THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 55/11
Reportable

In the matter between:

CITY OF JOHANNESBURG	**First Appellant**
CITY MANAGER OF THE CITY OF JOHANNESBURG	**Second Appellant**

and

AD OUTPOST (PTY) LTD	**Respondent**

Neutral citation: *City of Johannesburg v Ad Outpost* (55/11) [2012] ZASCA 40 (29 March 2012)

Coram: Farlam, Van Heerden, Mhlantla and Leach JJA and Ndita AJA

Heard: 27 February 2012

Delivered: 29 March 2012

Summary: Applicant applying under by-laws for permission to advertise alongside highways ─ application wrongly refused but by-laws repealed and fresh by-laws promulgated ─ application to be reconsidered under new by-laws

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ORDER

On appeal from: South Gauteng High Court, Johannesburg (Matlapeng AJ sitting as court of first instance):

1. The appeal succeeds with costs, such costs to include the costs of two counsel.
2. The order of the high court is set aside and is substituted with the following:

'(a) The decisions taken by the first respondent, the City of Johannesburg, on 29 August 2007, to refuse the applicant's applications for approval of the two outdoor advertising billboards known as the Sandown billboard and the Kelvin View billboard, as well as the decisions by the third respondent, the city manager, to dismiss the applicant's appeals against the aforementioned decisions of the first respondent, are reviewed and set aside.

(b) The applicant is to pay the respondents' costs, such costs to include the costs of two counsel.'

JUDGMENT

LEACH JA (FARLAM, VAN HEERDEN AND MHLANTLA JJA AND NDITA AJA concurring)

[1] As its name suggests, the respondent, Ad Outpost (Pty) Limited, is a company carrying on business in the advertising industry. At the heart of the present dispute are two billboards situated alongside roadways in Gauteng which the respondent has used in the course of its business for more than ten years. As is more fully set out below, the original authority which the respondent was granted in 2001 lapsed in the fullness of time, and led to the respondent applying to the City of Johannesburg (the first appellant) for a renewal of permission to use the billboards for a further five years. Its application was refused and an appeal to the City

Manager (the second appellant, but the third respondent in the high court) brought under the relevant by-law, was similarly dismissed.

[2] Disenchanted by this, the respondent proceeded to apply to the South Gauteng High Court for an order reviewing and setting aside the decisions of both appellants and seeking, in their stead, the court's authority to use the billboards in question for a period of five years. The high court granted relief in those terms, its permission being antedated to 29 August 2007, being the date when the first appellant had refused permission. With leave of the high court, the appellants now appeal against that order

[3] The billboards in question, referred to in the papers as the 'Sandown billboard' and the 'Kelvin View billboard', are both situated in the immediate vicinity of major public motorways in greater Johannesburg. The Sandown billboard is a 7.5m x 5m single-sided billboard located near an overhead traffic sign on Grayston Drive which gives warning of a nearby off-ramp leading to Katherine Street. The Kelvin View billboard, a 4.5m x 18m double-sided billboard with an overall height of 17m, is situated to the east of the M1 South Highway, near what is known as the Marlboro off-ramp. In 2001 the respondent applied for the necessary approval to use both billboards under the relevant by-laws in force at the time[1] (which I intend for convenience merely to refer to as 'the 1999 by-laws'), clause 39(3)(d) of which provided that:

'Billboards will not be permitted within specified distances of on and off-ramps of motorways and overhead traffic directional signs – see Figure 2 . . . except where a curve in the road renders the billboard not to interfere with a clear and undistracted view of the directional traffic sign.'

[4] Figure 2 referred to in this section contained a diagrammatic illustration of both an off-ramp and an on-ramp and the situation of a so-called 'prohibited area' immediately adjacent thereto, as well as an illustration of a prohibited area adjacent to an overhead traffic sign. It is common cause that the two billboards in question stand within prohibited areas as so determined and in which billboards were not to

[1] The Eastern Metropolitan Local Council Advertising Signs And Hoardings By-Laws 1999.

be permitted, subject of course to the exception envisaged by clause 39(3)(d). From the photographs of the billboards in question included in the papers, they appear unlikely to interfere with a clear and undistracted view of any directional traffic signs and, presumably due to this, the respondent's applications were granted: on 4 May 2001 in regard to the Sandown billboard and on 22 August 2001 in regard to the Kelvin View billboard.

[5] In both instances the approval was granted for a period of three years with further approval to be renegotiated three months prior to expiry of that period. No extension was ever negotiated and the authority to use the billboards therefore lapsed in 2004. This notwithstanding, the respondent continued to use both billboards without objection from the appellants until 13 November 2006 when the first appellant eventually wrote to the respondent about the Kelvin View billboard. It drew attention to the lapse of the original authority and stated that, as the billboard lacked the necessary approval, it should be removed within 21 days – although it went on to advise that if the respondent wished to 'legalise' the billboard it should submit a new application for consideration. Subsequently, on 29 November 2006, the first appellant addressed a letter in similar terms to the respondent in regard to the Sandown billboard. Consequently, in March 2007, the respondent applied to the first appellant for permission to use the billboards for advertising purposes for a period of five years. The application for each application was marked as being an application for a 'renewal' and indicated that the billboard was 'existing'. I shall refer to them as the 'renewal applications'.

[6] By this time, the 1999 by-laws had been repealed and replaced by the Advertising Signs And Hoardings By-laws[2] which came into effect on 1 December 2001 ('the 2001 by-laws'). Similar to clause 39(3)(d) of the 1999 by-laws, but couched in more permissive terms, clause 24(6)(d) of the 2001 by-laws contained the following safety condition :

'Prohibited areas on motorways –

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[2] Published in GN 7170 of 2001 in Gauteng *Provincial Gazette Extraordinary* 234 of 28 November 2001.

Billboards may be permitted within specified distances of on- and off-ramps of motorways and overhead traffic directional signs where a curve in the road renders the billboard not to interfere with a clear and undistracted view of the directional traffic sign.'

[7] Of course, this implies that billboards would not be permitted within specified distances of ramps and signs if they interfered with a 'clear and undistracted' view of the directional traffic signs. But despite the reference to 'specified distances' in the clause set out above, there appears to have been a lacuna in the by-laws as, in contradistinction to those of 1999, they neither prescribed any such specified distances nor defined any prohibited areas – and in this regard there was no diagram similar to figure 2 of the 1999 by-laws defining prohibited areas at on and off-ramps and near overhead signs. However the first appellant still enjoyed a discretion to approve the use of the billboards for advertising[3] and, in considering whether to do so, was enjoined to take into account, inter-alia, whether a billboard 'will in any way impair the visibility of any road traffic sign or affect the safety of motorists or pedestrians'.[4]

[8] After having lodged its renewal applications in March 2007, correspondence passed between the respondent and the first appellant which culminated in the first appellant writing to the respondent on 3 September 2007, informing it that both applications had been refused. The reason given for the decision in each case was that under 'the safety standards set by the Johannesburg Roads Agency in terms of clause 24(6)(d) of the [2001 by-laws], signs should be at least 200m away from an overhead traffic sign.'

[9] Aggrieved by this the respondent, relying on a provision in the 2001 by-laws, appealed to the second appellant contending, in particular, that the by-laws neither contained a 200m prohibition nor empowered the Johannesburg Roads Agency to prescribe conditions for the approval of billboards. However, on 31 March 2008, the respondent received a letter[5] from the second appellant dismissing the appeals on the ground that:

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[3] Clause 2(7) as read with clause 41 of the 2001 by-laws.
[4] Clause 2(6)(a)(vi) of the 2001 by-laws.
[5] Dated 21 January 2008.

'The Johannesburg Roads Agency as the custodians of road traffic safety in Johannesburg has determined certain areas close to overhead traffic signs as restricted areas for the purposes of traffic safety. No advertising signs are permitted within such restricted areas. Your proposed application is within such restricted area. See also section 24(6)(d) of the said by-laws. This traffic safety precaution has been consistently applied by the City.'

[10] Unhappy that the second appellant had also taken into account considerations which it felt were irrelevant and improper, the respondent applied to the high court to review and set aside the decisions of both the first and second appellants. As both those decisions had been predicated upon an erroneous view that the billboards in question were located in 'prohibited areas' as envisaged by the 2001 by-laws and that there was an absolute prohibition which precluded any discretion to grant permission for advertising signs in those areas, the appellants correctly conceded in their answering affidavits that their decisions had not been validly taken. But by the time the review was launched in September 2008, the 2001 by-laws had been repealed and replaced by the Outdoor Advertising By-laws[6] which came into operation on 1 July 2008 ('the 2008 by-laws'). These once more prescribed prohibited areas at on and off-ramps and overhead traffic signs, and re-introduced a diagrammatic illustration thereof in schedule 2. This was essentially the same as figure 2 in the 1999 by-laws. As the respondent's billboards are situated within prohibited areas as so defined, the appellants adopted the standpoint that to set their decisions aside and to ask them to reconsider the renewal applications would be a meaningless exercise, arguing that the 2008 by-laws contained an absolute prohibition against advertising in prohibited areas which precluded the respondent from being granted the permission it sought. The respondent, on the other hand, argued that its applications would have to be reconsidered not under the 2008 by-laws but those of 2001, under which the permission it sought could be granted.

[11] The high court rejected the appellant's argument, holding that the 2001 by-laws would apply to a reconsideration of the respondent's applications. As the appellants had neither suggested that the billboards contravened clause 24(6)(d) of

[6] Promulgated in the Gauteng *Provincial Gazette Extraordinary* 150 of 13 June 2008.

the 2001 by-laws[7] nor alleged that the billboards in any way interfered with traffic or been the subject of any complaint, and in the light of its further conclusion that the appellants had acted incompetently in assessing the respondent's applications, the high court decided not to refer the matter back for reconsideration by the appellants as it felt that to do so would cause the respondent to suffer 'unjustifiable prejudice'. It therefore set aside the decisions of both appellants and replaced them with its own decision granting the respondent permission to use the billboards for five years, ante-dating that authority as mentioned at the outset.

[12] In this court, the appellants conceded that in order to give effect to the principle of legality their invalid decisions should be set aside. However, as in the high court, the principal issue argued was whether in that event the respondent's applications would fall to be reconsidered under the 2001 or 2008 by-laws. In the alternative, counsel for the respondent argued that even if the 2008 by-laws were applicable, the prohibition they contained against advertising in prohibited areas was not absolute and the appellants could still grant the requisite permission. However, at the close of argument it transpired that in fact the 2008 by-laws had been repealed on 18 December 2009 when a fresh set of by-laws ('the 2009 by-laws')[8] were published by the second appellant under s 13(a) of the Local Government: Municipal Systems Act 32 of 2000. This had occurred even before the respondent had filed its replying affidavit in the high court, and the 2008 by-laws are therefore wholly irrelevant to the issues debated both in the high court as well as this court. This is a lamentable state of affairs which made it necessary for this court to afford the parties the opportunity to file written argument after the hearing dealing with the 2009 by-laws.

[13] In her subsequent written argument, counsel for the respondents submitted that, for the reasons she had advanced in respect of the 2008 by-laws, the first appellant had still retained a residual discretion to allow advertising signs in prohibited areas. This was founded on the provisions of clause 4 of the 2009 by-laws

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[7] Quoted in para 6 above.

[8] The City of Johannesburg: Outdoor Advertising By-Laws published in Gauteng *Provincial Gazette Extraordinary* 277 of 18 December 2009.

which, so the argument went, provide an over-arching discretion to the first appellant to grant the permission sought. Inter alia, that clause provides :

‘ 4 (1) In considering an application submitted in terms of section 3(3), the Council must, in addition to any other relevant factor, legislation, policy and by-laws of the Council, have due regard to the following:

(a) . . . .

(b) Whether the proposed advertising sign will ─

(i) . . . .

(ii) constitute a danger to any person or property or to motorists or pedestrians or obstruct vehicular or pedestrian traffic;

(iii) in any way impair the visibility of any road traffic sign’.

[14] However, the 2009 by-laws also contain a prohibition against advertising signs near on- and off-ramps and overhead traffic signs on freeways and major highways. These are diagrammatically illustrated in schedule 2, which is identical to the corresponding schedule to the 2008 by-laws. Relating thereto, clause 6(2) provides:

‘Any advertising sign on a public street or facing a public street, including advertising signs facing a Provincial Road, must comply with the following requirements:

(a) . . . .

(b) no advertising sign may be located inside a prohibited area at any on- and off-ramp of a motorway, whether local, provincial or national and in relation to overhead road traffic signs, as depicted in Figure 1 of Schedule 2.’

[15] The prohibition in clause 6(2), as read with schedule 2, is then incorporated by reference into clause 9 which details a number of instances ‘(i)n addition to any other prohibition . . . in these By-laws’ in which ‘no person may erect, maintain or display any advertising sign’. As clause 3(6)(b) goes on to provide in peremptory terms that the first appellant ‘must refuse to accept an application’ which relates to an advertising sign prohibited by clause 9, the by-laws clearly fall to be interpreted as

providing an absolute prohibition against advertising signs falling within prohibited areas in schedule 2, and the discretion provided by clause 4 (accepting for present purposes that there is one) can only relate to applications which the first appellant can accept ie those not prohibited by clause 9. As it is common cause that the respondent's renewal applications relate to billboards that are in prohibited areas which are referred to by reference in clause 9, if the 2009 by-laws are applicable to the reconsideration of the renewal applications, the first appellant has no discretion to grant the approval the respondent seeks.

[16] Consequently the cardinal issue to consider is the respondent's contention that the 2001 by-laws would be applicable to a reconsideration of its renewal applications. The immediate difficulty that I have with this argument is to be found in the terms of the subsequent by-laws. Clause 39(3) of the 2008 by-laws provided for any application brought under the repealed 2001 by-laws that was 'pending' before the first appellant at the date of the commencement of the 2008 by-laws to be dealt with in terms of the latter by-laws. Similarly, clause 39(3) of the 2009 by-laws provides that any application brought under the terms of the 2008 by-laws 'pending before the (first appellant) at the date of commencement of these By-laws must be dealt with in terms of these By-laws'.

[17] Both in the court a quo, and initially in this court, the parties accepted that the respondent's renewal applications had finally come to an end on 31 March 2008 when the second appellant dismissed the respondent's appeals. They therefore further accepted that the renewal applications could not be construed as 'pending' when the 2008 by-laws commenced on 1 July 2008 (and nor, for that matter, when the 2009 by-laws commenced on 18 December 2009). In their further written argument submitted after the appeal had been heard, the appellants retreated from this position to argue that the effect of the high court setting aside their invalid actions on 13 October 2010 was retrospectively to visit those decisions with nullity; with the result that the first appellant must be considered as not having taken any decision on the renewal applications before the 2009 by-laws commenced, and that such applications were therefore 'pending' at that time.

[18] As was correctly observed in *Noah*,[9] precisely when a matter may be said to be 'pending' is an issue that has to be determined in the context in which the word is used. However, the general meaning of the word is 'awaiting decision or settlement'[10] and there can be no doubt that, once the respondents had lodged their renewal applications with the first appellant, they were thereafter 'pending' until such time as they had been dealt with. The issue is whether the renewal applications were so pending when the 2009 by-laws came into operation.

[19] Counsel for the respondent correctly pointed out that this court had held in *Oudekraal*[11] that an invalid administrative decision stands and has effect until it is set aside. On the strength of this authority, she argued that as the declaration of invalidity was only made by the high court after the 2009 by-laws had come into operation and, as at that time a final decision had been taken by the appellants which had not yet been set aside, the renewal applications could not be construed as having been pending at that time.

[20] However, as this court has regularly stressed, an administrative decision declared to have been invalid is to be retrospectively regarded as if it had never been made.[12] Accordingly, if the decisions of the appellants are to be set aside, as all parties are agreed should occur, the matter is to be considered on the basis that no valid decisions in respect of the respondent's renewal applications were ever taken. Those applications must therefore still be regarded as still awaiting a decision and, that being so, they are clearly pending ─ and have been since they were lodged in March 2007. They were therefore pending when the 2009 by-laws came into effect and, by reason of clause 39(3) of such by-laws, must be dealt with in terms of those by-laws rather than the 2001 by-laws.

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[9] *Noah v Union National South British Insurance Co Ltd* 1979 (1) SA 330 (T) at 332B-333C.
[10] *Concise Oxford English Dictionary* 12 ed (2011).
[11] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) paras 27-31.
[12] See eg *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9 and *Seale v Van Rooyen NO & others: Provincial Government, North West Province v Van Rooyen NO & others* 2008 (4) SA 43 (SCA) paras 13 and 14.

[21] This conclusion renders it unnecessary to consider the respondent's argument based on s 12(2)(c) of the Interpretation Act 33 of 1957[13] that, if clause 39(3) is of no application, it had acquired the right to have its renewal applications considered under the 2001 by-laws before they were repealed. Suffice it to say in the light of the decisions of this court in *Gunn*,[14] *Volkswagen*[15] and *Edcon*[16] ─ the reasoning of which is supported by various judgments in foreign jurisdictions[17] ─ the respondent had no more than a hope or expectation of acquiring a right under the 2001 by-laws which fell short of its enjoying a right which had accrued to it to have its application decided under those by-laws. For that reason, the 2001 by-laws would in any event have been of no application even had clause 39(3) not been included in the 2009 by-laws.

[22] However, for the reasons given, the 2009 by-laws are clearly of application to the renewal applications and there is an absolute prohibition under those by-laws in respect of advertising signs being placed in the position in which the two billboards in question are situated. Thus not only did the high court err both in finding that the 2001 by-laws would be applicable to the reconsideration of the renewal applications but also in exercising a discretion on behalf of the first appellant which the latter did not have. Accordingly, not only can the order granting permission to the respondents to use the billboards not stand, but there would be no point in directing the first appellant to reconsider the renewal applications which it is obliged to refuse. In these circumstances, the high court ought merely to have made an order setting aside the decisions of the two appellants. That will be reflected in this court's order.

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[13] It reads as follows: 'Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not ─ . . . *(c)* affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed.'

[14] *Gunn & another NNO v Barclays Bank DCO* 1962 (3) SA 678 (A) at 684B-D.

[15] *Chairman, Board on Tariffs and Trade v Volkswagen of South Africa (Pty) Ltd & another* 2001 (2) SA 372 (SCA).

[16] *Edcon Pension Fund v Financial Services Board of Appeal & another* 2008 (5) SA 511 (SCA).

[17] Eg *Odelola v Secretary of State for the Home Department* [2009] UKHL 25:[2009] 3 All ER 1061 (HL); *Chief Adjudication Officer v Maguire* [1999] 2 All ER 589, [1999] 1 WLR 1778; *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353 (CA) and *Attorney-General for the State of Queensland v Australian Industrial Relations Commission & others*; *Minister for Employment and Workplace Relations of the Commonwealth of Australia v Australian Industrial Relations Commission and others* [2002] HCA 42: [2002] 213 CLR 485 at para 101.

[23] Turning to the question of costs, as the appellants have achieved substantial success on appeal they are entitled to their costs of appeal. In regard to the costs in the high court, the attitude of the appellants throughout has been that their decisions were indefensible. In truth, the proceedings in the high court concerned whether the respondent should be granted permission to use the billboards. The order the court a quo made in that regard should not have been granted. In these circumstances it seems to me that the respondent should bear the costs in the high court as well. It is not suggested that costs of two counsel would be inappropriate.

[24] The following order is therefore made:

1. The appeal succeeds with costs, such costs to include the costs of two counsel.
2. The order of the high court is set aside and is substituted with the following:

'(a) The decisions taken by the first respondent, the City of Johannesburg, on 29 August 2007, to refuse the applicant's applications for approval of the two outdoor advertising billboards known as the Sandown billboard and the Kelvin View billboard, as well as the decisions by the third respondent, the city manager, to dismiss the applicant's appeals against the aforementioned decisions of the first respondent, are reviewed and set aside.

(b) The applicant is to pay the respondents' costs, such costs to include the costs of two counsel.'

L E Leach
Judge of Appeal

APPEARANCES:

For Appellant:	J Both SC (with him A W Pullinger) Instructed by: Moodie & Robertson, Johannesburg Claude Reid Inc, Bloemfontein
For Respondent:	K Hofmeyr Instructed by: Pagel Schulenberg Inc, Johannesburg Symington & De Kok, Bloemfontein