter of urgency, seeking an order against the first to the seventh respondent that:

1. As against the first respondent, that it be interdicted and prohibited from allowing advertising signage, which does not comply with the Bylaws, to be erected on immovable property belonging to the it (the first respondent) and that it be directed to immediately cause to be removed from its properties any advertising signage which does not comply with the Bylaws;
2. As against the second to seventh respondents, that they be interdicted and prevented from erecting any signage which does not comply with the Bylaws and that they be ordered to remove any

advertising signage on the properties of the first respondent which does not comply with the Bylaws.

4]The application was precipitated by the first respondent allowing advertisements on its properties, which do not conform to the relevant advertising Bylaws. The advertising structures in question were erected pursuant to a tender awarded by the first respondent on 27 May 2010. In terms of the tender, the first respondent rented out sites, to the second to seventh respondents to source businesses to advertise their products on billboards erected on the sites owned by the first respondent. It is common cause that the applicant did not participate in the tender and was not awarded a contract thereunder. In the founding affidavit **Bruce Jeffries** stated, on behalf of the applicant, that the applicant intended to challenge the tender process by seeking a review thereof.

5]In the founding papers the applicant's case is that pursuant to the award of the tender, the beneficiaries erected advertising structures, being gantries and billboards which do not conform to the relevant Bylaws in various ways, including being erected without having sought and obtained the required consent to display the advertisement. The following, are examples of specific details of contravention of the Bylaws:¹

5.1 **Gantry Buffelsfontein Road**

¹ Outdoor Signs (Advertising and Other) Bylaws as published in the Provincial Gazette 2351 of 14 May 2010.

Contrary to Schedule 2 (section 7(b)) of the By-Law:

- (a) no specific consent was obtained for displaying the advertisement;
- (b) it is 75m from the intersection of that road with Titian Road (contrary to the provision that no sign may be erected within a radius of 300metres from the centre of an intersection on an arterial road).

5.2 **Gantry on Allistair Miller Road**

Contrary to Schedule 2 (section 7(b)) of the By-Law:

- a) the gantry is erected in an area of Maximum Urban Control;
- b) was erected without specific consent having been obtained (to display advertisements);
- c) it exceeds the maximum size allowed;
- d) is situated within 2,5km radius of another illegal gantry;
- e) is erected within 300m from the intersection of Allistair Miller Road and De Havilland Street.

5.3 **Gantry on William Moffett Expressway**

Contravenes schedule 2 (section 7(b)) in that:

- (a) it is erected in an area of maximum urban control;
- (b) no specific consent was obtained for display of signage.

5.4 **Gantry on Uitenhage Road**

Contrary to schedule 2 (section 7(b)) of the By-Law:

- a) the gantry is erected within an area of partial control;
- b) no specific consent was obtained for display of signage.

5.5 **Billboard on Beach Road**

Contrary to schedule 4 (section 7(d)) of the By-Law:

- a) is built within an area of maximum urban control;
- b) no specific consent to display signage was given and no SEA (strategic environmental assessment) was conducted; and
- a) is built within the urban road reserve.

5.6 **Billboard on Cape Road**

Contravenes schedule 4 (section 7(d)) in that no specific consent to display signage was obtained and no SEA was conducted:

- a) the billboard falls within the urban road reserve; and
- b) it was built within 100m of the intersection of Cape Road and Greyville Road.

5.7 **Billboard on 17th Avenue**

Contravenes schedule 4 (section 7(d)) of Law in that:

- a) it is built within an area of Maximum Urban Control;
- b) no specific consent to display signage was obtained and no SEA was conducted prior to erection;
- c) is located within 50m of intersection of 17th Avenue and Glencondor Crescent.

6]On 22 July 2010 the application was postponed to 19 August 2010 by an

order of court, granted with the consent of the applicant, the first respondent and the sixth respondent. The order also records an undertaking by the first respondent not to permit, in the meantime, erection of any advertising signage in contravention of the Bylaws on its property. The sixth respondent also gave an undertaking that, pending the determination of the application, it would not erect any advertising signage which was not compliant with the Bylaws, but would be entitled to secure *"for safety purposes, advertising signage already partially erected or constructed"*. The other respondents, it appears, never opposed the application.

7]On 5 August 2010, the applicant served another application (the second application) on the first and sixth respondent, seeking removal, by the sixth respondent, of non-complaint outdoor advertising signage. The second application was based on the persistence of the sixth respondent in erecting non-compliant signage subsequent to the order of 22 July 2010.

8]On 10 August 2010, being the date on which the second application was set down for hearing, it was also postponed to 19 August 2010. The sixth respondent, in opposing the second application, maintained that it had not intended to consent to the order of 22 July 2010, and that the agreement between the parties, in any event, had been that it could complete work and advertisements on five billboards/gantries that had already been in the course of construction.

9]The sixth respondent also brought a counter-application, seeking, amongst

others, consolidation of the first two applications and for an order that the applicant furnish security of R500,000.00 as security for the sixth respondent's costs, on the basis that the first two applications constitute abuse of court process and a *mala fide* intent on the part of the applicant, to eliminate competition.

10]On 19 August 2010 the application (including the counter-application) was postponed to 28 October 2010 and the applicant was ordered to furnish such security as would be determined by the Registrar. Orders were also made regarding filing of further affidavits. The second application was postponed *sine die*.

11]Prior to the 28 October 2010 the applicant filed a notice of its intention to amend its notice of motion by adding a further statutory prescript which the conduct of the sixth respondent falls foul off, ie section 4 of the National Building Regulations and Standards Act. The amendment had been preceded by a notice issued by the first respondent to the sixth respondent to remove the offending structures as they had been erected in contravention of section 4 of the Act. As a result of the step taken by the first respondent the order originally sought against it became unnecessary.

12]The notice to remove the structures was served on the sixth respondent following one of the gantries having become unstable and leaning over pursuant to strong winds. This resulted in traffic passing through the structure having to be redirected. The sixth respondent, however, never removed the

structures; instead, it submitted plans in respect thereof to the first respondent. The plans were assessed on 27 August 2010 and were rejected for a number of reasons. The structures, however, remained on the road until the hearing of the application.

13]On 28 October 2010 the application was postponed to 9 December 2010 being the date on which I heard it. When the application came before me the applicant sought a further amendment to the Notice of Motion being the deletion therefrom, of reference to the Eastern Cape Act, Act 3 of 2003 on which, at that stage, the applicant also relied in the application. Consequently, when the application served before me, the applicant's case was essentially one of contravention, by the sixth respondent, of the Bylaws and section 4 of the Act. The issues before me on 9 December 2010 in the application were:

Joinder

14]This was one of the orders sought by the sixth respondent in the counter-application. The sixth respondent sought to join, as respondents in its counter-application, the first respondent and some of its functionaries, together with the Premier of the Eastern Cape. The ultimate intention was to seek an order that the decisions by functionaries of the first respondent, rejecting building plans relating to the gantries, and issuing the notice that the gantries be removed, be set aside. I then heard the application for joinder and dismissed it with costs, prior to hearing the main application. My view was and remains that no proper case had been made for the joinder sought.

15]In the counter-application the sixth respondent explained that the joinder was precipitated by the applicant's (third) application in which was sought an amendment to the notice of motion as set out in paragraph 11 above. The sixth respondent contended that the effect of the amendment was that the applicant was now relying on the decision of the functionaries of the first respondent who had ordered removal of the structures and rejected the sixth respondent's building plans. The sixth respondent intended to bring an application, challenging the constitutionality of the Eastern Cape Legislation Act 3 of 2003. It contended that regulation, by Act 3 of 2003, of erection of structures near the roads could not be enforced as no Regulations had been issued in terms thereof and as required under that Act. Further, so it was argued, the relevant provisions sought to be enforced are unconstitutional for inconsistency with protection of freedom of speech under the Constitution Act 106 of 1996 (the Constitution).

16]My view was that this procedural step by the sixth respondent was misguided and had no proper basis. The application, as I have explained, is founded on contravention of the Bylaws and the Act as is apparent from the Notice of Motion. The relevant inquiry is whether the structures built by the sixth respondent comply with the relevant provisions in the Bylaws and the Act. I could not find that any interests of either the first respondent or the Premier that might be affected prejudicially by an order that I would grant in this application. It is common cause that no building plans were approved prior to the erection of the structures. Any Constitutional challenge to either the Bylaws or Act 3 of 2003 would be unrelated to the non-compliance with

the provisions of Act 103 of 1977.

17]Further, as *Mr Beyleveld* submitted on behalf of the applicant, the rejection of the building plans was irrelevant for the purposes of this application because the plans were submitted to the first respondent for approval subsequent to the transgression(s) complained of having been committed. The factual basis of the applicant's complaint had largely remained the same throughout the application. For example, In the original founding papers to the application **Bruce Jeffries** refers to a letter from its attorneys on 8 July 2010 (prior to the launch of the application) to the first respondent's attorney stating that: *"The signs are being erected without the requisite approvals and in contravention of a number of the sections covered under the signage By-Law. They are also being erected with no co-ordination or consultation with affected departments within the NMBM. A number of them constitute an immediate public safety risk regarding traffic safety"*. Any appeal that the sixth respondent intended to lodge against the notice that it removes the structures or against the rejection of its building plans will, in my view, not be sufficiently related to this application to warrant the joinder sought. It is for these reasons that I dismissed the application for joinder.

Locus standi

18]In the counter-application the sixth respondent challenges the applicant's *locus standi* and seeks that the applicant be ordered to furnish documents relating to its legal standing to bring the first two applications. The sixth respondent also seeks an order that the first two applications be stayed,

pending institution of proceedings by the applicant for review of the tender award. It is my view that this contention is based on the incorrect perception that the first two applications are founded on the intended review of the tender by the applicant. This is a persistent misunderstanding by the sixth applicant of the basis of this application. The record reveals that, at the hearing of the application by the sixth respondent for postponement of the application on 28 October 2010, Schoeman J attempted, repeatedly, to explain that this application is not founded on an intended review of the tender. But that remained the sixth respondent's view of the matter even before me. The fact that an intention to challenge the tender was expressed in the founding affidavit does not necessarily mean that the application is founded on the intended review. The order sought, for stay of the application, has, in my view, no foundation. From the contents of founding affidavit I can only conclude that the allegations therein result from a personal observation inspection of the offending structures. Photographs of the offending which form part of the founding papers. I can not find that the applications are based on hearsay as the sixth respondent contends.

19]In the founding affidavit **Jeffries** sets out the applicant's *locus standi* as founded on its interest as a member of the advertising industry, acting in the interests of all members and class of persons within the advertising industry in Port Elizabeth. I am satisfied that these allegations sufficiently establish the *locus standi* of the applicant. In any event, any ordinary user of the roads on which the gantries are built, who fears harm resulting from the erection thereof would, in my view, be entitled to bring proceedings in the relevant court of law

to have the billboards removed.

Urgency

20]The sixth respondent contends that the first two applications were not urgent and fall to be dismissed on this ground alone. I disagree. If the structures are illegal in that they were erected without the requisite consent and approval of plans, and if they pose physical danger to road users, the illegality and potential danger to road users require urgent determination. It is common cause that part of the assessment that would be done on the building plans would be determination of the structural soundness thereof. As the structures were erected without this assessment having been done there is nothing to gainsay the applicant's contention that the structures pose an immediate and significant danger to public safety.

Merits

21]The sixth respondent pleads that the order sought in the application is impermissible in the absence of the application for review of the tender. I have sufficiently expressed my views in this regard.

22]I have also expressed my views on the contention that the application is founded upon inadmissible hearsay, opinion and irrelevant matter; it is therefore unfounded.

23]As to the second application, the sixth respondent raises the issue of interpretation of the order of 22 July 2010. In my view the order is clear and

there is no provision therein for completion of works already started as contended by the sixth respondent. The sixth respondent draws a distinction between itself, as the company that erected the structures, and the “fighting company” that flighted the advertising banners thereon on instructions of the advertiser. The suggestion seems to be that the sixth respondent is not responsible for the banners and for the flighting thereof subsequent to the order of 22 July 2010. But, the sixth respondent is the one to whom the site(s) are contracted. In any event, this argument is not consistent with the contention by the sixth respondent that it understood the order of 22 July to entitle it to complete work on the structures.

24]Further, as submitted on behalf of the applicant, the distinction sought to be drawn by the sixth respondent between an advertisement and the structure on which it is mounted cannot be sustained. In terms of the Bylaws an advertisement includes *the structure on which the advertisement, i.e. the representation of words, figure, sign etc, is displayed* and *an advertising sign, an advertisement, object, structure or device which is in itself an advertisement or which is used to display an advertisement, in view of any street or public place; consent for the display of a sign includes consent for the purposes of the display, whether by the erection of structures or otherwise*. The sixth respondent is the contracting party with the first respondent in respect of use of the site and the structures for advertising.

25]A further ground on which the sixth respondent resists the application is that it obtained authorisation from the first respondent to build the structures.

A background thereto is set out that the tender issued by the first respondent was in compliance with the first respondent's obligations as a host city during the FIFA world cup. Because of delays, the tender was only finalised in May 2010, and immediately upon the awarding of the contracts, the sixth respondent was placed under pressure by the first respondent to discharge its obligations under the tender. In particular, it was instructed to proceed and erect the billboards/gantries. Having taken considerable trouble in preparing the structures, the sixth respondent explains, it then sought and obtained, on 21 June 2010, the necessary approval before commencing with installation of the structures. In this regard it obtained a letter from Mr Rodney Williams, the Director of Communications with the first respondent in which is stated that:

"This letter serves to authorise Century Media to put in foundations and erect billboard structures, as per Billboard tender awarded (Bid Adjudication Committee dated, 27 May 2010 and receipt of appointment Letter dated 29 May 2010. This letter constitutes full authorisation to proceed with building and erection".

26]The letter, however does not constitute compliance with relevant provisions of the Bylaws and/or the Act. No explanation is offered as to why a proper approval of plans in terms of the applicable laws, was not sought. Apart from the reference to the letter by Mr Williams, it is not the sixth respondent's case, as I understand it, that the gantries and billboards in fact comply with the relevant laws. Much is said, by the sixth respondent, of its intention to institute proceedings for the striking down of section 24 of the Eastern Cape Roads Act and the Bylaws as unconstitutional. But it remains common cause that the structures were built without approved plans. Neither

Mr Williams nor the first respondent, as a creature of statute has authority to authorise procedure which falls outside relevant Ordinances or legislation.

27] *Mr Venter's* submission, on behalf of the sixth respondent that because the National Building Regulations and Building Standards Act does not expressly preclude approval of building plans subsequent to the erection of the building and that such approval can be granted subsequent to the building having been erected is inconsistent with the provisions of the Act. Section 4(1) of the Act provides that:

“No person shall, without the prior approval, in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act”.

The wording is clear. It is a prohibition of construction of a building without approved building plans. It could never have been the intention of the Legislature, in my view, to allow buildings to be erected and to only seek approval of the building plans subsequent thereto. Such a situation would defeat the very foundation and purpose of the Act and would result in lawlessness and chaos. Even *Mr Venter* could not cite any precedent for his submission.

28] *Mr Venter* then submitted that the remedy sought by the applicant, being removal of the structures, is not the only remedy or is not provided for in the Act. In this case I cannot find that there is more appropriate remedy than the one sought by the applicant.

29]In submitting that I should not grant the demolition order sought *Mr Venter* referred me to various cases. I have considered them for guidance.² But in the exercise of my discretion in this regard I consider it relevant and persuasive that the structures are used for advertising purposes rather than for residential purposes. The potential harm to road users is, in my view, a further important consideration. The balance of convenience between setting allowing the illegal structures to remain on the road, is in my view, outweighed by the cumulative weight of the first two factors.

30]The following order shall therefore issue :

1. The sixth respondent is interdicted and prohibited from erecting signage which is not compliant with the provisions of the Outdoor Signs (Advertising and Other) Bylaws as published in the Provincial Gazette 2351 of 14 May 2010 and which is not compliant with section 4 of the National Building Regulations and Building Standards Act , 103 of 1977, as amended;
2. The sixth respondent is ordered to immediately remove any advertising signage and in particular, gantries erected on Allister Miller Road, William Moffett Expressway, Buffelsfontein Road and Uitenhage Road which are not compliant with the provisions of the aforesaid Bylaws and non compliant with the provisions of Act 103

² **Paola v Jeeva NO and Others** [2003] All SA 433 (SCA); **Walele v City of Cape Town and Others** 2008 (6) SA 129 (CC); **Rosebank Mall (Pty) Ltd & Another v Cradock Heights (Pty) Ltd** [2003] All SA 471 (W).

of 1977 as amended; and

3. The sixth respondent is ordered to pay the applicant's costs of this application.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the applicant:	Adv A. Beyleveld SC instructed by Cecil Kerbel Attorneys of Port Elizabeth
For 1 st respondent:	Adv R.G. Buchanan SC and Adv M. Booie instructed by McWilliam's & Elliot of Port Elizabeth
For 6 th respondent:	Adv P.J. Venter SC instructed by Burman Katz Attorneys of Port Elizabeth