REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/16177

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

In the matter of:

FIRE WINGS PROPERTIES 21 (PTY) LTD	Applicant
and	
SUNRISE TECHNOLOGIES (PTY) LTD	First Respondent
THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Second Respondent
JOHANNESBURG ROAD AGENCY (PTY) LTD	Third Respondent
CITY OF JOHANNESBURG PROPERTY COMPANY (PTY) LTD	Fourth Respondent

JUDGMENT

BESTER AJ

[1] The applicant seeks a declarator that an advertising sign owned, erected and maintained by the first respondent on a corner of South and Rivonia Roads, Sandton, is an illegal structure by reason of non-compliance with the Outdoor Advertising By-laws of the City of Johannesburg, cited as the second respondent (the City). In addition, the applicant seeks an order directing the removal or demolition of the sign.

[2] The application was originally brought by Smartgrowth Investments (Pty) Ltd, as the owner of the property adjacent to the road reserve on which the structure has been erected. However, prior to the hearing of this application, Fire Wings Properties 21 (Pty) Ltd became the owner of the property, and on this basis brought an application to be substituted as the applicant herein. The application was not opposed, and I granted the substitution at the commencement of argument.

[3] Three issues need to be determined in this application:

a) Whether the first respondent may rely on the defence of *lis alibi pendens*;

b) Whether the advertising sign is illegal; and

c) Whether the first respondent can rely on the second respondent's 'moratorium' on enforcing its Outdoor Advertising By-laws.

Lis alibi pendens

[4] The City launched an application against the first respondent under case number 18793/19 in this division in terms of which the City seeks an order that eight advertising signs, including the sign that is the subject matter of this application, be declared unlawful, and ordering the first respondent to remove them. It is clear that the relief sought in the two applications is substantially the same. On this basis the first respondent contends that it is entitled to raise the defence of *lis alibi pendens*.

[5] The applicant challenged this approach on the basis that it is not a party to the other application. In the result, the applicant contends, there is no litigation pending between the applicant and the first respondent for the same relief.

[6] In *Nestlé (South Africa) (Pty) Ltd v Mars Inc*[1] Nugent AJA, said of this defence:

> "There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions."

[7] In a similar vein, Zulman JA expressed the requirements as follows in *Hassan and Another v Berrange N.O.*:[2]

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1 *Nestlé (South Africa) (Pt) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) in [17].
2 *Hassan and Another v Berrange N.O.* 2012 (6) SA 329 (SCA) in [19].

> "Fundamental to the plea of *lis alibi pendens* is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause."

[8] *Ceaserstone v World of Marble and Granite*[3] approved of both the aforementioned passages.[4] The first respondent contended that *Ceaserstone*[5], with its analysis of *Cook v Muller N.O.*[6], allows for sufficient relaxation of the requirements of this defence to make it available in the current circumstances, where the same relief is sought in the other application by the City against the first respondent.

[9] The authorities relied upon do not come to the first respondent's assistance. In *Ceaserstone* Wallis JA specifically recorded that it was not submitted to the court that it *"should strike out in a new direction and allow a relaxation of the requirement that the two set of litigation be between the same parties, in the same way as the other requirements of lis pendens and res iudicata have been relaxed."*[7] What the court considered in *Ceaserstone* was whether there was sufficient commonality of interest between certain parties in the two sets of litigation to allow the plea of *lis pendens* to be available. The point was not raised in this application.

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3 *Ceaserstone SDOT-YAM Ltd v World of Marble and Granite 2000 CC* 2013 (6) SA 499 (SCA).
4 *Ceaserstone supra* in [4] and [12] respectively.
5 *Supra*.
6 *Cook and Others v Muller N.O.* 1973 (2) SA 240 (N).
7 *Ceaserstone supra* in [31].

[10] In the result, I find that the special plea of *lis alibi pendens* is not available to the first respondent.

Is the structure illegal?

[11] The applicant claims that the sign is illegal, because it does not comply with the City's Outdoor Advertising By-laws, 2009.[8]

[12] Section 2 of the By-laws provides that:

> "2. (1) These By-laws apply to all outdoor advertising in the area and jurisdiction of the Council.
>
> (2) Approval for outdoor advertising in term of these By-laws is required irrespective of the zoning of any property in terms of any applicable town planning scheme and irrespective of the provisions of any other law.
>
> (3) The owner of an advertising sign and any person who has applied for approval of an advertising sign in terms of these By-laws must comply with any provision of these By-laws relating to that sign and must ensure that such provisions are complied with, subject to anything to the contrary contained in such provision."

[13] Section 3.1 provides that:

> "3.1(1) No person may erect any advertising sign or use or continue to use any structure or device as an advertising sign without the prior written approval of the Council: Provided that the provisions of this subsection do not apply to any advertising sign exempted in terms of section 8."

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[8] *City of Johannesburg Outdoor Advertising By-Laws*, *Local Authority Notice 2007*, *Extraordinary Provincial Gazette 277 of 18 December 2009*.

[14] It is common cause on the papers that no such application had been made, no approval was obtained from the City, and no exemption as contemplated in section 8 was granted.

[15] In addition, the applicant's predecessor (Smartgrowth) had caused a registered professional land surveyor, Mr Willem Coetzer, to survey the location of the sign, and he reports that the sign is a mere 36m from the middle of the intersection. This is a contravention of section 6(3)(c)(iii) of the By-laws, which stipulates that a sign my not be closer than 50m from the centre of an intersection.[9] This evidence was met with a mere denial, which is not sufficient to create a *bona fide* dispute of fact.[10]

[16] It is thus clear that the sign contravenes the By-laws and is an illegal structure.

[17] The applicant contends that it has *locus standi in iudicio* to seek the relief as a member of the class of persons in whose interest the By-laws were enacted. In this regard, it relies on *Pick-Pay Stores Limited v Teasers Comedy and Review CC*[11]. There, Hussain J concluded that the applicant had the necessary standing to seek compliance with the Town Planning Scheme from a property owner in the immediate vicinity of the applicant's property, as it was thus a

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[9] The exceptions are not relevant here.

[10] See for instance *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) in [13].

[11] *Pick-Pay Stores Limited v Teasers Comedy and Review CC* 2000 (3) SA 645 (W) at 653 C – 654 I.

person in whose interest the Scheme was enacted. In my view the reasoning is also applicable here.

[18] The first respondent did not challenge the applicant's entitlement to seek the relief, and I am satisfied that the applicant has the required legal standing.

Does the 'moratorium' prevent the applicant from obtaining relief?

[19] The first respondent contends that the structure is not illegal by virtue of what it calls a 'moratorium' by the second respondent on enforcing its Outdoor Advertising By-laws.

[20] It appears that the first respondent erected the sign pursuant to an agreement concluded with the Johannesburg Roads Agency (Pty) Ltd, cited as the third respondent, in 2009. The third respondent did not have the jurisdiction to authorise the erection of the sign, irrespective of the agreement it concluded with the first respondent. Wisely in my view, Mr Stevens, for the first respondent, did not press this argument. In any event, that agreement endured for a period of two years, and the first respondent did not rely on a written renewal, as a required by the agreement.

[21] The City endeavoured to replace the existing Outdoor Advertising By-laws, but those efforts were scuppered when the advertising industry raised various objections to the proposed By-laws, and through litigation prevented

its promulgation. In the result, the 2009 By-laws remained effective, but the City implemented a 'transitional period' of 36 months in which it sought to engage with the industry to regularise various aspects of existing outdoor advertising, that may not comply with the extant By-laws.

[22] This does not mean, as the first respondent argued, that the current By-laws are unenforceable. In fact, the report to the Mayoral Committee that recommended the transitional period, expressly state that those By-laws must still be enforced. On my reading of the City's invitation to the industry, there is no true moratorium, in the sense contended for by the first respondent, whereby illegal signs will be allowed over the period of the 36-month transition period.

[23] The City itself states that the transition period is a form of indulgence creating an interim framework for the phasing out of illegal signs over the 36-month transitional period. The City undertook to the sector that it would not take punitive action against any advertising assets declared to the City, provided agreement is reached on a timeframe to remove signs found to be non-compliant with the By-laws within the 36-month period. This signifies a pragmatic approach by the City, which seems to have been overwhelmed by a multitude of illegal advertising signs and resultant litigation.

[24] Once it is accepted that the applicant has legal standing to seek compliance with the By-laws, it does not matter, in my view, that the City took these pragmatic steps. Where a party with sufficient interest in the matter approaches a court to enforce the By-laws, a court would not refrain from enforcing the By-laws on the basis of the City having agreed to not prosecute owners of illegal advertising structures whilst it engaged with them on the regularisation or demolition of the illegal structures.

[25] The fact that the first respondent is an active participant in the transitional process, does not give it immunity against its clear transgression of the By-laws. In any event, the sign cannot be approved, because it is built too close to the centre of the intersection, so there is no basis for arguing that the sign may be regularised instead of demolished.

[26] In the circumstances, I conclude that the City's transition period does not prevent the applicant from seeking compliance with the Outdoor Advertising By-laws.

Conclusion

[27] In the result, I make an order in the following terms:

a) The advertising signage structure owned, erected, and maintained by or on behalf of the first respondent and situated on the Corner of South

and Rivonia Roads, Sandton, identified in FA5 to the founding affidavit, does not comply with the second respondent's outdoor advertising By-laws of 2009, and is an illegal structure.

b) The first respondent must demolish and/or remove the structure within 20 days from date of this order at its own cost, failing which the Sheriff of this Court is authorised and directed to demolish and/or remove the structure at the expense and costs of the first respondent.

c) The first respondent shall pay the applicant's costs of the application, excluding the costs of the substitution application.

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A Bester
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Heard:	24 November 2021
Judgment:	27 September 2022
Counsel for the Applicant:	Adv L Hollander
Instructed by:	Hirschowitz Flionis Attorneys
Counsel for the First Respondent:	Adv BD Stevens
Instructed by:	Jurgens Bekker Attorneys
Second Respondent:	No appearance