

IN THE KWAZULU NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 2604/2012

REPORTABLE

In the matter between:

ETHEKWINI MUNICIPALITY

Applicant

and

ADMED INVESTMENTS CC

First Respondent

MINESH MAHARAJ

Second Respondent

THE SOUTH AFRICAN NATIONAL

ROAD AGENCY LIMITED

Third Respondent

J U D G M E N T

NDLOVU J

Introduction

[1] The applicant seeks interdictory relief against the first and second respondents in terms of which they must be directed to remove forthwith the advertising sign and supporting structures at the property located in the vicinity of the eastern boundary of the N2 freeway between Sea Cow Lake and Riverhorse Valley, Durban, at or near the directional markers N2-25, 24.25 and N2-25, 24.05; and other ancillary relief.

[2] It turned out during the course of the pleadings filed by the first respondent that the second respondent (who was cited by virtue of being the sole member of the first respondent close corporation) was in fact no longer associated with the first

respondent and that the first respondent's business had since been taken over by one Ridwaan Mohammed. The second respondent did not participate in the proceedings. No relief was sought against the third respondent (SANRAL), cited only on account of the substantial interest that it probably had in the outcome of the application.

[3] The first respondent opposed the application and filed a counter-application, which was in turn opposed by both the applicant and the third respondent. In the counter-application the first respondent raised various constitutional challenges against the applicant's specific bylaws and certain national legislation, the detail of which is discussed below.

[4] Hence, it was incumbent on the first respondent to comply with rule 16A(1) of the Uniform Rules; and this issue became the ultimate focal point for consideration by the Court. The matter was argued before me on 27 February, 15 and 19 April 2013.

The common cause facts

[5] It is common cause that the first respondent, without any permission or authorisation from the applicant, constructed and displayed a large canvass outdoor advertising sign ("the advertising sign" or "the billboard") depicting the main words: "Phone? Tablet? It's Galaxy Note!" erected on vacant land, as specifically and specially described in paragraph (a) of the applicant's amended order prayed. It is further common cause that the first respondent did not apply for such authorisation or permission from the applicant to erect the advertising sign.

The applicant's founding averments

[6] In its founding papers the applicant alleged that the first respondent, in doing what it did, contravened chapter IV section 2 read with section 4(1) of the applicant's Building Bylaws referred to specifically in that chapter as the advertising bylaws ("the advertising bylaws") and section 50(1)(c) of the South African National Roads Agency Ltd and National Roads Act, 1998 (Act 7 of 1998) ("the SANRAL Act") read with Regulation 40(15) to the SANRAL Act. The advertising sign faced towards the south-western direction in a manner which indicated that the sign was intended for the attention of the north-bound traffic, as well as the busy developing commercial district of Riverhorse Valley and the residential areas of Sea Cow Lake, Newlands and Reservoir Hills.

[7] The applicant further noted that metal and wooden posts were erected to support the advertising sign which was mounted onto these posts by a system of cables, rope and hooks and that concrete foundations in turn supported the posts. By failing to obtain the applicant's authorisation in accordance with the relevant legislation aforesaid, the first respondent had denied the applicant any opportunity properly to ascertain and assess the safety and integrity of the structures supporting the billboard by scrutinising any plans and design information as well as the desirability of the billboard in the present form or at all.

The first respondent's counter-application

[8] In its response to the applicant's claims, the first respondent filed a counter-application, duly accompanied by a consolidated or combined affidavit which served both as founding affidavit to the counter-application and answering affidavit to the present application (or the main application). The affidavit was deposed to by Ashveer Dwarikapersadh, the first respondent's consultant and the applicant's former employee. Whilst employed by the applicant, Dwarikapersadh was specifically assigned to the applicant's signage department where part of his job responsibilities was to evaluate signage (including billboard) applications and make the necessary recommendations for consideration of the applicant.

[9] The first respondent submitted that the applicant was only seeking the Court to enforce a wholly unconstitutional regulatory framework which was not in accordance with section 156(1) of the Constitution, read with Schedule 5 Part B thereto. It was alleged on behalf of the first respondent that the said flawed regulatory framework promoted arbitrary, biased and irrational decision-making on the part of the applicant. As a direct consequence of the applicant's arbitrary, biased and irrational conduct aforesaid, the first respondent had been denied its constitutional rights to the freedom of commercial speech; to the freedom of trade and occupation; and to fair and just administrative action, as protected by sections 16(1), 22 and 33, respectively, of the Constitution¹.

[10] On the basis of the abovementioned averments the first respondent set out its defences to the applicant's claim in the following terms:

10.1 The applicant had failed to establish a regulatory infrastructure for third party outdoor advertising as required by the Constitution;

¹ The Constitution of the Republic of South Africa Act, 1996 (Act No 108 of 1996)

10.2 The advertising bylaws did not constitute regulation of third party outdoor advertising as required by the Constitution;

10.3 The applicant did not have the constitutional authority to enforce legislation outside the sphere of its constitutional jurisdiction without being authorised by law to do so. In other words, the applicant did not have the authority to police the SANRAL Act; and

10.4 In the alternative to the above, Chapter IV of the applicant's advertising bylaws and section 50 of the SANRAL Act directly infringed the first respondent's rights as protected in sections 16, 22 and 33 of the Constitution and fell to be set aside on the basis of their inconsistency with section 2 of the Constitution.

The applicant's combined answering/replying affidavit (in relation to the counter application and the main application, respectively) and application for condonation of the late filing thereof

[11] The applicant filed a combined affidavit embracing its answering affidavit to the first respondent's counter application and replying affidavit in the main application. In addition, the applicant filed an application for condonation of its late filing of the said combined affidavit. The applicant raised further preliminary technical objections to the first respondent's counter application, which included the following matters: the non-joinder of the relevant national government minister or the MEC, as the case might be, in compliance with Rule 10(A); the striking out of paragraphs 13-23, 25-31, 33-35, 38-42, 45-46 and 67-70 of Dwarikapersadh's affidavit on the basis that they contained irrelevant matter; and the non-compliance with rule 16A(1) read with rule 18(4) in relation to the constitutional challenge of the advertising bylaws and section 50 of the SANRAL Act .

The various interlocutory applications

[12] There were also a number of interlocutory applications most of which raised important preliminary issues that would otherwise have to be determined by the Court prior to attending to the merits of the main application. However, at the commencement and during the course of argument, counsel from either side withdrew one or more of such interlocutory applications. In particular, the following challenges or objections were withdrawn by the parties concerned, as indicated:

12.1 The applicant's application to strike out the specified paragraphs in Dwarikapersadh's affidavit on the ground that they contained irrelevant matter;

12.2 The applicant's objection to the authority of Mohammed and Dwarikapersadh to represent the first and second respondents;

12.3 The first respondent's claim for relief in relation to the SANRAL Act, which in turn necessitated the withdrawal of the applicant's non-joinder claim (in terms of rule 10A) of the relevant national minister or the MEC, as the case might be.

12.4 The first respondent's application to compel the applicant to produce for inspection records of decisions taken in terms of the Intergovernmental Relations Framework Act 13 of 2005 and the minutes of the meeting where such decisions were taken between the applicant and SANRAL.

The issues

[13] Hence, the following issues remained live for determination by the Court:

13.1 The applicant's application for condonation of its late filing of the combined answering/replying affidavit.

13.2 The first respondent's non-compliance with rule 16A(1) and its application for condonation of the late filing of the rule 16A(1) notice.

13.3 The applicant's complaint that the first respondent raised new issues in its supplementary heads of argument which were not raised in its pleadings.

13.4 Whether the applicant is entitled to the relief sought, in terms of the amended order prayed, in the main application.

The application for condonation of the applicant's late filing of its combined answering/replying affidavit

[14] The provision in rule 27(3) of the Uniform Rules that "[t]he court may, on good cause shown, condone any non-compliance with these rules" clearly indicates that the Court has a discretion in determining whether or not to grant an application for condonation of non-compliance with the rules. In the well-renowned case of *Melanev Santam Insurance Co Ltd*² the Appellate Division (per Holmes JA) stated the following:³

²1962 (4) SA 531 (A).

³*Melanev* at 532C-F. See also *Chopra v Sparks Cinemas (Pty) Ltd and Another* 1973 (2) SA 353 (D) at 357A-B; *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307D-E.

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases.”

[15] In other words, a condonation application is not just a formality or merely something for the taking; so a full and detailed account of the causes of the delay and the effect thereof must be furnished.⁴The more serious the consequences of non-compliance, the more difficult it will be for the party seeking condonation to have its application granted.⁵It is therefore important that a party seeking condonation must, firstly, tender an explanation in order for the Court to understand fully how the non-compliance occurred; and secondly, show that the explanation so tendered is bona fide and not unfounded.⁶

[16] At the end of the day, the Court has to be satisfied that a valid and justifiable reason exists why non-compliance should be condoned.⁷The essence of the issue is fairness to both sides.⁸However, when the failure to comply with the rules has been flagrant and gross, condonation will not be granted, regardless of the prospects of success on the merits of the party seeking condonation.⁹

⁴*Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6.

⁵*Du Plooy v Anwes Motors (Edms) Bpk*1983 (4) SA 212 (O) at 217C.

⁶*DuPlooy*, at 218B.

⁷*General Accident Insurance Co South Africa Ltd v Zampelli*1988 (4) SA 407 (C) at 410I-J.

⁸*United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-F.

⁹*Darries v Sheriff, Magistrates' Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 41D.

[17] The first respondent's counter-application was served on the applicant on 31 May 2012. The answering affidavit was due to be filed by the applicant fifteen days later¹⁰, that is, by 22 June 2012. The combined answering/replying affidavit was delivered on 24 July 2012. In the circumstances the applicant's answering/replying affidavit was delivered 22 days late.

[18] Mr *van Niekerk*, for the applicant, submitted that the condonation application should be granted. He referred to the applicant's answering/replying affidavit, deposed to by the applicant's chief legal advisor, Alisande Grace Bradshaw. In the affidavit Ms Bradshaw pointed out that when the first respondent's counter-application was received, the applicant referred the papers to SANRAL as it was obliged to do so in terms of the Intergovernmental Relations Framework Act. SANRAL had delivered a notice of its intention to abide the decision of the Court. After all, the applicant was of the opinion that given the potentially far-reaching consequences of the relief sought in the counter-application, it was necessary that SANRAL be informed thereof to reassess its position, particularly because parts of the challenge in the counter-application related to the SANRAL Act, a piece of legislation over which the applicant did not have the requisite authority to defend.

[19] Further, it was imperative that a joint decision between the applicant and SANRAL on the appropriate course of action be taken in terms of the Intergovernmental Relations Framework Act. SANRAL briefed counsel who contacted the applicant's counsel on the 2 July 2012 and only then did SANRAL confirm that it would participate in the proceedings. Then both counsel for the applicant and SANRAL discussed the framework and time for opposing the counter-application and it was only at that point that the applicant was in a position to proceed with the drafting of the answering/replying affidavit.

[20] Mr *Van Niekerk* further submitted that the first and second respondents had not suffered any prejudice by the late filing of the answering/replying affidavit because the advertising sign had remained in place all the time.

¹⁰ In terms of rule 6(5)(d)(ii) of the Uniform Rules.

[21] Mr Krog, for the first respondent, noted that it was conceivable that the process of consultation between both counsel for the applicant and SANRAL took some time and that this amounted to good governance. He also pointed out that in terms of Bradshaw's affidavit a 'joint decision' was taken between the applicant and SANRAL. However, when the first respondent sought to compel the applicant to provide it with the documents related to this process, the applicant had advised that there were no such documents and that there was merely a discussion between Mr Van Niekerk and counsel for SANRAL. Therefore, if there were no such documents it meant that the applicant did not follow the procedure required in terms of the Intergovernmental Relations Framework Act. On this basis, counsel submitted that the applicant's condonation application should fail.

[22] In my view, lateness by only 22 days was, in the circumstances of this case, not a grave matter. Having considered the reasons proffered for this fairly short period of lateness I am satisfied that the reasons are valid and sincere. It does appear that the main cause of the late filing of the applicant's answering/replying affidavit was the consultation between the applicant and SANRAL. It is also clear that, had the first respondent not initially decided to raise constitutional challenges involving the SANRAL Act, such consultation process would never have been necessary in the first place, in which case there would most probably not have been this delay on the part of the applicant in filing its answering/replying affidavit. As we all know, the first respondent subsequently decided to withdraw any court challenge in relation to the SANRAL Act. In other words, it seems to me, the first respondent indirectly contributed to the delay and, for this reason alone, it cannot plead prejudice. Besides, as the applicant correctly submitted, the billboard had remained in place all the time and the first respondent had continued to generate income out of the impugned situation.

[23] In the circumstances, I am inclined to find that the applicant has shown good cause why condonation should be granted. Accordingly, the application for condonation of the late filing of the applicant's combined answering/replying affidavit succeeds.

The first respondent's non-compliance with rule 16A(1) and its application for condonation of the late filing of the rule 16A(1) notice

[24] The pertinent requirements referred to by me during my determination of the applicant's application for condonation of its late filing of the combined answering/replying affidavit, above, shall be applied *mutatis mutandis* in my consideration of the first respondent's condonation application for its late filing of the rule 16A(1) notice. Therefore, I do not need to repeat those requirements here.

[25] The first respondent challenged, among other things, the constitutional validity of the advertising bylaws in that they allegedly promoted arbitrary, biased and irrational decision making on the part of the applicant in relation to billboard applications, thus directly infringing upon the first respondent's rights enshrined in sections 16, 22 and 33 of the Constitution. Hence, it was submitted that the advertising bylaws should be set aside on the basis that they were inconsistent with section 2 of the Constitution. That being the challenge, it was incumbent on the first respondent to comply with rule 16A(1) of the Uniform Rules.

[26] Rule 16A(1) provides as follows:

"(1)(a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.

(b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.

(c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.

(d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days."

[27] In *Phillips v South African Reserve Bank and Others*,¹¹ the Supreme Court of Appeal (per Farlam JA) stated¹²:

¹¹2012 (7) BCLR 732 (SCA).

¹²*Phillips* para 31.

“Rule 16(A)(1) has, accordingly, to be interpreted in the light of the purpose for which it was enacted, viz. to bring cases involving constitutional issues to the attention of persons who may be affected by or have a legitimate interest in such cases so that they may take steps to protect their interests by seeking to be admitted as *amici curiae* with a view to drawing the attention of the court to relevant matters of fact and law to which attention would not otherwise be drawn ...”

[28] The word ‘*shall*’ interspersed throughout the entire rule 16A(1) doubtlessly demonstrates the degree of peremptoriness and importance of the rule.¹³ The rule was clearly intended to serve a specific public service. Indeed, it has been said that as constitutional matters often have consequences that go beyond the parties concerned,¹⁴ such matters should be brought to the attention of those who may potentially wish to intervene in the proceedings.¹⁵

[29] Rule 16A(1) leaves no doubt or uncertainty as to the stage of proceedings when the notice must be filed with the registrar. This must happen “at the time of filing the relevant affidavit or pleading” unless the Court, in the exercise of its discretion, as envisaged in terms of sub-rule (9) of the rule, directs otherwise. In *Phillips*, the SCA suggested a practical guideline in relation to rule 16A to be followed by those engaged in constitutional litigation¹⁶:

“Regard being had, however, to the fact that it appears that problems (real or imagined) relating to compliance with Rule 16A appear to arise not infrequently in constitutional cases, it is advisable that those responsible for drafting (and settling) founding affidavits in constitutional cases (and, where appropriate opposing affidavits in which constitutional issues are raised which are not previously raised in the proceedings), should make it a practise of inserting an allegation that a notice (a copy of which is annexed) has been prepared in terms of the rule, and it is to be handed to the registrar for the necessary action when the founding (or opposing) affidavit is filed. It is also advisable that the notice, when removed from the notice board after the 20 day period has elapsed and put in the file, be included among the “necessary” documents which go before the judge. The attorneys acting for

¹³ See *African National Congress v Harmse and Another: In Re Harmse v Vawda* 2011(5) SA 460 (GSJ) para 113.

¹⁴ *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) para 21.

¹⁵ *Rates Action Group* para 22.

¹⁶ *Phillips* para 55.

departments or organs of state which are respondents in such cases should also follow the practise of checking as soon as the papers are received that the rule has been complied with and, if it appears not to have been, of bringing the omission to the attention of the applicant's attorneys . . . State respondents should take timeous steps to assist applicants to have constitutional issues raised with a minimum of obstruction."

[30] In the present instance the first respondent raised, in its counter-application, a constitutional challenge against the advertising bylaws. The counter-application was served on the applicant's attorneys of record on 31 May 2012 and filed with the registrar on 4 June 2012. No allegation, as suggested in *Phillips*, above, was inserted in the counter-application to the effect that a notice had been prepared in terms of rule 16A(1) and would be handed to the registrar for the necessary action. However, the applicant did not seek to take advantage of the first respondent's omission at that stage. Instead, and in line with *Phillips*, the applicant, in its combined answering/replying affidavit, brought this omission to the attention of the first respondent.¹⁷ The said answering/replying affidavit was served on the first respondent's attorneys of record on or about 17 July 2012.

[31] The first respondent had the right to file its replying affidavit within ten days of its receipt of the applicant's combined answering/replying affidavit¹⁸. However, the first respondent chose not to file a replying affidavit at all. Again, the first respondent missed another opportunity to rectify the error and comply with rule 16A(1).

[32] In the applicant's heads of argument delivered on 18 February 2013 Mr Van Niekerk raised the point that the application to strike out was brought on grounds including that "the first respondent has failed to comply with rule 16A"¹⁹ and at the same time he referred to paragraph 11 of the applicant's answering/replying affidavit in which the point had previously been brought to the attention of the first respondent. It is not in dispute that the first respondent's attorneys of record and Mr Krogh received the applicant's heads of argument, referred to presently, reasonably well in time before the matter was argued for the first time on 27 February 2013. Yet,

¹⁷ See para 11 of the applicant's answering/replying affidavit.

¹⁸ In terms of rule 6(5)(e) of the Uniform Rules.

¹⁹ See para 8(a) of the applicant's heads of argument dated 14 February 2013.

still nothing was done by the first respondent to rectify the omission. This was the third opportunity missed.

[33] Furthermore, in his argument on 27 February 2013 Mr *Van Niekerk* raised the rule 16A issue yet again, when he stated the following:

“Now, there is another secondary point to this, M’Lord. There was a further failure and that was there was a failure to issue a notice in terms of rule 16A which relates to ... the question of giving notice of the raising of a constitutional point, and that arises in all matters, if there is a constitutional point that arises – if any constitutional issue in an application arises then the provisions of rule 16A have to be followed and a notice has to be issued, it has to be placed on the notice boards, the Registrar must be given notice of it, and allows amici curiae to enter the arena if it is necessary – if they consider that (it) is necessary to do so. This is a peremptory provision and that I say because it says:

‘Any person raising a constitutional issue in an application or action shall give notice thereof.’ Etcetera.

There is a provision, M’Lord, in sub-rule (9) ... which says the Court may dispense with any of the requirements of the rule if it is in the interests of justice to do so. Now, M’Lord, regretfully, of course, there is no – no case has been made out for the dispensing of the provisions of the rule, the point was raised, it’s been pooh-poohed effectively by the first respondent and I will submit, M’Lord, that on that basis alone the application is defective and should be – the counter-application is defective and should be dismissed.”

[34] Later on the same day, that is 27 February 2013, Mr *Krog* had his turn to address the Court but, significantly, nothing was mentioned on why the first respondent had not complied with rule 16A(1) and what it was that first respondent sought to do in terms of rectifying the situation. Due to the lateness of the hour Mr *Krog* could not finish his argument on 27 February 2013, hence the matter was adjourned *sine die*. Subsequently, I granted indulgence to the parties to have matter argued further during the next Court recess on 15 April 2013.

[35] In the meantime, on 5 April 2013, the first respondent delivered its supplementary heads of argument. In response thereto, the applicant filed its further

heads of argument in which Mr *Van Niekerk*, among other things, submitted that the first respondent's supplementary heads of argument were completely and materially different in content and substance from the first respondent's answering affidavit and founding affidavit to the counter-application.

[36] When the hearing resumed on 15 April 2013 Mr *Krog* took the entire day with his further argument to the extent that by the time he concluded it was already too late in the afternoon for Mr *Van Niekerk* to reply. Remarkably, when Mr *Krog* indicated that he had no further submissions to make it was specifically pointed out to him by me that he had seemingly not addressed the issue of why the first respondent had not complied with rule 16A(1). To this, Mr *Krog* unambiguously, and honestly so, conceded that he had no explanation to offer as to why the first respondent up to that time had not complied with rule 16A(1). Thereupon, I adjourned the matter to 19 April 2013 for the sole purpose of allowing Mr *Van Niekerk* the opportunity to reply.

[37] Prior to the adjournment aforesaid Mr *Van Niekerk* pointed out that on the next Court date (that is 19 April 2013) he would limit his argument only to the two preliminary issues; firstly, that the first respondent had persistently failed to comply with rule 16A(1) and, secondly, that the first respondent's supplementary heads of argument had introduced matters which were completely different from those raised in its pleadings. On that basis alone he would submit that the first respondent's counter-application should be dismissed and that the main application be granted in terms of the amended order prayed. He reserved his right to address me further, on the merits, should I not agree with him on either of the two preliminary points.

[38] Surprisingly, on 18 April 2013, being the eve of the final date for the hearing of argument, the first respondent filed an interlocutory application (accompanied by a supporting affidavit) in terms of which notice was given that on 19 April 2013 an application would be made on behalf of the first respondent for an order in the following terms:

"1. That the late filing of the Rule 16A notice, attached hereto as annexure A1, be condoned;

2. That the matter be postponed for a period of 20 days to allow any interesting (sic) party to be admitted as amicus curiae in the matter;
3. That the non-compliance of the provisions of the Court Rules for the hearing and set down of an interlocutory application be condoned by this Honourable Court.”

[39] Indeed, the matter resumed on 19 April 2013 when Mr *Krog* moved for the granting of the latest interlocutory application, which Mr *Van Niekerk* vehemently opposed. In his submissions Mr *Krog* referred me to the averments set out in the supporting affidavit deposed to by Dwarikapersadh. In the supporting affidavit the first respondent sought to explain why the rule 16A(1) notice was not filed and, in the main, the following was averred:

“5. In the entire process it was overlooked that there was no similar notice in terms of Rule 16A filed in the current case. It was only when the applicant filed its heads of argument that we were reminded that no notice was filed in terms of Rule 16A.

6. At the time we were advised that due to the fact that there are many points in *limine* raised by the applicant as well as by the first respondent for the trial in February that a filing of the Rule 16A notice would be interpreted as being opportunistic and aim to derail the proceedings as it would necessitate a postponement.

7. We were also advised that the issue might well be overtaken by any of the other points in *limine* and it was decided to deal with the points *in limine* in front of the Court and if the Rule 16A notice was the last remaining issue we would seek a postponement at that time.

8. After the hearing in February the impression was that the applicant is not continuing with the said issue and that the matter will proceed on the merits on 15 April 2013.

9. This explanation given but does not distract (sic) from the fact that the first respondent should have filed the said notice when it raised the constitutional issue in June 2012. The first respondent is therefore solely to blame for the non-compliance of the said rule.

10. It is however a rule that grants the public at large a right and therefore the compliance with the rule is paramount above the interest of the litigating parties at this time in place.

11. Any inconvenience suffered by the applicant may be cured with the appropriate costs order that is brought about by this application for condonation and late filing and the inevitable postponement of the matter to allow for the time period to lapse.

12. If no *amicus curiae* is forthcoming in the period then there would be minimal wasted costs in this matter.

13. It is therefore appropriate that the rights of the public at large to participate in constitutional matters in which they may have an interest supersedes any possible interest of the two litigating parties in front of the Court and that the application for the condonation for the late filing be granted."

[40] Mr *Van Niekerk* submitted that the first respondent's condonation application was too late and also fatally defective. He contended that rule 16A(1) clearly stipulated that the notice must be filed "at the time of filing the relevant affidavit or pleading" and that the present case had gone so far as to be about 90 per cent complete.

[41] On the merits of the condonation application, Mr *Van Niekerk* argued that it was trite that a condonation application should set out complete reasons of why the rule was not complied with and why condonation should be granted. By not doing this, the application was defective and should not be entertained. In the present instance there had been a complete failure on the part of the first respondent to provide an explanation for the delay. The averments in the affidavit were also either wrong or dishonest. For instance, in paragraph 5 of the affidavit, deponent alleged that the issue of the rule 16A(1) notice was overlooked and that the first respondent was reminded about it when applicant filed its heads of argument. This was not true because the issue had been raised in the applicant's replying/answering affidavit. Further, in paragraph 8, the deponent stated that the impression was that the applicant would not continue with the issue. This was another untruth, as the transcript of February proceedings (at page 7) showed that the issue was once again raised. Mr *Van Niekerk* then submitted that the application should be dismissed with costs on an attorney and client scale given that the application was brought this late, with this content and mistruths.

[42] In his reply in the main application Mr *Van Niekerk* dealt only with the two preliminary issues, namely, the first respondent's non-compliance with rule 16A(1) and the introduction of new constitutional matters in the first respondent's heads of argument.

[43] As regards rule 16A(1), Mr *Van Niekerk* pointed out that the words "at the time of filing" clearly indicated that when the first pleading was filed notice must be given simultaneously. The fact that the rule referred to the word 'shall' meant that the provisions thereof were peremptory. On the second issue he submitted that the applicant's heads of argument set out and contrasted the first respondent's case as initially pleaded and then later as developed in its heads of argument. He pointed out that the test in that regard was formulated in *Prince v President, Cape Law Society*²⁰ which clearly set out what must be done and what must not be done.

[44] The first respondent conceded, in its supporting affidavit, that the rule 16A(1) notice ought to have been filed by it "when it raised the constitutional issue in June 2012"²¹. However, for no apparent valid and just cause the first respondent elected not to comply with the rule. The purported explanation tendered in support of the condonation application is, in my view, generally either factually incorrect or not bona fide. It was factually untrue that the first respondent was only reminded about the notice when the applicant filed its heads of argument. As clearly indicated earlier, the issue of non-compliance with the rule was initially brought to the first respondent's attention in the applicant's answering/replying affidavit,²² which was served on the first respondent on or about 17 July 2012. This was long before the applicant filed its heads of argument²³ on 18 February 2013 and which would have been served on the first respondent on or about the same date.

[45] It is not clear on what basis the first respondent could have been "advised that due to the fact that there are many points *in limine* raised by the applicant as well as by the first respondent for the trial in February that a filing of the rule 16A notice

²⁰ *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) para 22.

²¹ See para 9 of the first respondent's affidavit in support of its application for condonation of late filing of the Rule 16A notice..

²² See para 11 of the applicant's answering/replying affidavit, at p117 of the indexed papers.

²³ The applicant's heads of argument dated 14 February 2013.

would be interpreted as being opportunistic and aim to derail the proceedings as it would necessitate a postponement” because the issue of non-compliance with rule 16A had always remained live since the time it was first raised by the applicant in its answering/replying affidavit. There was never any indication of the applicant abandoning it at any stage. It seems to me that the apparent ‘back door’ method which the first respondent now seeks to employ in order to avoid potentially adverse consequences of its obvious deliberate failure to comply with rule 16A(1) is what could justifiably, in the first respondent’s own words, “be interpreted as being opportunistic and aim(ing) to derail the proceedings.”

[46] Indeed, it is also unclear on what basis the first respondent alleged that “[a]fter the hearing in February the impression was that the applicant is not continuing with the said issue and that the matter will proceed on the merits on 15 April 2013”. As to who and how that impression was created in the mind of the first respondent or its legal representatives is difficult to figure out. As illustrated earlier, on 27 February 2013 Mr *Van Niekerk* made it clear that this was a live issue and he went on to address the Court at length on the issue²⁴.

[47] The first respondent is correct when it concedes that it is “solely to blame for the non-compliance of the rule” and, equally, it should blame no-one else but solely itself about the adverse consequences of its deliberate and flagrant failure to comply with the said Rule. If the first respondent was aware that compliance with rule 16A(1) was “paramount above the interest of the litigating parties”, which the first respondent clearly was, then the first respondent ought to have conducted itself in accordance with that awareness by complying with the Rule at the appropriate time.

[48] Indeed, I am satisfied that the explanation proffered by the first respondent for its failure to comply with rule 16A(1) is neither valid nor bona fide. In my view, the first respondent has dismally failed to furnish a valid, bona fide and justifiable reason why non-compliance should be condoned. In fact, it would not be completely incorrect to say that there was virtually no explanation at all for the non-

²⁴ See Transcript of court proceedings for 27 February 2013 at p 7.

compliance, an observation borne out by Mr *Krog's* initial, and apparently sincere, response that he could not give an explanation why the Rule was not complied with.

[49] I am also satisfied, on the facts of this case, that the first respondent, for reasons better known to itself, deliberately, intentionally and defiantly decided not to comply with rule 16A(1). The subsequent partly mutually contradictory and partly factually inaccurate so-called explanation contained in Dwarikapersadh's supporting affidavit is, in my view, only an afterthought on the part of the first respondent; and therefore its rejection is totally justifiable.

[50] As pointed out earlier, when a failure to comply with the rules has been flagrant and gross, which it certainly was in this case, condonation should not be granted, regardless of the prospects of success on the merits of the party seeking condonation.²⁵ There is thus no need to determine the question of the first respondent's prospects of success on the merits.

[51] Clearly, granting condonation which would necessitate a further postponement would not be without prejudice to the applicant which is, after all, entitled to finality in the matter. I bear in mind that the applicant lodged this application on 8 March 2012 – already over a year ago. As stated earlier, the order the applicant seeks is one, amongst others, directing the first and second respondents “to remove forthwith the advertising sign ...”. (my emphasis). It is clear, therefore, from the nature of the relief sought, that the applicant had anticipated a degree of urgency in the adjudication of the dispute. The Court is enjoined to show fairness to both parties. In the circumstances, I am not satisfied that the first respondent has made out a case for condonation that it seeks. The application for condonation must, therefore, fail.

[52] The next question is what effect or impact my refusal to grant condonation should have on the first respondent's case. I reiterate, by the nature of its peremptoriness, alluded to earlier, rule 16A is certainly a very important provision

²⁵ *Darries v Sheriff, Magistrates' Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 41D.

which parties contemplating to raise any constitutional challenge ought to be warned not to pay lip service to. It seems to me that in an appropriate case where a party has deliberately, grossly or flagrantly flouted the rule, the consequence may well be the dismissal of the application/action or the defence concerned, as the case may be. Such should be the consequence here. The facts of this case are completely distinguished from those in *Phillips*, above, where the notice was delivered to the registrar by the appellant but the registrar omitted to post it on the notice board in terms of the rule, hence in that case the matter was postponed to enable compliance with the rule. In this case the first respondent cannot reasonably and justifiably expect the same indulgence.

[53] Given my finding above, it becomes unnecessary to deal with the further preliminary issue raised on behalf of the applicant, namely, the allegation that the first respondent's supplementary heads of argument introduced material issues which were completely different from those raised in the first respondent's pleadings. Equally so, it also becomes unnecessary to enter the merits of the dispute which, after all, Mr *Van Niekerk* elected, prudently so, not to address me on.

Conclusion

[54] Accordingly, the first respondent's counter application falls to be dismissed. This then leaves me with the applicant's main application, as deemed unchallenged. I am satisfied of the legality, legitimacy and soundness of the application. It, therefore, ought to succeed.

The costs

[55] Mr *Van Niekerk* submitted that in dismissing the counter application the Court should mark its displeasure by awarding costs against the first respondent on the scale as between attorney and client. The SCA intimated in *Phillips*, that it is now settled practice by the Courts to recognise ". . . the possible 'chilling effect' that an award of costs may have on litigants wishing to vindicate their constitutional rights, where the litigation in question is not frivolous or vexatious."²⁶ Hence, ". . . the general

²⁶*Phillips* para 57.

principle applicable in constitutional litigation (is) that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs.”²⁷ The learned Judge of Appeal added that “. . . this principle does not only apply to orders on the merits in constitutional cases but also to what may be described as ancillary points.”²⁸ However, a distinction should be made in cases, such as the present, where the constitutional litigation is commercial in nature and the losing party is, after all, making money out of the commercial business concerned. In the recent SCA decision of *Independent Outdoor Media (Pty) Ltd and Others v City of Cape Town*²⁹ the Court (per Leach JA) stated as follows³⁰:

“It was argued by the appellants that they were seeking to enforce a constitutional right and that, consequently, even if unsuccessful, they should not pay the City’s costs. However, as counsel for the appellants readily conceded, the fact of the matter is that this litigation is commercial in nature in that the appellants would not have sued had they not been making money out of their advertising (indeed the first appellant’s business is to place on outdoor advertisements). The appellants’ private commercial interests were paramount and, that being so, I see no reason why they should not pay the City’s costs.”

[56] Indeed, whilst the first respondent’s apparent deliberate and somewhat arrogant conduct in its dismal and unashamed handling of the rule 16A issue would ordinarily tend to persuade the Court to seriously consider awarding costs against the first respondent on a punitive basis, I am persuaded to lean in favour of leniency in this regard and to award costs on party and party scale. The applicant shall, therefore, be entitled to costs, which shall include the costs of employment of two counsel for the two days when junior counsel attended, namely, 27 February and 15 April 2013; but not for when she (junior counsel) did not attend, that is, on 19 April 2013.

[57] When Mr Krog withdrew any allegation made, and relief sought, against SANRAL or in relation to the SANRAL Act, any further participation by counsel for

²⁷ Phillips para 56.

²⁸ Phillips para 58.

²⁹ [2013] JOL 30245 SCA

³⁰ *Independent Outdoor Media*, para 37. See also *Rootman v President of RSA* [2006] JOL 17547 (SCA), para 14 cited with approval in *Independent Outdoor Media*.

SANRAL, Mr *Schumann*, became academic and unnecessary. However, Mr *Schumann* submitted that SANRAL was nevertheless entitled to an award of costs against the first respondent for its participation on 27 February 2013. Indeed, when the hearing resumed on 15 April 2013 Mr *Schumann* was no longer present and Mr Krog placed on record that the first respondent was tendering SANRAL's (third respondent's) wasted costs for 27 February 2013.

The order

[58] In the result, I grant the order as follows:

1. The first and second respondents are directed to remove forthwith the advertising sign and supporting structures erected at the property located in the vicinity of the eastern boundary of the N2 freeway between Sea Cow Lake and Riverhorse Valley, at or near the directional markers bearing the details N2-25, 24.25 and N2-25, 24.5 as depicted in annexures "C1"- "C2" and "D1"- "D5" to the founding affidavit of Alisande Grace Bradshaw;
2. In the event of the first and second respondents failing to comply with paragraph 1 above within seven (7) days of the grant of this order, the Sheriff of this Court is authorised and directed to take all such steps as may be necessary, including utilising the services of the applicant or its agents, to give effect to the order;
3. The first and second respondents are interdicted and restrained forthwith from erecting or causing or permitting the erection of any advertising signs within the applicant's area of jurisdiction without the applicant's written permission first having been obtained;
4. The late filing of the applicant's answering/replying affidavit be and is condoned;
5. The first and second respondents, alternatively the first respondent and Ridwaan Mohammed, are directed to pay the costs of this application jointly and severally, the one paying the other to be absolved, such costs to include those incurred consequent upon the execution of the order in paragraph 2 above and the costs of two counsel for the period 27 February 2013 and 15 April 2013 and only for senior counsel on 19 April 2013.

6. The first respondent, by agreement, is directed to pay the costs of the third respondent for 27 February 2013.
7. The first respondent's application for condonation of its late filing of the Rule 16A notice is refused with costs.
8. The first respondent's counter application is refused with costs.

Appearances:

For the applicant	:	Mr G Van Niekerk SC, with him Ms S Mahabeer
Instructed by	:	Naidoo Maharaj, Morningside, Durban
For the first respondent	:	Mr W Krog
Instructed by	:	Maraj Attorneys, Umhlanga, Durban
For the second respondent:		No appearance
For the third respondent	:	Mr P Schumann
Instructed by	:	State Attorney, Durban
Dates of hearing	:	27 February, 15 and 19 April 2013
Date of judgment	:	8 May 2013