



IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: AR26/11

In the matter between:

THE BODY CORPORATE OF THE SCHEME
VAN DER STEL

First Appellant

WIDEOPEN PLATFORM (PTY) LTD

Second Appellant

and

ETHEKWINI MUNICIPALITY

Respondent

JUDGMENT

SEEGOBIN J

[1] This is an appeal with leave of the court *a quo* (K Pillay J) against the whole of her judgment delivered on 4 June 2010.

[2] The primary relief that was applied for and granted to the respondent in the court *a quo* was an interdict directing the appellants to remove an advertising billboard and supporting structures at 15 Gillespie Street, Durban. The appellants were also restrained from erecting any signage, sky sign or billboard in contravention of any by-law on the said property without first having made

proper application to the respondent for permission to do so and obtaining the grant of such permission from the respondent.

[3] The principal issue for determination before the court *a quo* was the correct interpretation and application of the provisions of section 29 of the National Building Regulations and Building Standards Act No.103 of 1977 (“the NBR”).

[4] There is no dispute on the following matters: In terms of section 156(1)(a) read with Schedule 5, Part B of the Constitution of the Republic of South Africa, 1996, and the Local Authorities Ordinance No.25 of 1974 (“the Ordinance”), the respondent is empowered to make and administer bylaws relating to advertising in public areas. The respondent has promulgated bylaws for the regulation and control of outdoor advertising undertaken in its area of jurisdiction.¹ The respondent’s by-laws require that its written permission be obtained prior to any advertising signs being erected and displayed.² The property where the sign was erected and displayed falls within the respondent’s area of jurisdiction. The first appellant is the owner of the property where the sign was erected, while the second appellant was responsible for erecting and displaying the disputed sign. The sign in question was constructed of a canvas type material attached to a steel frame fixed to the wall of the building. The sign covered more than seventy five percent (75%) of the west facing wall of the building. The respondent’s by-laws³ prohibit the display or erection of signs which obstruct, *inter alia*, any street fire escape, exit way or any window or door or other opening used as a means of egress from the premises or for ventilation or for fire-fighting purposes. The advertising sign and supporting structure were positioned in a manner that obstructed windows. The advertising sign and supporting structure were erected

1 Chapter IV of the respondent’s Building Bylaws constitutes the Advertising Bylaws and is headed: “Advertising Signs”.

2 Section 2 of Chapter IV states: “2 **Advertisements and signs for which approval is required:** 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.

3 Section 11(1)(C) of the By-Laws

and displayed without the respondent's prior written permission. By the time the application was finalised in January 2010, the advertising sign and supporting structure remained in place.

[5] The appellants' challenge to the respondent's authority concerning its bylaws is based on an argument that Chapter IV of the Building Bylaws which constitutes the Advertising Bylaws was repealed by the NBR. The alternative argument relied on by the appellants is that the 2010 FIFA Bylaws do not apply to the property where the unauthorized sign is displayed because the place where the sign is located is not in a "*place owned, leased, administered by or under the control of*" the respondent. In sub-para 18.3.2 of their heads of argument the appellants claim, for the first time, on infringement of a so-called "*constitutional right to advertise*". No such challenge was made in the court *a quo* and there is no reason why such a challenge should be entertained on appeal.

[6] The purpose of the NBR is contained in the preamble thereto and reads:

"To provide for the promotion of uniformity in the law relating to the erection of building in the areas of jurisdiction of local authorities; for the prescribing of building standards; and for matters connected therewith".

[7] Section 29 of the NBR provides for Repeal of Laws as follows:

- "1) Subject to the provisions of section 31 the provisions of any law applicable to any local authority are hereby repealed insofar as they confer a power to make building regulations or bylaws regarding any matter provided for in this Act: Provided that such provisions shall be deemed not to have been repealed in respect of –
- a) any such building regulation or bylaw which has not been replaced by or which is not repugnant to any national building regulation;
 - b) the area of jurisdiction, or any part thereof, of any local authority

insofar as it has in terms of section 2(2) been exempted from the application of any national building regulation, irrespective of whether such area of jurisdiction or part was exempted after the commencement of such national building regulation.

- 2) A local authority shall within six months after the coming into operation of the National Building Regulations and Building Standards Amendment Act, 1989, submit any building regulation or bylaw referred to in paragraph (a) of sub-section (1), and any standard building regulation referred to in the proviso to section 31, which is applied by the local authority by reason thereof that it is considered that the regulation or bylaw, or standard building regulation has not lapsed by virtue of sub-section (1) or section 31 as the case may be, in consolidated form in both official texts to the Minister.”

[8] The purpose of the NBR and the objective sought to be achieved by section 29 must be looked at in conjunction with the law that was applicable when the NBR came into effect. The existing law at the time which empowered the respondent to pass bylaws was the Local Authorities Ordinance referred to above. Section 266 of the Ordinance set out the purposes for which bylaws could be made, section 267 provided for general provisions which may be included in bylaws while section 268 set out the procedure for the promulgation of bylaws which in terms of section 268(5) would gain the force of law on promulgation in the Gazette. The power conferred on the respondent to make advertising bylaws were contained in section 266(1)(a) of the Ordinance. The power to make “*building regulations or bylaws*” was contained in section 266(1)(d). There is no dispute raised about these bylaws having been duly and properly promulgated and that they have the force of law.

[9] The appellants’ argument that the bylaws have been repealed by section 29

of the NBR is, in my view, unsustainable for the following reasons. In terms of section 29(1) of the NBR, the provisions of any law applicable to any local authority are repealed “*insofar as they confer a power to make building regulations or bylaws regarding any matter provided for in this Act*”. It seems that the repeal was aimed at the empowering legislation and not the bylaws. The power to repeal in section 29(1) is subject to the proviso that such provisions in the empowering legislation will be deemed not to have been repealed “*in respect of*”, *inter alia*:

“any such building regulation or bylaw which has not been replaced by or which is not repugnant to any National Building Regulation.”

[10] Bearing in mind that section 266(1)(d) of the Ordinance dealt with the power to make “*building regulations or bylaws*”, it seems that the target of the NBR was this section, namely, section 266(1)(d) and not section 266(1)(a) which deals with advertising bylaws.

[11] Even if one were to assume that section 29 of the NBR can be read to be of application to the advertising bylaws, the appellants were unable to identify any provision in those bylaws which does not satisfy one of the two alternative requirements, that is, either :

- a) replaced by; or
- b) repugnant to a National Building Regulation.

[12] At the hearing of the appeal on 8 August 2011, Mr *Jeffreys SC* who, together with Mr *Bingham*, appeared on behalf of the appellants, quite fairly and correctly, in my view, conceded that there was nothing in the provisions of section 29 which were aimed at the respondent’s advertising bylaws. It follows therefore that the appeal must fail. In light of this the appellants’ alternative argument relating to the respondents powers in terms of the 2010 FIFA World Cup falls by the way-side.

[13] I accordingly make the following order:

The appeal is dismissed with costs.

Balton J

Gorven J