

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 1456/2012

In the matter between:

MARIBO MEDIA (PTY) LTD

Applicant

and

**THE BODY CORPORATE OF THE
CHARTWELL CENTRE SCHEME**

Respondent

JUDGMENT

Delivered on 8 January 2013

Vahed J:

[1] After hearing an opposed application brought on an urgent basis *Lopes J*, on 23 February 2012, delivered a written judgment which concluded with the following order being made by him:

- '1. That a rule nisi is issued calling upon the respondent to show cause, if any, why an order in the following terms should not be granted:-
 - (a) declaring that the respondent's purported cancellation of the lease agreement concluded between the applicant and the respondent in respect of advertising sites on the north and south walls of Chartwell Centre is invalid;
 - (b) interdicting and restraining the respondent from interfering with the applicant's rights in respect of the lease agreement and its use of the sites;
 - (c) interdicting and restraining the respondent from claiming or receiving any amounts in respect of advertising on the sties,

other than rental from the applicant, and that Rapid Media Outdoor Services (Pty) Ltd be directed to continue to pay to the applicant's agents JB Media Connection the revenue applicable in accordance with the contract annexed to the applicant's replying affidavit marked 'AJD4'. Those payments are to be made provided that the applicant continues to pay rental to the respondent timeously and in full.

2. That the relief set forth in sub-paragraphs I (b) and (c) above shall operate as interim orders with immediate effect, and are to continue to apply, and the rule is extended, until confirmed or discharged by an order of this court.
3. That the costs of this application and the costs of the opposed hearing on the 20th February 2012 are reserved for the decision of the court finally deciding the application.'

[2] During October 2012 respondent launched an interlocutory application in terms of which it sought the discharge of the interim relief set out in paragraph 2 of the order made by *Lopes J* together with an order that the applicant pay the costs of the interlocutory application as well as the costs of the opposed hearing on 20 February 2012.

[3] The facts which served before *Lopes J* have been summarised in his judgment (which can be found at [2012] ZAKZDHC 7 (23 February 2012)) and I set these out here:

'[1] The applicant in this matter carries on business providing a variety of media and advertising services, including the sourcing and leasing of outdoor advertising sites. It concluded a series of agreements with the respondent in terms of which the respondent granted the applicant permission to erect advertising structures on the north and south facing walls of its property known as Chartwell Centre in Umhlanga Rocks, KwaZulu-Natal.

[2] The basis of the agreement was that the respondent allowed the applicant to erect advertising structures and to advertise for its clients on those structures, and in return the applicant paid to the respondent a monthly rental. The applicant paid the

rental to the respondent out of income which it received from an advertising agency (in this case referred to as Rapid Media Outdoor Services (Pty) Ltd ('Rapid')) who in turn procured the ultimate client, Cell C, whose wares were advertised on the billboards.

[3] The contract endured for a number of years with the Cell C advertisements being flighted on the structures erected on the respondent's building by the applicant. On the 16th September 2011 the respondent's attorney addressed a letter to the applicant. That letter was clearly precipitated by concerns which the respondent's insurers had regarding the structures erected on the respondent's building by the applicant. In the letter the respondent requested that the applicant provide certain information to it. In addition it referred to an outstanding amount of rental as at the 31st August 2011 being a sum of R60 499,74 in respect of which the respondent's attorney urged the applicant 'to ensure that the account be brought up to date as a matter of urgency.'

[4] On the 20th October 2011 a letter was addressed to the applicant by the respondent's attorney, purporting to cancel the agreement. The cancellation was on the basis of the applicant's failure to comply with the terms of what it referred to as 'the breach letter' of the 16th September 2011. It recorded that 'the material breaches of the material terms of the Agreement which we have referred to in the breach letter, have not been rectified'.

[5] As a consequence of the respondent's purported cancellation of its agreement with the applicant, Rapid was notified that an entity known as Africa Responds Clearly Media Holdings (Pty) Ltd ('Arc') claimed to have been given the rights to place advertising on the applicant's billboards, and Rapid was requested to pay Arc for that advertising as from the 1st December 2011. Rapid had adopted the attitude of a stakeholder and refused to pay either Arc or the applicant.

[6] The upshot of the foregoing is that the applicant would be denied its income from Rapid. According to the applicant's Director of Development, one Dwarikapersadh, this revenue represents the applicant's largest single source of income and is allegedly its only steady and reliable income stream, constituting approximately half of the applicant's monthly turnover. The applicant is consequently dependant upon that income in order to continue operating and, in addition were that income to be suspended, the applicant would be compelled to cancel various agreements with independent contractors who operate as its staff.

[7] Accordingly the applicant has brought an application for urgent relief in terms of which it seeks a rule nisi declaring the purported cancellation of the lease agreement to be invalid, with interim relief interdicting and restraining the respondent from interfering with its rights in terms of the lease agreement and its use of the respondent's building to advertise; and further interdicting and restraining the respondent from claiming or receiving any amounts in respect of the advertising on its building other than rental from the applicant.'

[4] *Lopes J*, in finding for the applicant on an interim basis, reasoned as follows:

[15] In my view the public's constitutionally enshrined right of access to justice would be poorly served were applicants to be barred from bringing urgent applications where they have shown that the very survival of their business, and the livelihood of shareholders, employees and others dependant upon it, are in jeopardy unless an application is heard urgently.

[16] I am satisfied that the applicant has made out a case for urgency. The respondent has delivered its answering affidavits, and the applicant has delivered replying affidavits. There was no request from the respondent's counsel that the matter be adjourned, albeit for a short period of time, to enable further affidavits to be filed. I accept that a fuller and more complete answer to the applicant's application papers will be delivered in due course by the respondent. However, I am of the view that there is no prejudice to the respondent in my hearing this application, and I accept the reasons for urgency set out in the applicant's affidavit to the effect that cutting off the income stream which it hitherto enjoyed pursuant to its contractual arrangements with the respondent, would imperil the very survival of the applicant.

[17] What finally needs to be considered is whether the applicant has established the requisites for an interim interdict. With regard to a prima facie right, I have considered all the affidavits. The contractual arrangements between the parties prior to cancellation appear to be common cause. The cancellation itself has been attacked on the basis that the applicant was not in default and that the so-called 'breach letter' did not sufficiently comply with the requirements of such a notice as to bestow upon the respondent the right to cancel.

[18] It would appear that the complaints of the respondent in the 'breach letter' were either matters with which the applicant claims to have already complied, or were matters not covered by the terms of the agreement. The outstanding amount alleged of R60 499,74 as at the 31st August 2011 is alleged by the applicant not to have been due at that stage and that the only amount which was 'in arrears' was R30 000, which was paid. The applicant contends that it was in any event not due because it was claimed by the respondent on a basis not covered by the contractual arrangements between the parties. In my view the applicant's right is accurately described as 'prima facie established though open to some doubt' as envisaged in *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D).

[19] There is no doubt that the applicant has a well-grounded apprehension of irreparable harm if interim relief is not granted, and it ultimately succeeds in establishing that the contract was wrongly cancelled by the respondent. It will be left with insufficient operating income to continue its business.

[20] I am satisfied that the applicant has no other satisfactory remedy in that it will

be cold comfort to it to recover damages in due course, if its business has, due to a lack of operating capital, collapsed and it has lost its goodwill.

[21] With regard to the balance of convenience, the prejudice to the applicant if the relief is not granted clearly outweighs the prejudice to the respondent if the application is granted. If the application is not granted the applicant is in danger of losing its business. If the application is granted the respondent will continue to receive the rentals to which it was entitled in terms of the contractual arrangements between the parties and which would appear to expire at the end of December 2012.

[22] I am accordingly of the view that the applicant has established its entitlement to interim interdictory relief.'

[5] In asking for the interim relief to be discharged the respondent alleges that new facts have subsequently come to light, which, had they been known at the time, would have influenced *Lopes J* differently.

[6] In its founding affidavit the applicant alleged that the advertising structures erected on the respondent's building had been so erected "...to the knowledge of the Respondent, with due authority from the eThekweni Municipality ("the municipality")." The applicant went on to state that "[t]he Respondent was well aware of this because the authority to erect the signs ... is addressed to the Respondent.". In the course of making that assertion the applicant annexed ("Annexure 'F'") to its founding affidavit a copy of the document referred to.

[7] In the present interlocutory application the respondent asserts that *Lopes J* relied on the applicant's submission that that document constituted the "authority" in terms of which the advertising structures had been erected and in terms of which they were lawfully to remain *in situ*. I reproduce overleaf a facsimile of Annexure 'F'.

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Enquiries : N. Maema
Telephone : 031 3117059
Fax. : 031 3117684
Reference : 15/2/7/5/3

2007 -08- 31

Controlling Body of Chartwell Centre
P.O. Box 1548
New Germany
3620

Dear Sir/Madam

RE: SIGN APPLICATION NO. : 0020 - 08 - 07S

Address: 5/15 Chartwell Centre, Umhlanga Rocks

Please be advised that the above application is **APPROVED** in terms of and in compliance with the eThekweni Municipality's Advertising Signage Policy, subject to the following conditions;

- An engineers stability certificate being submitted to this Department on completion.
- Content not to exceed 6 bits of information.
- Lettering height to be a minimum of 500mm.
- Wall to be maintained to the satisfaction of the Head of the Department.
- The sign must be erected within six months of the date of approval and this office must be notified of the date of erection, failing which, the approval will lapse.

Your attention is drawn in particular to section 2.4.1.4 of the eThekweni Municipality's Advertising Signage Policy which states inter alia that:-

The owner of any premises.....shall maintain such advertisement or sign (together with its supports, braces guys and anchors) in a state of good repair, structurally and aesthetically.

Kindly note that:-

The electrical installation for the sign must comply with the code of Practice for the Wiring of Premises. S.A.B.S. 0142-1978, as amended. In terms of the Machinery and Occupational Safety Act/1983, a Certificate of Compliance and Application for Permission to connect must be lodged with the Durban Electricity prior to the electrical connection of the sign. Safety clearances to overhead lines must comply with Machinery and occupational Safety act 6/1983 and also with Durban Electricity's code of conduct.

Yours faithfully,

Head: Development Planning and Management

01/10/07 FILE

[8] In the founding affidavit deposed in support of the interlocutory application the respondent says the following:

18.
Subsequent to the granting of the interim relief, the Respondent's attorney established that :-

- 18.1. each billboard required and was subject to its own application process and approval;
- 18.2. annexure "F" to the Applicant's Founding Affidavit could therefore never have been "the authority" in respect of both billboards;
- 18.3. according to the eThekweni Municipality's records in any event, annexure "F" does not accurately reflect the approval granted and is an altered or tampered with version of the approval.
- 18.4. there were in fact two application processes :-
 - 18.4.1. The one in respect of the North face of the Respondent's building under application number 00200807S; and
 - 18.4.2. The one in respect of the South face of the Respondent's building under application number 00220907S.

ANNEXURE "F" TO THE APPLICANT'S FOUNDING AFFIDAVIT

19.
Annexure "F" to the Applicant's Founding Affidavit reflects that the eThekweni Municipality approved the erection and the retention of the billboards, on the Respondent's building, for an indefinite and undefined period.

- 20.
- 20.1. The Respondent's attorney of record obtained a photocopy of the original approval document from the eThekweni Municipality in respect of the North face of the Respondent's building under application number 0020-08-07S.
 - 20.2. I annex hereto marked "SMH2", a copy of that document.
 - 20.3. Annexure ISMH2" hereto records, in the second paragraph thereof:

"Please be advised that the above application is APPROVED in terms of and in compliance with the eThekweni Municipality's

Advertising Signage Policy, subject to the following conditions;

- 1. The approval being granted for a period of five years.**
- 2. An engineers stability certificate being submitted to this Department on completion.**
- 3. Content not to exceed 6 bits of information.**
- 4. Lettering height to be a minimum of 500mm.**
- 5. Wall to be maintained to the satisfaction of the Head of the Department.**
- 6. The sign must be erected within six months of the date of approval and this office must be notified of the date of erection, failing which, the approval will lapse."**
(Underlining added)

21.

In contrast to the above, Annexure "F" to the Applicant's Founding Affidavit reflects the following:

"Please be advised that the above application is APPROVED in terms of and in compliance with the eThekwin Municipality's Advertising Signage Policy, subject to the following conditions;

An engineers stability certificate being submitted to this Department on completion.

Content not to exceed 6 bits of information.

Lettering height to be a minimum of 500mm.

Wall to be maintained to the satisfaction of the Head of the Department.

The sign must be erected within six months of the date of approval and this office must be notified of the date of erection, failing which, the approval will lapse."

22.

22.1. Annexure "F" to the Applicant's Founding Affidavit does not reflect the same conditions as contained in annexure "SMH2" hereto.

22.2. Significantly, what is absent from annexure "F", is the first condition which appears on annexure "SMH2", namely, that the approval was "**granted for a period of five years**" only.'

[9] I reproduce overleaf a facsimile of annexure "SMH2"

ET

Development Management Department

Durban 4001

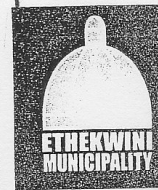
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2007 -08- 31

Controlling Body of Chartwell Centre
P.O. Box 1548
New Germany
3620

Dear Sir/Madam

RE: SIGN APPLICATION NO. : 0020 - 08 - 07S

Name of business: Body Corporate Chartwell Centre
Address: 5/15 Chartwell Centre, Umhlanga Rocks

Please be advised that the above application is **APPROVED** in terms of and in compliance with the eThekweni Municipality's Advertising Signage Policy, subject to the following conditions;

1. The approval being granted for a period of five years.
2. An engineers stability certificate being submitted to this Department on completion.
3. Content not to exceed 6 bits of information.
4. Lettering height to be a minimum of 500mm.
5. Wall to be maintained to the satisfaction of the Head of the Department.
6. The sign must be erected within six months of the date of approval and this office must be notified of the date of erection, failing which, the approval will lapse.

Your attention is drawn in particular to section 2.4.1.4 of the eThekweni Municipality's Advertising Signage Policy which states inter alia that:-

The owner of any premises.....shall maintain such advertisement or sign (together with its supports, braces guys and anchors) in a state of good repair, structurally and aesthetically.

Kindly note that:-

The electrical installation for the sign must comply with the code of Practice for the Wiring of Premises. S.A.B.S 0142-1978, as amended. In terms of the Machinery and Occupational Safety Act/1983, a Certificate of Compliance and Application for Permission to connect must be lodged with the Durban Electricity prior to the electrical connection of the sign. Safety clearances to overhead lines must comply with Machinery and occupational Safety act 6/1983 and also with Durban Electricity's code of conduct.

Yours faithfully,

Head: Development Planning and Management

2007

[10] The respondent goes on to state the following:

23.

In granting the interim relief as it did, this Court had regard to, an indeed based its Order on the allegations in the Applicant's Founding Affidavit that annexure "F" thereto was the approval document and that the retention of the billboards on the sides of the Respondent's building was lawful and would continue to be lawful for an indefinite period.

24.

24.1. I annex hereto marked ISMH3", a copy of a letter dated 1 August 2012 from the eThekweni Municipality sent to the Respondent's attorney of record herein, Mr Massimo Dus, confirming that annexure "SMH2" hereto is the actual approval.

24.2. In annexure "SMH3" hereto, the eThekweni Municipality records the following :-

"Dear Mr.Dus

Ref.: Chartwell Centre Wall Billboard signs - Umhlanga
Reference is made to your e-mail sent to this office on the 20th July 2012.

This letter serves to confirm the following:

- **Approval was granted for a period of 5 (five) years to the Chartwell Centre Controlling Body to erect and manage the wall mounted billboard signage on its retaining walls in August 2007.**
- **This approval will lapse on the 31st of August 2012.**
- **The signs must be removed at the end of the approval period. Should the Owners fail to remove the signs and their structures, the municipality will take legal action.**
- **The copy of the approval letter stating six (6) conditions of approval where condition number one (1.) states: 'The approval being granted for a period of five years', is the correct notice of approval."**

25.

25.1. It follows that, if annexure "SMH2" is the correct approval document, then annexure "F" to the Applicant's Founding Affidavit cannot be.

25.2. The Applicant is invited to explain :_

25.2.1. the discrepancy between annexure "F" to its Founding Affidavit and annexure "SMH2" hereto, and

25.2.2. how it came to be in possession of the document which is

annexure "F" to its Founding Affidavit.

26.

Whatever the explanation by the Applicant as to annexure "F" to its Founding Affidavit, it is clear that the continued retention of the billboards on the Respondent's building, as of 31 August 2012, became illegal.

27.

It is submitted that, had the Honourable Judge presiding, in the application for interim relief, been aware of the correct situation, he would not have granted the interim Order, alternatively, would not have granted the Order in the terms in which it was granted.

28.

At the very least, he would have limited the period of application of the interim Order to the period for which the retention of the billboards on the Respondent's building would remain lawful, in other words, for a period of no more than five years from the date on which the approval was granted.

29.

In either such event, it is no longer legally permissible for the Respondent to retain the billboards on its property.'

[11] The allegations relating to the municipality's involvement were confirmed on oath with an affidavit being submitted by Ms *Maema*.

[12] The respondent goes on to state that *Lopes J* was misled by a material misstatement made under oath and that in granting the interim relief he was misled by the statement that annexure 'F' was **the authority to erect the signs**.

[13] The respondent also takes issue with the fact that the deponent to the applicant's founding affidavit when the interim relief was sought, one *AshveerJairajhDwarikapersadh* ("*Dwarikapersadh*"), who then described himself as the applicant's Director of Development, was at the time the

municipality's approvals were granted employed by the municipality as the Advertising Signage Assessment Officer and was intimately involved in the approval process. He did not disclose this information in his affidavit.

[14] *Dwarikapersadh* again deposed to the principal affidavit in opposition to the interlocutory application. He says the following:

'3. Before I deal with the allegations in the respondent's affidavit, I first wish to explain the history of my employment with the Ethekewini Municipality, and how I later came to be involved with the applicant. The respondent implies that there is something sinister in this, but this is completely unfounded. My history was not disclosed in the main application, because it had no relevance.

4. I started employment with the eThekewini City Council in 2001 as a temporary clerk in Plan Submissions department. I remained in this position until 2004 when I was appointed to the Signage Department as Signs Approval and Record Officer.

5. At that time Mr Benjamin Ramnarin headed the Signage Department and I received extensive training from MrRamnarin who was skilled and experienced in this field.

6. The application process was as follows. I would receive any application for the approval of signage. There was a checklist to make sure that all the necessary documents were submitted with the application. I would discuss the application with MrRamnarin and once he and I had reached agreement regarding the approval or rejection of the application we would refer the application to the Head of the Planning Department, MsMoonsamy, with a recommendation.

7. At this time we had a Signage Policy which applied to all applications for outdoor advertising signs. During the period of my employment there, we seldom referred to the provisions of the Building Bylaws pertaining to advertising signs. The primarily drafter of the signage policy was MrRamnarin, so he was very knowledgeable of all the requirements of the Policy.

8. This was the process and work order until 2007 when MrRamnarin's post was advertised and filled by one NtombiMaema.

9. It transpired that MrRamnarin had only been appointed as Acting Manager of the Department and that this was not his permanent post, although he had worked as the *de facto* Manager of Signage since before my arrival in 2004, until 2007.

10. Mrs. Maema came from Bloemfontein, where she had been an Environmental

Officer, and she had no signage experience whatsoever. MrRamnarin returned to his designation as signage inspector, a very junior position in the Signage Department. He was understandably disgruntled and thereafter refused to participate in any of the signage application proceedings or to offer any advice thereon.

11. As he had been my mentor I felt the injury personally and decided to follow his lead and not to give Mrs. Maema any support whatsoever. My attitude at the time was that if she was appointed to the position she must know the work. My intention was to make it uncomfortable for her in the hope that she would resign, and MrRamnarin could resume what I perceived to be his rightful position as the Head Manager of Signage. I realise now that this might have been youthful naiveté, but I was only 20 when I commenced working for the Municipality, and it was my first permanent job.

12. It goes without saying that the situation resulted in lots of animosity, especially between myself and Mrs. Maema. This of course divided the Department and as a result thereof I left at the end of November 2007.

13. I did not become involved with the applicant immediately. Initially I consulted to various companies, assisting them to make applications for signage approval. I commenced consulting to the applicant, although not exclusively, in around March or April 2008. Later, in 2011, the applicant offered me full time employment and a directorship, which I accepted.

14. During my years with the Municipality, outdoor advertising companies and/or property owners would use so-called experts to make application to and liaise with the Municipality to get applications approved. MrBirtSimes was such a person. Apparently MrSimes was previously employed in the Signage Department of the Municipality, and I believe that he took up consultancy after he retired.

15. During my years at the Municipality, I had many dealings with MrSimes, and came to know him very well. I respected his knowledge of signage applications, signage policy and signage law. MrSimes' applications were, in contrast to many others, of a very high quality and his success rate in the Signage Department was very high, with an estimated approval rate of more than 90%.

16. When I was employed in the Signage Department there were applications by various people to place advertising signs on the Chartwell Centre, including the Body Corporate itself. All such applications had been refused. Umhlanga, where the building is situated, has very limited outdoor advertising opportunities due to various restrictions applicable in the area.

17. During about the middle of 2007, MrSimes approached the Signage Department with a signage proposal for the Chartwell Centre. MrSimes' approach in this matter was quite unique in that he engaged a specific design for the advertising structure which was not previously done. I considered MrSimes' proposal and it seemed acceptable to me, in view of the Policy and approval criteria. I took it to the Manager of Planning, LekhaAllopi, and discussed a whole host of planning issues

with her. The new design, which didn't look like the conventional lip and bar advertising signage present in the CBD currently, met with her approval and she indicated that she would be happy to approve the said signage application.

18. Of course, a relevant factor was that the property in question is zoned business, residential and commercial. However, one of the differences in MrSimes' application was the size of the proposed signage. Most previous applicants proposed to cover the entire wall facades, which was not acceptable to the Municipality and was in contravention of the provisions of the Policy.

19. Only after MrSimes received favourable response for his proposal did he lodge a formal application on behalf of the Centre. By then, I was familiar with the detail of his application and therefore presented it to MsMoonsammy immediately, with my recommendation. MsMoonsammy was satisfied with all the aspects, inclusive of the Planning approval, and the attitude of the other relevant Departments had already been canvassed so she was able to approve the application immediately. I realise that this was somewhat unconventional, but MrSimes had the trust and respect of those involved with signage at the Municipality, and he worked with them all the time, in his capacity as a consultant.

20. It was me who prepared the approval letter for MsMoonsamy to sign. I did not recommend an approval period for the application, for the following reason. Not long before MrSimes made the application for Chartwell Centre, MrRamanarin had rejected an application for various sky signs on a couple of buildings. The applying party appealed to the full council and the approval was granted, but without any time period or any other conditions imposed. In fact, it seems that neither the policy nor the bylaws provide for a stipulated time period. It was after this that I considered the Chartwell Centre application, and I did not stipulate a time period when I recommended approval, because of this prior experience. I therefore believe that the document which is annexure NM2 to MrsMaema's affidavit is incorrect, and that the approvals which were finally issued to the respondent, were in the form of annexure "F" to my affidavit in the main application.

21. MrsMaema does not have personal knowledge of what occurred with this particular approval, and her evidence in this regard is hearsay. The approval decision lay with MsMoonsammy. I did the recommendations only and, if I recommended acceptance of an application, I had to convince MsMoonsammy that the application was within the parameters of the policy. The policy does not demand an approval period, and neither do the by-laws. I therefore recommended approval for an open-ended period.

22. At first MrSimes only made application for the north elevation of the building. Once formal approval was given for this, he lodged the application for the south elevation. This approval was granted on 31 October 2007. A copy is annexed hereto marked "B". As I can recall it is signed by LihlePhewa - MsMoonsamy's deputy head.

23. In March of 2008 I was contacted by MrRidwaan Mohamed of the applicant. He invited me to become a consultant to the applicant, on the understanding that I

would also be able to do work for other companies. He explained to me that MrSimes was getting old and wondered whether I would assume the same role that MrSimes fulfilled for the applicant. I immediately agreed to this.

24. However, I was not able to achieve any success for the applicant in this capacity. All applications I made on behalf of the applicant were rejected by the Municipality. This might have been partly by virtue of the animosity between MrsMaema and me, but after discussions with others in the industry, I realised that very few other people were receiving approvals after I left.

25. The feedback I had from others was that nobody inside the Department knew anything about signage. I agree with this assessment - the only two people that knew anything about signage were MrRamnarin and me, and MrRamnarin had refused to partake in approvals after MrsMaema was engaged.

26. By virtue of the acrimony between me and Mrs. Maema, the Municipality then started to remove billboards which belonged to the applicant, despite the fact that the billboards had Municipal approval. In the African Billboards judgment, which is binding precedent in this division, the court held that Municipality is not entitled to remove advertising signage belonging to third parties, without a court order. This resulted in the applicant obtaining interdicts against the Municipality.

27. Despite these difficulties, I built up a good relationship with Mr Mohamed of the applicant and assisted him in other jurisdictions, including Johannesburg and Tshwane, to obtain approvals for billboard applications. In 2011 I was offered a directorship by the applicant and full time employment, which I accepted.'

[15] I have deliberately quoted extensively from the affidavits because I believe it to be necessary for a proper evaluation of the probabilities.

[16] It is apparent that at the time he deposed his affidavit in the interlocutory application *Dwarikapersadh*, under oath, affirmed his belief that annexure 'F' was a legitimate document and that the municipality's Ms *Maema* was, at best, mistaken in her view concerning the approvals.

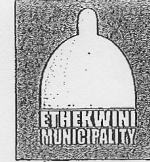
[17] I reproduce overleaf a facsimile of the approval annexed to *Dwarikapersadh*'s affidavit as annexure 'B'.

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2007 -10- 01

Dear Sir/Madam

RE: SIGN APPLICATION NO. : 0022 - 09 - 07S

Name of business: Body Corporate Chartwell Centre
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The owner of any premises.....shall maintain such advertisement or sign (together with its supports, braces guys and anchors) in a state of good repair, structurally and aesthetically.

Kindly note that:-
The electrical installation for the sign must comply with the code of Practice for the Wiring of Premises. S.A.B.S. 0142-1978, as amended. In terms of the Machinery and Occupational Safety Act/1983, a Certificate of Compliance and Application for Permission to connect must be lodged with the Durban Electricity prior to the electrical connection of the sign. Safety clearances to overhead lines must comply with Machinery and occupational Safety act 6/1983 and also with Durban Electricity's code of conduct.

Yours faithfully,


Head of Development Planning and Management

DAVID PHE

[18] That, he said was the approval for the signage on the south face of the respondent's building, while annexure 'F' was the approval for the signage on the north face.

[19] On the papers, therefore, a dispute of fact emerged concerning this crucial aspect of the matter.

[20] When the matter was argued before me on 13 December 2012 both Ms *Mills*, who appeared for the applicant, and Mr *Phillips*, who appeared for the respondent, were agreed that no referral for the hearing of oral evidence was necessary because the applicant no longer disputed that annexure 'F' to its founding affidavit in the interim relief application and annexure 'B' to its answering affidavit in the interlocutory application did not reflect the approval authority granted by the municipality.

[21] The applicant nevertheless persisted in its opposition to the relief claimed in the interlocutory application, and, together with its answering affidavit, delivered a conditional counter-application, which I will deal with later in this judgment.

[22] It was thus common cause that the municipal approval for the signage expired on 31 August 2012 while the contract of lease between the applicant and the first respondent will terminate in July 2013.

[23] The essence of the applicant's case is that:-

- a. the respondent has not proved illegality because it has not put up any evidence of any bylaw indicating that it is illegal to display a sign without municipal approval. Bylaws must be pleaded and a court cannot take judicial notice thereof.
- b. Even if it were unlawful, the contract between the parties is still capable of lawful performance and accordingly the respondent must be compelled to re-apply for approval.

[24] The matter is not that simple. I cannot simply ignore what has happened.

[25] Any examination of the facsimile documents set out above, even by the untrained eye, would reveal that something was amiss. Annexure 'F' and the correct version put up by the respondent is one and the same document. The correct version has in some way been 'doctored' or interfered with to produce annexure 'F'. That much is clear. The signatures are identical in every respect and the date stamp and its position and alignment on the document is identical in every respect. What is clear is that the reference line reading '*Name of Business: **Body Corporate Chartwell Centre***' has been obliterated as was the first condition and the numbering.

[26] For *Dwarikapersadh* to confidently state under oath that annexure 'F' was the correct document, in the face of Ms *Maema's* assertions, and to thereafter simply accept that it was not, without tendering additional evidence, is utterly unacceptable, especially not after the elaborate explanation he embarked upon concerning the state of affairs that existed at the municipal offices while he was employed there.

[27] Equally baffling is the assertion that he prepared both approval documents (annexure 'F' and annexure 'B') yet they were different, annexure 'B' containing the reference line omitted in annexure 'F'. If he prepared both, with both containing identical line and sentence breaks, that omission would not have occurred. The only conclusion that can be reached is that the original of annexure 'B' was 'doctored' at a different time, without sufficient care being taken to ensure that it was identical in every respect to annexure 'F'.

[28] The only reasonable inference that can be drawn from this is that a reference to oral evidence was avoided because *Dwarikapersadh* could not face cross-examination. His assertions on oath are palpably implausible. On the probabilities I must conclude that he has been less than completely truthful.

[29] I turn now to deal with Ms *Mills'* principal submission that the respondent's failure to plead and prove the bylaws, and consequently, the illegality, is fatal to its case. In support she referred me to *R H Christie*, The

Law of Contract in South Africa, 6thed, LexisNexis, at page 357 where the learned authors state that a "...by-law must be pleaded in order to bring it to the attention of the court...". In support of that statement the learned authors rely on the authority of *RaadvirKuratorevirWarmbadPlase v Bester* 1954 (3) SA 71 (T).

[30] During the course of argument I asked counsel whether that situation could continue to hold true in our modern constitutional era. They were unable to assist in that regard, but in fairness it must be recorded that they were unprepared to deal with the issue I raised.

[31] In Zeffertt&Paizes, The South African Law of Evidence, 2nded, LexisNexis, at page 876 the learned authors deal with the topic thus:

'At common law the courts do not take judicial notice of legislation such as proclamations made under statutory authority, government notices or regulations, or municipal or railway by-laws. They must be specifically pleaded and proved by the party who seeks to rely upon them.'

For that statement the learned authors rely on the decisions in *Durr v SAR&H* 1917 CPD 284, *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265 (O) and *Benator NO v Worcester Court (Pty) Ltd* 1983 SA 126 (C).

[32] The learned authors in *Schmidt &Rademeyer*, Law of Evidence, LexisNexis, at page 6-18 offer the following treatment:

'Judicial notice extends to "any law or any matter" published in the *Government Gazette* or *Official Gazette* and, in criminal proceedings, to "any

law” published under the supervision of or on the order of the government printer. Thus it does not extend to subordinate legislation which is published elsewhere.’

They rely, for that statement, on *Edward A Shaw & Co v Electronic Diamond Processing (Pty) Ltd* 1971 (1) SA 581 (C), *S v Van Rensburg* 1973 (2) SA 543 (T) and on *Serobe’s* case and *Benator’s* case *supra*.

[33] The reasoning for the prohibition against the taking of judicial notice of municipal bylaws is perhaps best explained by the following extract from *Serobe’s* case (270B – 271A):

‘In England judicial notice, as regards legislative acts, was at one time restricted to Public Acts of Parliament. By the Documentary Evidence Acts 1845, 1868 and 1882 it was extended to Private Acts of Parliament, Proclamations, Orders in Council, and Regulations issued by Government Departments or officials. (See *Rex v. Gaisie*, 1911 C.P.D. 76, and Hibbert’s *Law of Evidence*, 4th ed. p. 11.) No similar legislation has been enacted in South Africa except in regard to criminal proceedings for which see sec. 251 of Act 56 of 1955 in terms of which

“judicial notice shall be taken of any laws or *Government Notice* or of any other matter which has been published in the *Gazette* or the official *Gazette* of any Province.”

Until the enactment of that section in 1917 as sec. 280 of Act 31 of 1917, it has been generally held

“both in England and here, that regulations that affect particular classes of individuals have to be proved before a Court of law, and that Judges and magistrates do not take judicial cognizance of them”—

per WESSELS, J., in *Rex v. Theunissen*, 1916 T.P.D. 324 at p. 326. After referring to *Rex v. Ferreira*, 12 E.D.C. 91, WESSELS, J., proceeded as follows in *Theunissen’s* case at p. 326:

“That is a distinct decision to the effect that regulations that have been published in the *Government Gazette*, and that have been framed under an Act of Parliament, must be proved by the production of the *Government Gazette*. It is unnecessary for me to quote other cases because they are all decided upon the same lines. The reason probably is that, although Judges are bound to know the statutes, they are not supposed to have at their finger’s ends the particular regulations that affect a small class of the community only. They are only required to consider these regulations when a question with regard to them is raised before the Court, and then it is the duty of the person, who relies upon

a particular regulation, to put such regulation before the magistrate or Judge; if he fails to do so he has failed to prove the existence of such a regulation. This has its practical side, too, because although a regulation may have been gazetted, there may be some defence with regard to its validity, and that defence can only be dealt with if the Court has before it all the particulars with regard to its promulgation. Those particulars can only be ascertained by the Judge when he has the actual *Gazette* before him. It is, therefore, the duty of the Crown, when it relies upon such a regulation, to place the *Gazette* which contains it before the judicial officer. That has been the practice in the past and I have never seen it questioned. For that reason I think, as a doubt has been cast upon the practice, we ought again to affirm it."

In *Durrv. S.A. Railways and Harbours*, 1917 C.P.D. 284, it was held that the Court does not take judicial notice of by-laws and regulations but requires them to be proved. At p. 286 of the judgment KOTZE, J., said that:

"No doubt there are several matters of which the Court will take judicial cognizance on the principle *curia novit jus*, and a public statute is one of these. But private Acts, if relied on, must be alleged, and similarly it is necessary to set out a by-law or regulation. The Court cannot and does not, from the nature of things, take judicial cognizance of the existence of a particular bylaw or regulation."

(See also *Rex v. Gaisie*, 1911 C.P.D. 76, and *BrandfortMunisipaliteitv. Esterhuizen*, 1957 (1) S.A. 229 (O) at p. 232.)'

[34] It seems to me that we have come a long way since *Theunissen's* case. Modern research methods which include access to the internet and electronic media have resulted in counsel and judges having access to much more at "their finger's ends".

[35] More importantly, however, is that in my view the provisions of section 34 of the Bill of Rights require that judicial officers do everything possible to ensure that litigants enjoy the fullest possible access to the courts:

'34. Access to Courts.

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'

[36] Section 8 of the Bill of Rights reminds us that it applies to all law and binds all persons and provides, in sub-section 3, that in order to give

effect to a right in the Bill, a court must, where necessary, develop the common law.

[37] A municipal bylaw is **law** as envisaged in section 34 of the Bill of Rights.

[38] I am mindful of the fact that, notwithstanding the exponential increase in material available, it is still impossible to expect judicial officers and other decision makers to know of, and have at their “finger’s ends” every single regulation, bylaw and notice. In general, the rule set out in *Theunissen’s* case must continue to be good law. However, in my view, it needs to be relaxed in some measure.

[39] Where, in a particular case, it is brought to the attention of the presiding official that a particular bylaw, regulation or notice, having a bearing on the matter at hand, exists, she or he becomes duty bound, where at all possible, and within the reasonable exigencies of the case, to seek out such bylaw, regulation or notice in order to properly decide the matter at hand. Not to do so would, in my view, fall foul of section 34 of the Bill of Rights and, particularly where judges are concerned, offend their oath of office.

[40] The existence of such bylaw, regulation or notice, having been brought to the attention of a judicial officer, demands that it be considered for the proper and expeditious resolution of the dispute, and to seek refuge in an ancient rule requiring such matter to be specifically pleaded would be an exercise in placing form over substance.

[41] In her heads of argument Ms *Mills* has not only drawn my attention to the municipality's relevant bylaws but has also made specific reference to and quoted portions thereof. She very kindly made the relevant provisions available to me and I consider myself duty bound to refer to them.

[42] Chapter IV of the municipality's building bylaws deals with Advertising Signs. Section 2 provides as follows:

'Subject to the provisions of this Chapter no person shall erect, alter, display or maintain or cause or permit to be erected, altered, displayed or maintained any advertisement or sign which is visible from or which in the case of an advertisement can be heard in any public place except under and in accordance with the written permission of the City Engineer.'

[43] Section 4(b) stipulates that "[e]very advertisement or sign displayed or erected ... shall be deemed to be at the pleasure of the Council..." and section 7 stipulates that for every sign for which permission '...has expired lapsed or been withdrawn...' the City Engineer may serve not less than fourteen days' notice requiring the removal of such sign "...or to do such other things as may be set forth in such notice so as to bring the advertisement or sign into conformity or compliance...".

[44] It is this latter provision that Ms *Mills* referred me to in an attempt to argue that it was still possible for the parties to comply with the lease and in support of the order sought in the counter-application compelling the respondent to re-apply for permission.

[45] It is clear that, having accepted that the permission for the signage lapsed on 31 August 2012 for the one and presumably on 01 October 2012

for the other, their continued display is in contravention of the bylaws and is illegal. The provision for the giving of notice by the City Engineer does not alter that status.

[46] The provisions in the lease must give way to the principle of legality and accordingly the counter-application is bad.

[47] During argument Mr *Phillips* assured me that the discharge of the interim relief in no way entitles the respondent to resort to self-help. He indicated from the bar that the applicant did not itself intend to remove the signage unless it was authorised to do by order of this court or by some other legitimate process. I accept that assurance.

[48] So then the question remains: what would *Lopes J* have done if all these facts had been placed before him? I have no doubt that he would have declined to grant the interim relief. It is not difficult to say what would have been done on the question of costs and in my view he would certainly have, given *Dwarikapersadh's* involvement, awarded the respondent the costs of the opposed motion on 20 February 2012.

[49] In the result I make the following order:

a. The Order made on 20 February 2012 under case number 1456/2012 is amended by the deletion of paragraphs 2 and 3 thereof and by the inclusion therein of a new paragraph 2 in the following terms:

“2. The costs of the opposed hearing on 20 February 2012 are to be paid by the applicant. All other costs are reserved for the decision of the court finally deciding the application.”

- b. The conditional counter-application dated 26 October 2012 is dismissed with costs.
- c. The applicant (Maribo Media (Pty) Ltd) is directed to pay the costs of the interlocutory application.

Vahed J

CASE INFORMATION

Date of Hearing: 13 December 2012

Date of Judgment: 8 January 2013

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