IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Application number: 4027/2021

In the application between:

KENA MEDIA (PTY) LTD Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY Respondent

CORAM: VAN ZYL, J

HEARD ON: 19 JULY 2023

DELIVERED ON: 7 FEBRUARY 2024

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[1] This is an application for leave to appeal against a spoliation application brought by the applicant and wherein a rule *nisi* was

issued by one of my colleagues, which rule *nisi* I discharged on the return date thereof and dismissed the application, with costs.

[2] The parties as presently cited were also the applicant and the respondent, respectively, in the spoliation application. I will, however refer to them as "Kena Media" and "the Municipality", respectively, like I did in the main judgment.

Applicable legal principles pertaining to applications for leave to appeal:

[3] Section 17(1)(a) of the Superior Courts Act, 10 of 2013 ("the Act") determines as follows:

> "1. Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
>
> (a)(i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
>
> (b) …"

[4] In the judgment of **Acting National Director of Public Prosecutions v Democratic Alliance *In Re* Democratic Alliance v Acting National Director of Public Prosecutions** (19577/09) [2016] ZAGPPHZ 489 (24 June 2016) the court held at para [25] of the judgment that the Act has raised the bar for granting leave to appeal and in this regard it referred to the judgment of **The Mont**

Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others 2014 JDR 2325 (LCC). See also **Rohde v S** 2020 (1) SACR 329 (SCA) at para [8] and **Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another** (21688/2020) [2020] ZAGPPHC 311 (24 July 2020) at para [4].

[5] In considering whether there is some other compelling reason why the proposed appeal should be heard, an important question of law may constitute such a compelling reason. However, the merits thereof still need to be considered in deciding whether to grant leave to appeal or not. In **Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd** 2020 (5) SA 35 (SCA) at para [2] the court determined as follows in this regard:

> [2] In order to be granted leave to appeal in terms of s 17(1)*(a)*(i) and s 17(1)*(a)*(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. Caratco must satisfy this court that it has met this threshold." (My emphasis)

[6] In **Talhado Fishing Enterprises (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank** (1104/2022) [2023] ZAECQBHC 16 (14 March 2023) the aforesaid principles were duly followed and applied:

> "4. Irrespective of the prospects of success, there may nevertheless exist a compelling reason for the appeal to be heard. The subsection does not contain an exhaustive list of criteria, and each application for leave to appeal must be decided on its own facts.
>
> 5. It is the applicant for leave to appeal must demonstrate that there is a compelling reason why the appeal should be heard.
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> 6. …
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> 7. Other compelling reasons include the fact that the decision sought to be appealed against involves an important question of law and that the administration of justice, either generally or in the particular case concerned, requires the appeal to be heard. …
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> 8. As far as compelling reasons are concerned, the merits of the prospects of success remain vitally important and are often decisive."

The merits of the appeal:

[7] The subject matter of the spoliation application was an electronic billboard ("the billboard") situated at the corner of Parfitt Avenue

and Henry Street, Bloemfontein, which had been removed by the Municipality.

[8] Amongst other findings I made, which are not the subject of the appeal, I found as follows at paragraphs [50] and [51] of the judgment:

> "[50] Based on the totality of the facts and circumstances of this matter, I am satisfied that Kena Media proved on a balance of probabilities that it is the entity who was in peaceful and undisturbed possession of the billboard at the time when it was removed by the Municipality. It consequently also had the necessary *locus standi* to have launched the application. In the circumstances it was not necessary to have joined PACOFS.
>
> [51] Even should I be wrong in my last-mentioned finding to the extent that both Kena Media and PACOFS were in peaceful and undisturbed possession of the billboard at the time when the Municipality removed same (which I do not find), that would not have deprived Kena Media of its *locus standi* to have launched the application. The possession for purposes of spoliation need not be exclusive possession. A spoliation claim is also available to a person who holds jointly with others. See **Nienaber v Stuckey** 1946 AD 1049 at 1056. In such instance it would still not have been necessary to join PACOFS, since PACOFS would not have had a direct interest in the subject matter of the application, namely the alleged unlawful deprivation of Kena Media`s possession of the billboard by the Municipality."

[9] I, however, also found as follows at paragraphs [66] and [67] of the main judgment:

"[66] In view of the explicit and clear wording of section 25(5) of the By-laws that the Municipality may remove a sign in the stipulated circumstances without an Order of Court, the Municipality was, in my view, entitled to have removed the billboard in the present circumstances.

[67] Kena Media therefore failed to prove on a balance of probabilities that it was wrongfully deprived of its peaceful and undisturbed possession of the billboard."

[10] The grounds of appeal are stated to be the following:

"1. The Honourable Van Zyl J erred and misdirected herself in law in that, despite a positive finding 'that Kena Media (Applicant) was in peaceful and undisturbed possession of the billboard at the time it was removed by the Municipality", the Honourable Judge went on to interrogate other aspects of lawfulness of removal in terms of the By-Law in section 25(5) of the Mangaung Metropolitan Municipality Outdoor Advertising By-law (By-law), issued in the Provincial Notice No. 46 of 2019.

2. The Honourable Van Zyl's finding that section 25(5) of the By-law, makes provision for action by the by the Municipality without notice and without a Court Order in certain specified circumstances, has the unfortunate consequence of resulting in the court arriving at a conclusion diametrically opposite to a long list of authorities on spoliation.

3. The above finding, with respect, loses sight of the fact that the Municipality had already launched the court proceedings about the same billboard seeking ostensibly the same order for removal of the

Applicant's same electronic sign, which was removed without a court order triggering the spoliation application.

4. The Court's misdirection raises fundamental questions of law which another court would find against and they are: -

4.1 There was a pending matter brought by the Municipality [para 53] in which questions of constitutional invalidity of certain provisions of the By-Law are raised by KENA MEDIA (PTY)Ltd, which but for the judgement of the Honourable Van Zyl J, are rendered moot.

4.2 The Honourable Judge considered that the Municipality received an e-mail on 30 June 2021 with regard to the billboard [page 26 para 21, that notwithstanding, the Municipality resorted to self-help on 20 December 2021 (some five and half months later), without a court order when the Applicant had already filed an answering affidavit and counter-application on the 8th October 2021.

4.3 With respect, the Honourable Van Zyl J misdirects herself in paragraph [63] where the Honourable Judge says "In my view section 25(5) is precisely the type of By-law which the Court in the African Billboard-judgment had in mind..."

4.4 The above finding, with respect, ignores the fact that there was pending litigation in respect of the removal of the same subject billboard of Kena Media (‘Applicant') initiated by the Municipality in casu which distinguishes this case from African Billboard Advertising (Pty) Ltd v North and South Central Local Councils, Durban 2004 (3) SA 223 (N).

4.5 The Honourable Judge further misdirects herself on the inquiry "if the sign constitutes a danger to life or property, or causes an obstruction of visibility to traffic or to road traffic sign on or adjacent to any public road" without expressing a positive finding whether section 10 of the By-law and in terms of which the Municipality first approached the court as a basis for the removal can simply be used interchangeably with section 25 of the By-law by the Municipality to circumvent a court to enable the removal of the Billboard without recourse to the court.

4.6 The Judge misdirected herself on the established principle that the purpose of the mandament is to provide a remedy by requiring the status quo preceding the dispossession to be restored by returning the property "as a preliminary to any enquiry or investigation into the merits of the dispute".

4.7 With respect, the Honourable Judge Van Zyl considered the merits of the dispute in a manner that deprives the Applicant from properly ventilating the constitutional validity of section 25 of the By-law before the court with competent jurisdiction, moreover, in circumstances where litigation was lis pendens and issues of constitutional invalidity of certain provisions of the By-law were raised in order to be ventilated in court. (My emphasis)

4.8 From the admitted and common cause facts, there was nothing preventing the Municipality from approaching the court between date of service of the first application on 1 September 2021 and 20 December 2021, even on an urgent basis for removal of the billboard as opposed to its unlawful and wanton disregard for the due process of law the Municipality had already initiated.

4.9 On the contrary and upon the Honourable Van Zyl J's finding of: -

4.9.1 Peaceful and undisturbed possession and evidence of dispossession by the Municipality [paragraph 50];

4.9.2 the finding that the billboard was removed by the Municipality or on instructions of the Municipality [paragraph 52];

4.9.3 there was pending litigation brought on 1 September 2021 issued by respondent, inter alia, to seek the removal or cause to be removed at their own cost, within 7 days of the order, the outdoor sign located at Henry Street and Parfitt Avenue, Bloemfontein ... [paragraph 5].

5. The Honourable Van Zyl J ought to have found that:

5.1 The rule nisi is confirmed.

5.2 The Respondent is ordered to pay the Applicant's costs on attorney and client scale.

The Applicant submits that this appeal raises important questions of law dealing with spoliation in the context of lis pendens. It is submitted further that reasonable prospects exist that another court would find that the Applicant has made a case for the spoliation relief pending the hearing of the first application brought under the above case number and that it will be just and equitable that the order by the Honourable Van Zyl J be set aside.

[11] I have duly considered the grounds of appeal, together with the eloquent arguments which Ms Sogoni, who appeared on behalf of Kena Media in the hearing of the application for leave to appeal,

presented. She submitted that I correctly found that Kena Media was in peaceful and undisturbed possession of the billboard at the time it was removed by the Municipality. She, however, submitted that I erred in having gone further into the question of the entitlement of the Municipality to have removed the billboard in terms of section 25(5) of the By-laws. In this regard she submitted that for purposes of spoliation I should not have dealt with the merits of the entitlement, or not, of the Municipality to have done so, and secondly, by having done so, I inadvertently deemed the By-laws to be constitutionally valid, whilst there was a pending application which sought the By-laws to be declared unconstitutional and invalid.

[12] In my view I have not erred in having made the findings in paragraphs [66] and [67] of my judgment, already quoted above. Those findings, and the reasoning therefore, dealt with the question of whether the removal of the billboard was wrongful, or not, which is the second requirement for purposes of obtaining a spoliation order, which I found did not constitute wrongful deprivation.

[13] Furthermore, it was not the case of Kena Media that I am not entitled or should not deal with the spoliation application pending the outcome of the first application. In my view there was in any event no such bar for me to have done so, because at the time I adjudicated the application, the By-laws were still in force and enforceable. This is addition to the fact that the first application

dealt with section 10 of the By-laws, whilst in the spoliation application I dealt with section 25 of the By-laws. As correctly contended by Mr Patel, who appeared on behalf of the Municipality, it was not Kena Media`s case before me during the hearing of the application that section 25(5) of the By-laws infringe upon section 34 of the Constitution. This line of argument was only raised for the first time in the application for leave to appeal. I was never called upon to determine the constitutionality of section 25 (5) of the By-laws. Kena Media is precluded from attempting to build or create a new case on appeal. See **Ras and Others NNO v Van der Meulen and Another** 2011 (4) SA 17 (SCA) at para [16].

[14] In my view there are no reasonable prospects that the proposed appeal would succeed and there is no other compelling reason why the appeal should be heard.

Order:

[15] The following order is made:

1. The application for leave to appeal is dismissed, with costs.

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C. VAN ZYL, J

On behalf of the applicant: Adv. P. Sogoni
Instructed by:
Menzi Vilakazi Inc Attorneys
C/O Mlozana Attorneys
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