IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2016/44430

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES**

3 January 2017 .....

DATE SIGNATURE

In the matter between:

THE CITY OF JOHANNESBURG Applicant

And

FRIEDSHELF 1120 (PTY) LTD Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. On 14 December 2016 The City of Johannesburg served on Friedshelf 1120 Pty) Ltd an urgent application for the issue of a *rule nisi* in the following terms;

a. That the respondent show cause on 28 December 2016 why an interim order should not be made pending a return date to be determined by the court;

   i. ordering the respondent to remove the advertising sign erected on the latter's property;

   ii. interdicting and restraining the respondent from erecting any advertising signs within applicant's jurisdiction without the requisite approval as contemplated by the Municipal's Outdoor Advertising By- laws for the City of Johannesburg's Metropolitan Municipality published under Local Authority Notice 2007 of 18 December 2009 ('*the By-Laws*") and the National Building Regulations and Building Standards Act 103 of 1977 ("*the NBRBS Act*");

   iii. authorising and directing the Sheriff to give effect to the order sought in prayer (a)(i) should the respondent fail to remove the sign and directing that the respondent pay all costs incurred in dismantling and removing the advertising sign from the property;

b. directing that the removal of the advertising sign and the interdictory relief operate as an interim order with immediate effect pending the return date;

c. that the respondent pays the costs on the attorney and own client scale.

2. In terms of the notice of motion the respondent was required to deliver its answering affidavit by 19 December 2016. The answering affidavit was deposed to on 20 December and formally served on 23 December. A replying affidavit was then filed.

THE ISSUES

3. The respondent raised three broad issues. Urgency was challenged. It also contended that the wrong party was sued as it was not the owner of the advertising sign and had no obligation to comply with the By-Laws or the provisions of the NBRBS Act. Finally it submitted that the requirements for an interim interdict had not been satisfied. Among

the factual allegations relied upon was that the sign did not pose a danger or hazard to pedestrians or motorists.

4. During the course of argument the respondent contended that although it was the owner of the property on which the advertising sign had been erected, it had leased the façade of on front wall of the building to DG Tree CC, an entity that constructs and erects advertising signs.

   Since the evidence relied upon was heresay I allowed the respondent to supplement its answering affidavit by introducing the written lease on which it relied and clarifying that it was not responsible for erecting the sign. The respondent took that opportunity to further allege that it has no control whatsoever over the sign and that it considered the position of DG Tree to be no different from any other tenant who rented floor space in its building,

5. The respondent admitted that it was the owner of the property on which the sign was placed and did not dispute that the sign had been illegally erected. It was also common cause that no application had been made to the City for approval to put up the advertising sign. However the respondent's case remained that only the owner of the sign could be sued. It however did not seek to join DG Tree, the identity of which it only disclosed for the first time in its answering affidavit.

URGENCY

6. The respondent argues that the applicant relies for urgency on the ground that the sign poses a danger to pedestrians and traffic, a concern that has now been addressed by a certificate from Mr Benn a structural engineer. The certificate was also produced for the first time as an attachment to the answering affidavit although it purports to have been completed on 12 October 2016[1].

7. This cannot be correct since the inspection report was only purportedly signed by the same person on 13 December 2016[2] .

8. In my view the respondent misconstrues the basis relied on for urgency.

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[1] The relevant part of the standard completion certificate reads: " *Date of completion and final inspection by person appointed"* with provision for the insertion of a date. The date *'12.10.2016'* was inserted in manuscript by Mr Benn the structural engineer.

[2] The date in manuscript and in the same hand is inserted as *'13.12.2016'*

The starting point is that the sign was allegedly erected illegally because the necessary permission required under the By-Law was not sought when it was evident that the structure of the advertising sign extends beyond the exterior wall of the building and projects over the street pavement.

9. The photograph attached to the application shows a scaffold of six upright metal beams bolted at the bottom to the front of the building approximately in line with the first floor window sills. Each beam is approximately two stories high and presumably is constituted of welded components.

   Each vertical pole is linked to the other by two cross beams; one just above the height of the roof overhang and the other at the top of the structure, creating a basic frame. The structure stretches across almost the entire width of the front of the building. There are a number of diagonal cross beams between each section of the frame. In addition there are back stays, appearing to be six in number, from the roof top to near the top of the frame which are intended to supporting the structure from the rear.

10. The fact that an engineer's certificate was produced after the application was instituted cannot assist a party who has not had plans properly approved in circumstances where the municipality continues to express grave concern about the general soundness of the structure and where the certificate itself claims that the "*Hoarding consists of 14.65mx5, .46m in size attached to the front of the .. building*".

    To the naked eye the photographs of the structure indicate that it is much wider than it is taller and its height, judging from the building being a two storey structure itself, cannot be less than 15 metres. Accordingly the height measurement provided by the engineer and the conflicting date of when Benn claims to have certified the structural system pursuant to a purported final inspection is of cold comfort to the court.

11. Moreover the completion certificate signed by Benn purportedly on 12 October 2016 in its terms claims that he was certifying that the structure was in accordance with the "*application in respect of which approval was granted (by The City) in terms of section 7 of the National Building Regulations and Building Standards Act 103 of 1977*", yet it is common cause that no municipal approval had been granted for the structure, let alone the actual advertisement that is now placed over its entire surface area.

12. A final difficulty is that the structure had to comply not only with the broad requirements of the NBRBS Act but also the By-Laws specifically applicable to outdoor advertising signs. The certificate does not address these requirements.

13. Aside from this, in terms of s 6(6) of the By-Laws the height of an advertising sign may not exceed 12m with a clear height of 2.1m unless the Council approves a taller structure when granting the application. Accordingly Benn's certificate cannot substitute the approval which must be given by the Council for a structure of this magnitude and the inherent risk it so obviously creates if not properly constructed to support its own weight in the manner required by the By-Laws or to support a sign board that will be affected by wind pressure from either the front or the rear adding to the dynamic stresses to which the entire structure will be subjected.

14. In terms of s 12 of the By-Laws, special safety requirements must be met in respect of projecting signs. It was for the respondent to present to this court evidence that the sign was not projecting 300mm from the face of the building since the photographs indicate that it does project and that information is pecuniary within its own knowledge or readily ascertainable by it from DG Tree CC.

    Benn fails to give this dimension in his report, which as stated earlier fails to engage the safety requirements of the By-Laws and the maximum permissible dimensions lay down. He cannot substitute his own opinion with regard to these requirements for the safety considerations that the By-Laws require to be determined by the Council. IN short Benn is silent on critical issues which are required to be addressed under the By-Laws with regard to the effectiveness of any braces and stays provided in order to protect the structure once the advertisement is in place from wind pressure and the requirement that two of the brackets must be able to carry the entire structural mass.

15. Accordingly these considerations satisfy me that the applicant remained justified in pursuing the application even after the answering affidavit was filed.

16. There is another consideration on which it is unnecessary to make a final finding. The record shows a deliberate flouting of the by-laws. While it is open for the respondent to argue that it neither erected the sign nor is it the owner, it allowed a scaffold to be erected which protrudes over a pedestrian sidewalk. To any reasonable person, the structure poses a potential source of danger to pedestrians and to motorists (including the consequential risk of motor accidents) unless the authorities were satisfied that that the structure was sound. The memory of scaffolding erected by engineers over the M1

which collapsed and led to the death of a motorist is part of our collective knowledge and experience.

17. The fact that the applicant was provided with some form of a certificate only in response to an application but remains disinterested in ensuring that a proper application is made to the authorities must have consequences where the scaffolding remains illegally erected: There remains a continuing illegal activity with no suggestion that the situation will be remedied within the framework of the By-Laws, with the consequence that the respondent continues to receive revenue illegally and where on a proper reading of the lease between itself and DG Tree CC the structure can only be erected, and therefore it can only receive rental for the use of the space, on condition that approval is granted by the City.

18. The clause in question allows the lessee to waive the condition if approval is not obtained within nine months. This only means that the agreement will not come to an end but its commencement will be delayed (at the discretion of the lessee) until approval is obtained. It does not mean that DG Tree can erect a structure prior to applying for or obtaining municipal authority under the applicable legislation. Until the City has itself considered the application in the interests of all affected persons the actions and failures of those responsible for erecting or permitting the erection of a potentially hazardous structure without approval must have immediate consequences.

19. On the facts before me the court would be turning a blind eye to continuing illegal activity which the authorities have not satisfied themselves is danger free. This would amount to a public policy element that may be a factor that a court can or should take into account in order to act as a deterrent against those who flout the law and potentially place members of the public going about their ordinary daily routine at risk.

20. The matter was therefore urgent.

WRONG PARTY BEFORE THE COURT

21. The applicant relied on two pieces of legislation to support its *prima facie* right to relief.

22. The one is s 4(1) of the NBRBS Act which provides that no person shall erect any building in respect of which the Act requires plans and specifications to be drawn and

submitted unless he has obtained the prior written approval of the local authority in question.

23. Adv Makgate on behalf of The City argued that a building included a structure erected in connection with the display of an advertisement. He relied on subpara (a) (ii) of the definition of *'building'* in section 1 of the Act. The relevant portions of the provision read:

> *" 'building' includes-*
>
> *(a) Any structure, whether of a temporary or permanent nature and irrespective of the materials used in the erection thereof, erected or used for or in connection with-*
>
> *(i) ....*
>
> *(ii) The manufacture, processing, storage, display or sale of any goods;"*

24. It is evident that the subject matter of the subparagraph is goods. It is equally evident that the goods must have a physical attribute to satisfy the mentioned activity that precedes it; at least in relation to manufacture, processing, storage or sale. The only sensible meaning to give the word *'display'* is to interpret by applying the aids conveyed by the maxims *eiusdem generis* and *noscitur a sociis*; i.e., *'terms with a wide meaning may be restricted by terms with a narrower meaning with which they are connected'* [3]. In my view the intention of the legislature was to concern itself in this subpara of the definition with a physical object not an image, whether of a thing or otherwise.

25. The applicant did not argue that the definition of *'building'* provided for in subparas (b) or (d) was of application. Accordingly the respondent was not asked to deal with them in argument and I am loath to make a finding by reliance on those provisions without having heard argument. This judgment should not be construed as having rejected their application.

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[3] See *Bertie van Zyl (Pty) Ltd and another v Minister for Safety & Security and others* 2010 (2) SA 181 (CC) at para 44 and the cases cited in ftn 47

26. The other legislation relied on was s 3(1) of the Outdoor Advertising By-Law mentioned earlier. It provides:

> *"No person may erect any advertising sign or use or continue to us any advertising sign or any stricture or device as an advertising sign without the prior written approval of the Council: ...."*

27. Adv Erasmus argued on behalf of the respondent that on the facts it did not erect the sign. Moreover he contended that the By-Law draws a clear distinction between the owner of property and the owner of an advertising sign. According to counsel's submission it therefore followed that only the owner of the advertising sign could be held responsible under the By-Laws if there was a failure to obtain the written approval the Council before erecting the sign.

28. Unless s 3(1) is to be construed as covering a person who causes or permits an advertising sign to be erected it appears that the By-Law specifically targets the owner of the advertising sign and not the owner of the property on which the sign is erected.

29. While it might be possible to bring the owner of the building within the criminal sanction provided for in s 38 on the basis of an accessory, sitting during a busy urgent court week of some 20 matters most of which were contested, I did not have the opportunity to research the law before making the order.

30. However in my view the applicant has a prima facie right to enforce legislation that requires its prior approval. The mere fact that it is not the respondent who would have applied, but the owner of the advertising sign, does not militate from the fact that a sign has been erected without the Council's approval and which the City is entitled to have taken down. Moreover only the City can exercise powers to regulate and approve the erection of advertising signs.[4] The By-Law is premised on an application being made for approval. In the present case there has been no application.

31. It is axiomatic therefore that the City has a right which is entitled to protect both expressly and on behalf of its residents.

32. It is our common law that where an activity or a structure located on property causes a nuisance or danger to others then it is the responsibility of the owner to abate the

[4] See also s 156(1) of the Constitution

nuisance or remove the danger irrespective of who on the property may have been responsible. Accordingly the right to which the City is civilly entitled is enforceable against the owner of the property unless it can be said that the By-Law was intended to either alter the common law or was intended to codify the respective rights and duties of the authority, the property owner and the person who owns and erects the sign (if not the owner of the land or building).

33. I can find nothing in the By-Law (including its necessary ancillary powers) to suggest that that there has been an abrogation of the common law duty of a land owner which requires him to take steps to prevent illegal activities on his property or to dismantle a structure that poses a danger to neighbours or members of the public who are beyond the perimeter walls. Accordingly, even if the NBRBS Act does not provide a general obligation on land owners to ensure compliance with any By-Laws the common law remains operative.

34. The fact that the point had not been raised by the applicant does not preclude this court from applying *mero motu* the common law since the point of law is apparent from the papers and is not based on a specific statutory provision. See *Cusa v To Ying Metal Industries and others* 2009(2) SA 204 (CC) at para 68.

35. I was also fortunate to find the case of *Kwanobhule Town Council v Andries and others* 1988 (2) SA 796 (SE) where Kroon J applied the *ratio* of *Coetzee v Fick and another* 1926 TPD 213 in a case concerning whether civil remedies had been excluded by the relevant legislation. The learned judge held that it did not.

36. In *Coetzee* the Full Court held at 216 that:

> ""*We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under statute, that other remedies are necessarily excluded."*

This case was approved by the Appellate Division in *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) at 135F.

37. Interestingly, in *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 (2) SA 733 (C) the court interdicted both the person who erected the sign and the registered owner of the property. The issue before me however was not raised and it cannot be ascertained from the law report whether the legislation is similarly worded.

38. The consequences to the orderly enforcement of By-Laws if civil remedies were excluded are apparent from the facts of this case. Unless the owner of the advertising sign actually applies for approval, the City has no way of knowing who is erecting the sign or if it is separately owned.

    When a desist notice was served on the respondent it replied through its attorneys that it did not erect the sign and is not the owner of the sign. The respondent however withheld the owner's name.

39. It could never have been in the contemplation of the legislature that the Council could be at the mercy of the landowner and be remediless in the face of a mute property owner while an advertising sign is erected. In the present case the structure is a basic frame with stays and braces with no indication that it was owned or erected on behalf of anyone other than the respondent.

40. In my view the civil remedies available against a property owner who permits ongoing illegal activity and on whose property there is a potentially dangerous structure are interdictory relief and the removal of the structure provided no Council approval has been obtained.

NON-JOINDER

41. I invited the applicant to consider joining DG Tree CC. It elected not to.

42. That does not preclude a court from itself declining to hear an aspect of a case where it is necessary to safeguard the rights of a party not before the court until that party is joined. Accordingly even where it is necessary to join a party(as opposed to joinder as a matter of convenience) an application will not be fatally flawed for want of joinder. Again I was fortunate to come across in the limited time available the case of *Rosebank Mall (Pty) Ltd and another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W), a Full Court decision delivered by Cilliers AJ. I consider it to be directly in point and have fashioned the present order around the one granted in that case.

43. In the present case DG Tree is the owner of the scaffolding. It has a direct interest in the removal of the structure. See generally *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA).

44. Insofar as interdict is concerned, DG Tree does not have a direct interest unless it had actually applied for approval. It did not. It is therefore in no better position than a tenant where action is taken by a third party against the landowner.

45. In this case DG Tree failed to apply for approval at all. It continued with the erection despite the rickety appearance if its structure and without approval of appropriately qualified and designated authority.

46. DG Tree also erected the structure despite the lease clearly requiring that approval be first obtained before the lease could become effective. For this reason too DG Tree has no interest in the interdict. As a matter of law the lease agreement has not come into existence.

47. However insofar as removal or the demolition of the structure is concerned, DG Tree is the owner. It would amount to expropriation if it were dismantled and removed without giving DG Tree an opportunity to be heard.

48. On reconsideration I gave DG Tree too long a time within which to respond considering the potential danger the structure poses. At the time I made the order I had not yet considered the certificate in any detail or correlated it to the pictures of the scaffolding or the requirements of the By-Laws in relation to maximum dimensions or where they are projecting since these were not brought to my attention, although I believe that both sets of legal should have been more thorough and have done so.

ORDER

49. These constitute the reasons for granting the following order on 30 December 2016:

1. *Pending the outcome of the orders set out in paragraph 4 hereof and provided the applicant effects the joinder referred to in paragraph 3 below by no later than 8 January 2017 the respondent is restrained from permitting to be erected or utilised*

any advertising sign within the applicant's jurisdiction without the requisite approval as contemplated by the Municipal Outdoor Advertising By-Laws of the City of Johannesburg Metropolitan Municipality published under Local Authority Notice 2007 dates 18 December 2009 ("the By-laws)

2. *The applicant is given leave, provided it does so by no later than 8 January 2017, to effect the joinder in this application of DG Tree CC, being the lessee of a portion of the façade of the respondent's building, and supplementing its application accordingly, to seek the orders set out in prayers 4.1 and 4.2 hereof. Service may be effected at its registered office.*

3. *On condition that joinder is effected by 8 January 2017 the respondent and DG Tree CC are to show cause on Friday 27 January 2017 before Spilg J why;*

    4.1. The advertising sign erected on the property, erf 2784 Braamfontein, Johannesburg should not be removed forthwith

    4.2 In the event of a failure to comply with prayer 4.1 within 5 days that the Sheriff be authorised and directed to take all necessary steps to remove the advertising sign and that the respondent and/or DG Tree CC pay all reasonable costs incurred in dismantling and removing the said advertising sign from the property

4. *This order and the reasons for the decision (which will be handed down on Tuesday 3 January 2017 at 10am) are to be served on DG Tree CC.*

5. *The costs of the hearing on 28, 29 and 30 December 2016, which affect only the applicant and respondent, are reserved.*

SPILG J

DATES OF HEARING:	28, 29 and 30 December 2016
DATE OF ORDER:	30 December 2016
DATE OF JUDGMENT:	3 January 2017

FOR APPLICANT:	Adv T Makgate
	Prince Mudau & Associates
FOR RESPONDENT:	Adv C Erasmus
	Kuilman Mundell & Arlow