CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 36/22

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
INDEPENDENT OUTDOOR MEDIA (PTY) LIMITED	First Respondent
BODY CORPORATE OF THE OVERBEEK BUILDING, CAPE TOWN	Second Respondent
MINISTER OF TRADE, INDUSTRY AND COMPETITION	Third Respondent
and	
OUT OF HOME MEDIA SOUTH AFRICA NPC	Amicus Curiae

Neutral citation: *City of Cape Town v Independent Outdoor Media (Pty) Ltd and Others* [2023] ZACC 17

Coram: Maya DCJ, Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J and Rogers J

Judgment: Mbatha AJ (unanimous)

Heard on: 3 November 2022

Decided on: 23 June 2023

Summary: Declaration of constitutional invalidity — Section 29(8) of the National Building Regulations and Building Standards Act 103 of 1977 — Minister's supervisory role in making regulations for matters falling within Part B of Schedule 4 of the Constitution

Section 151(2) of the Constitution — Legislative authority of a municipality vests in the Municipal Council — section 156(2) of the Constitution — a municipality has the power to make and administer by-laws for the effective administration of matters over which it has the right to administer — separation of powers

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ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Western Cape Division, Cape Town:

1. The order of the High Court declaring section 29(8) of the National Building Regulations and Building Standards Act 103 of 1977 inconsistent with the Constitution and invalid is confirmed.
2. The first respondent's purported appeal is struck from the roll.
3. The first respondent must pay the applicant's costs occasioned by its purported appeal, including the costs of two counsel.

JUDGMENT

MBATHA AJ (Maya DCJ, Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J and Rogers J concurring):

Introduction

[1] This is an application by the City of Cape Town (City) for confirmation of an order of constitutional invalidity of section 29(8) of the National Building Regulations and Building Standards Act[1] (Building Act) granted by the High Court of South Africa, Western Cape Division, Cape Town. Section 29(8) of the Building Act requires municipalities to obtain the approval from the relevant Minister before promulgating by-laws "relat[ing] to the erection of a building".[2] The City's application for confirmation is unopposed. In this Court, Independent Outdoor Media (Pty) Ltd (IOM) served a notice of appeal, purportedly in terms of section 172(2)(d) of the Constitution.[3] IOM's ostensible appeal is opposed by the City.

The parties

[2] The City, a metropolitan municipality, is the applicant in the confirmation proceedings and a respondent in the appeal. IOM is a company engaged in the display and management of advertising signs and spaces on behalf of its clients. IOM is the first respondent in the confirmation proceedings and the appellant in the appeal. The second respondent is the Body Corporate of the Overbeek Building (Overbeek), which owns the building on which the two advertising spaces relevant to these proceedings are erected. Overbeek abides the decision of this Court.

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[1] 103 of 1977.

[2] Section 29(8) of the Building Act, which is headed "[r]epeal of laws" reads:

> "(a) A local authority which intends to make any regulation or by-law which relates to the erection of a building, shall prior to the promulgation thereof submit a draft of the regulation or by-law in writing and by registered post to the Minister for approval.
>
> (b) A regulation or by-law referred to in paragraph (a) which is promulgated without the Minister previously having approved of it shall, notwithstanding the fact that the promulgation is effected in accordance with all other legal provisions relating to the making and promulgation of the regulation or by-law, be void."

[3] Its grounds of appeal were that the High Court should have specifically addressed the retrospectivity of the order of invalidity but failed to do so; the High Court incorrectly dismissed its counter-application premised on section 29(8) of the Building Act impugned in the confirmation application; the High Court's orders flowing from the declaration of invalidity of section 29(8) were erroneous because the declaration did not make provision for the validity of the relevant by-law pending this Court's confirmation of the order of invalidity; the High Court's costs orders in respect of its counter-application and supplementary challenges were incorrect; and the High Court was incorrect that the relevant sign was not approved in terms of the Building Act.

[3] The third respondent is the Minister of Trade, Industry and Competition (Minister), who is responsible for the administration of the Building Act and is the Minister contemplated in section 29(8). The Minister abides the decision of this Court but made submissions regarding the interpretation of the Building Act.

[4] Out of Home Media South Africa NPC (OHMSA) was admitted as an amicus curiae and made written submissions. OHMSA is a non-profit company that represents the interests of media owners in the outdoor advertising industry. Its members collectively own and operate approximately 80% of all outdoor advertising signs in South Africa.

Background

[5] The applications arise from a dispute relating to two billboards on the Overbeek Building, a prominent building on Long Street in Cape Town. In 1999 and 2000, Overbeek leased two billboards on the building's facades to IOM. IOM describes the billboards as follows:

> "[T]he physical structure is a galvanised steel frame bolted onto galvanised steel brackets, set into the plaster and brick of the building's external walls using 1100 mm long, 12 mm diameter expanding Rawl bolts. The changeable artwork [is affixed onto] that."

It is common cause between the parties that these structures are buildings under the definition of "building" in the Building Act.[4]

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[4] However, the Minister, as explained later, submits that, in the context of section 29(8), the word "building" should be given its ordinary meaning and not the defined meaning. The word "building" is defined in the Building Act as:

> "(a) any other structure whether temporary or of a permanent nature irrespective of the materials used in the erection thereof, erected or used in connection with—
>
> (i) the accommodation or convenience of human beings or animals;
>
> (ii) the manufacture, processing, storage, display or sale of any goods;
>
> (iii) the rendering of any service;
>
> (iv) the destruction or treatment of refuse or other waste materials;

[6] The City authorised IOM to use these billboards for a period of five years, in terms of the by-laws applicable at the time. These authorisations lapsed on 3 March 2004 and 5 November 2005 respectively. However, IOM continued to display advertisements on the building without authorisation from the City.

[7] The City's enforcement efforts against IOM's unauthorised display of the advertisements, which included imposing fines, initiating criminal proceedings and issuing compliance notices, were fruitless. IOM would simply pay the fine or temporarily remove the advertisements, but the advertising structures would remain in place in defiance of the City's enforcement measures, and a new advertisement would go up.

Litigation history

High Court

[8] In March 2016, the City brought an enforcement application against Overbeek and IOM for the removal of the advertisements. In March 2021, Overbeek made an application in which it sought an order directing IOM to remove the allegedly unlawful advertisements on its building on the basis that they were not authorised in terms of the Outdoor Advertising and Signage By-Law, 2001 (Advertising By-Law). The two applications were consolidated. IOM, in opposing the City's application, brought a counter-application for a declaration that the Advertising By-Law is void for non-compliance with section 29(8) of the Building Act because the City had not obtained ministerial approval before promulgating the By-Law. IOM contended that

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(v) the cultivation or growing of any plant or crop;

(b) any wall, swimming bath, swimming pool, reservoir or bridge or any other structure connected therewith;

(c) any fuel pump or any tank used in connection therewith;

(d) any part of a building, including a building as defined in paragraph (a), (b) or (c);

(e) any facilities or system, or part or portion thereof, within or outside but incidental to a building, for the provision of a water supply, drainage, sewerage, stormwater disposal, electricity supply or other similar service in respect of the building."

outdoor advertising in Cape Town was "completely unregulated". In response, the City deployed a collateral defence, arguing that section 29(8) of the Building Act is constitutionally invalid. After engaging with the Minister in the spirit of cooperative governance, the City joined the Minister to the proceedings and launched a direct constitutional challenge to section 29(8) of the Building Act. The direct challenge, which was unopposed, displaced the collateral defence.

[9] The Minister did not oppose the constitutional challenge, but made submissions on the interpretation of the provision and argued that, if his interpretation was correct, the facts of the case did not warrant a declaration of constitutional invalidity. The Minister pursued the same argument in this Court, but did not oppose the confirmation application.

[10] The High Court held that section 29(8) of the Building Act is constitutionally invalid and, consequently, dismissed IOM's counter-application to declare the Advertising By-Law void for non-compliance with section 29(8). It reasoned that section 29(8) violates the independent and exclusive legislative authority of municipalities by requiring the Minister's approval before a by-law that "relates to the erection of a building" may be validly promulgated,[5] and that section 29(8) violates the mutual respect provisions in the Constitution that require each sphere of government to respect the constitutional status of the other spheres.[6]

[11] The High Court held that municipal autonomy ensured by the mutual respect provisions in the Constitution must inform the interpretation of municipal powers[7] and

[5] *Body Corporate of the Overbeek Building, Cape Town v Independent Outdoor Media (Pty) Ltd* 2022 (4) SA 167 (WCC) (High Court judgment) at para 21.

[6] Id at para 22. See for example section 41(1)(e) and (g) of the Constitution. Section 41(1)(e) reads: "All spheres of government and all organs of state within each sphere must respect the constitutional status, institutions, powers and functions of government in the other spheres". Section 41(1)(g) reads: "All spheres of government and all organs of state within each sphere must not assume any power or function except those conferred on them in terms of the Constitution."

[7] Id at para 24.

it endorsed the City's argument that the effect of section 29(8) is to grant the Minister a constitutionally impermissible veto power over by-laws that relate "to the erection of a building".[8]

[12] The High Court reasoned that, although Parliament may legislate on "building regulations" because it is a Schedule 4 functional area,[9] these powers are limited in nature and cannot be interpreted as concurrent with municipal legislative powers.[10] The national government may only regulate a municipality's executive authority, not its legislative authority.[11] It held that the national government's powers are limited, in relation to municipalities, to a "monitoring, supervising and support function".[12] Section 29(8) exceeds this function and was accordingly constitutionally invalid.[13]

[13] In respect of the separation of powers, the High Court held that the Minister's veto power "imposes a different legislative process and a different legislator from that

[8] Id at para 25.

[9] Section 44(1)(a)(ii) of the Constitution reads:

> "The national legislative authority as vested in Parliament confers on the National Assembly the power to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5".

[10] High Court judgment above n 5 at para 26.

[11] Id at para 27. Section 155(7) of the Constitution reads: "The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)".

[12] Id at para 28.

[13] Id at paras 29-30.

which is constitutionally envisioned".[14] This was held to be contrary to the scheme set out in sections 43(c),[15] 151(4),[16] and 160(2)(a)[17] of the Constitution.[18]

[14] Although it is not in issue in this case, the High Court noted that section 29(8) creates the possibility that the Minister will have veto power over by-laws covering functional areas of exclusive municipal competence.[19] Further, citing *Tasima*, the High Court held that, by giving the Minister the ability to determine the validity of by-laws, section 29(8) unconstitutionally ousts the courts' role as the "sole arbiters of legality".[20]

[15] The High Court rejected the Minister's argument that billboards and public advertisements are not covered by section 29(8), instead preferring the interpretation of the High Court in *SAPOA*[21] and *Independent Outdoor Media (Pty) Ltd*.[22] It reasoned that, in any event, interpreting section 29(8) so that it does not apply to billboards and public advertising is unhelpful because the provision will "jeopardise [the City's] current and future law-making, as well as a number of other by-laws of other municipalities, countrywide" in spheres other than public advertising that "relate to the

[14] Id at para 31.

[15] Section 43(c) of the Constitution provides that "the legislative authority of the local sphere of government is vested in the Municipal Councils, as set out in section 156."

[16] Section 151(4) of the Constitution provides that "[t]he national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

[17] Section 160(2)(a) of the Constitution provides that "a Municipal Council may not delegate the passing of by-laws."

[18] Id at para 31 fn 16.

[19] Id at para 33. Schedule 5 Part B of the Constitution.

[20] Id at para 32. See *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) at para 147.

[21] *South African Property Owners Association v City of Johannesburg Metropolitan Municipality* unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No 19656/18, undated at para 63.

[22] High Court judgment above n 5 at para 34. See *City of Cape Town v Independent Outdoor Media (Pty) Ltd* unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No A9346/2009, 23 December 2011.

erection of a building".[23] The High Court further rejected the contention that the doctrine of avoidance found application in this matter and held that it only applies if the dispute is "capable of being decided differently in its entirety".[24] The High Court commented that, if the constitutional validity of section 29(8) was not decided, the validity of a number of municipal by-laws would be uncertain.[25]

[16] Consequently, the High Court dismissed IOM's counter-application and supplementary challenges. The High Court also ordered that the impugned advertisements, which were unauthorised under the Building Act and the Advertising By-Law, be removed. IOM was ordered to pay the City's costs in relation to the counter-application and the supplementary challenges to the lawfulness of the Advertising By-Law.[26] IOM appeals these costs orders in this Court.

Proceedings in this Court

[17] These are confirmation proceedings in terms of section 167(5) of the Constitution. The order to be confirmed is the High Court's declaration of constitutional invalidity of section 29(8) of the Building Act. In terms of section 172(2)(d) read with section 167(5) of the Constitution, this Court must make the final decision and confirm any order of constitutional invalidity made by the High Court before that order has any force or effect.

[18] In respect of the appeal, section 172(2)(d) of the Constitution provides that "[a]ny person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity". To the extent that IOM's appeal arises from the High Court's order of constitutional invalidity, it is properly before this Court. Therefore, those elements relating to IOM's

[23] High Court judgment id at para 36.

[24] Id at para 40.

[25] Id at para 42.

[26] The supplementary challenges repeated arguments that had been previously dismissed by the Supreme Court of Appeal in *Independent Outdoor Media v City of Cape Town* [2013] ZASCA 46; [2013] 2 All SA 679 (SCA).

counter-application and supplementary challenges, for example, which are discrete from the confirmation orders, should have been brought by means of an application for leave to appeal. Those elements are not properly before this Court.

City of Cape Town's submissions

[19] The City submits that section 29(8) is unconstitutional for several reasons. First, it infringes on the legislative autonomy of municipalities, as it impedes a municipality's ability and right to exercise the legislative powers assigned to it in Schedule 4 Part B and Schedule 5 Part B of the Constitution by requiring prior ministerial approval for the making of by-laws regarding "the erection of a building".

[20] Second, the Building Act is old-order legislation passed during the era of parliamentary sovereignty and fails to recognise that Parliament has limited authority in matters relating to building regulations under the constitutional order. Parliament can only play a supportive role but has no power to regulate the passing of municipal legislation.

[21] Third, the City submits that section 29(8) infringes upon the doctrine of separation of powers because the making of by-laws falls exclusively within the terrain of municipal councils. However, section 29(8) empowers the Minister to veto municipal legislation and replaces a legislature with an executive functionary in a different sphere of government.

[22] Fourth, the City contends that Parliament is not competent to legislate in respect of a Schedule 5 functional area. The relevant functional area, the City argues, is "billboards and the display of advertisements in public places", which is the subject of the Advertising By-Law. Section 44(1)(a)(ii) of the Constitution empowers Parliament to legislate on any matter, excluding a matter within a functional area listed in Schedule 5.

[23] Fifth, section 29(8) usurps the powers of the courts in that it provides that a by-law which does not comply with its terms is void. The City argues that only a court of law has the constitutional authority to declare an exercise of public power invalid and determine the consequences of invalidity, including whether it is void.

[24] Lastly, section 29(8) applies in respect of any by-law that "relates to the erection of a building". It is of wide application and incorporates many municipal competencies which relate to the erection of a building, including "billboards and the display of advertisements in public places", "amusement facilities", "facilities for the accommodation, care and burial of animals", "fencing", "local amenities" and "municipal abattoirs". This does not only affect the City but impacts negatively on all municipalities with by-laws containing provisions that "relate to the erection of a building".[27]

Minister's submissions

[25] The Minister does not oppose the confirmation proceedings. However, he submitted an explanatory affidavit in which he argued that section 29(8) can be interpreted in such a way that a constitutional challenge is not necessary on the facts of this case.

[26] The Minister is of the view that the High Court did not engage in the interpretative exercise to determine whether the Building Act, correctly interpreted, applies to the City's by-law in respect of "billboards and the display of advertisements in public places". The Minister submits that the facts of this case do not warrant a declaration of constitutional invalidity.

[27] The Building Act, contends the Minister, is intended to promote uniformity in the law relating to the erection of buildings in municipalities across the country. He

[27] In the City of Cape Town alone, these include the Community Fire Safety By-Law, 2002 and the Coastal By-Law, 2020.

submits that the Act (and specifically section 29(8)) does not apply to "billboards and the display of advertisements in public spaces" and, therefore, does not encroach on municipalities' Schedule 5 Part B competence. The Minister submits that section 29(8) is only constitutionally offensive if a billboard or outdoor advertisement signage is a "building" for the purposes of the Act. The Minister concedes that if section 29(8) applies to the Advertising By-Law, the section would be non-compliant with the Constitution.

[28] The Minister argues that where a court can avoid declaring national legislation inconsistent with an exclusive municipal competence, it should do so by reading the provisions harmoniously and purposively. He argues that there is no conflict between the Building Act and the Advertising By-Law because the purpose of the Act is to regulate buildings, which do not include billboards and advertisements in public spaces.

[29] On remedy, the Minister argues that there is no need for an order regulating retrospectivity because Parliament is in the process of drafting new legislation to regulate building norms and standards that will be scrutinised for constitutional compliance in the parliamentary process. The Minister also submits that the order need not be suspended.

The City's response to the Minister

[30] In response to the Minister's arguments on interpretation, the City submits that the proposed interpretation does not address any of the grounds of constitutional invalidity beyond the Schedule 5 Part B argument and even then it does so only in respect of one by-law (i.e. the Advertising By-Law). The suggested interpretation does not cure any of the following defects: (a) infringement on municipalities' power to legislate autonomously; (b) exceeding Parliament's competence; (c) infringement of the separation of powers; (d) infringement of the powers of the courts; and (e) impermissible regulation of Schedule 5 Part B matters other than "billboards and the display of advertisements in public spaces". The City submits that section 29(8) is "too extensively riddled with constitutional invalidity to be saved by a restrictive

interpretation". It argues further that the doctrine of constitutional avoidance, on which the Minister's argument is based, is no longer part of our law.[28] The City points out that its direct constitutional challenge was made not only in respect of the Advertising By-Law, but concerned section 29(8), to the extent that it affects *all* by-laws relating to the "erection of a building".

IOM's submissions

[31] IOM's main contention in support of its purported appeal in terms of section 172(2)(d) is that the High Court failed to determine whether the declaration of invalidity of section 29(8) of the Building Act was retrospective and, if so, to what extent. Therefore, IOM submits that the declaration is not retrospective and that, for this reason, the Advertising By-Law remains void for failure to comply with section 29(8) of the Act. In other words, in the absence of retrospective invalidation, section 29(8) was in force at the time the Advertising By-Law was enacted, and non-compliance with section 29(8) thus invalidated the By-Law.

[32] IOM also argues that, because the High Court's order of constitutional invalidity has no force or effect until confirmed by this Court, the High Court was wrong in two respects. First, the High Court incorrectly dismissed its counter-application, which was premised on the fact that the Advertising By-Law remains void until this Court confirms the declaration of constitutional invalidity with retrospective effect. Second, the High Court should not have granted the order declaring IOM's signage unlawful and directing IOM to remove it. IOM submits that in order to keep the Advertising By-Law alive, a suspended order of invalidity should have been made and the removal order should have been granted as temporary relief.

[33] IOM also takes issue with the fact that the High Court ordered it to pay the City's costs in respect of its failed counter-application and supplementary challenges.

[28] *Jordaan v Tshwane Metropolitan Municipality* [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC).

It contends that the counter-application and supplementary challenges were constitutional in nature and thus, according to *Biowatch*, each party should bear its own costs.[29] It submits further that the High Court ought to have found that the signage had been approved as required under the Building Act and, thus, no order for its removal was warranted.

[34] In addition, IOM submits that the impact of the retrospectivity of the order should be limited in respect of criminal liability. It does not object that section 29(8), if confirmed to be invalid, should be invalid retrospectively from 4 February 1997, the date that the Constitution came into force, provided that the Advertising By-Law is not applied in criminal proceedings. IOM argues that it should not bear the adverse criminal consequences of an ambiguity created by the legislative scheme. IOM's argument is that, until now, the Advertising By-Law has been invalid due to non-compliance with section 29(8). If section 29(8) is declared invalid with retrospective effect, the Advertising By-Law will acquire retrospective validity. In the absence of some qualification, this will expose IOM and similarly placed advertisers to criminal liability for failure to comply in the past with the retrospectively validated Advertising By-Law. On this aspect, they are supported by the amicus curiae, OHMSA.

The City's response to IOM

[35] Though the City pointed out that the appeal was not properly before this Court, it made submissions in response to IOM. The City argues that there is no basis for the contention that the Advertising By-Law should not be applied in criminal proceedings pending at the date of the order. It submits that the criminal sanctions in the Advertising By-Law are constitutionally valid and serve an important public function. The City submits that if IOM wished the High Court to depart from the default position on retrospectivity, it should have adduced evidence in support of such a prayer. IOM did not do this. The City argues that the present proceedings are not concerned with

[29] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

reviving the Advertising By-Law, but recognising that it has always had legal force because it was never voided by section 29(8). It argues that the declaration of invalidity should be given its ordinary legal effect, in accordance with the doctrine of objective constitutional invalidity, namely, that it be declared invalid from 4 February 1997, when the Constitution came into force.

OHMSA's submissions

[36] OHMSA accepts that section 29(8) is constitutionally invalid. Like IOM, OHMSA submits that its members have arranged their affairs on the basis that various by-laws regulating outdoor advertising across the country were void for non-compliance with section 29(8). As a result, they submit that the declaration of invalidity should be suspended to enable outdoor advertisers to regularise their activities. Regarding the retrospective effect of the order of invalidity, OHMSA submits that the by-laws were void at the time they were promulgated and cannot be made valid by an order of constitutional invalidity of section 29(8).

[37] OHMSA argues that it has, for a long time, taken the position that outdoor advertising by-laws across the country are void due to the lack of ministerial approval, as required by section 29(8). Thus, its members have not been applying for various approvals required in terms of those by-laws. It argues that, if this Court confirms the High Court's order, with the declaration of invalidity taking immediate effect and applying retrospectively, it will validate a by-law that was previously void, leaving outdoor advertisers in a position of not having the approvals required in terms of the Advertising By-Law. This will render their advertising structures immediately illegal, opening them up to criminal prosecution and severely hampering their ability to continue doing business.

[38] OHMSA also submits that the entire Building Act is unconstitutional because its subject matter is a Schedule 4 Part B functional area ("building regulations"). These submissions are beyond the scope of the present application.

[39] OHMSA argues that the High Court did not take cognisance of the consequences of a finding that section 29(8) is constitutionally invalid for those in the industry. According to OHMSA, an order of this kind requires a remedy that provides time for parties to arrange their affairs as a consequence of the finding – for example, a suspension of the declaration of invalidity for a period of time and a limitation on the retrospective effect of the declaration.

[40] OHMSA submits that the finding of constitutional invalidity should be confirmed, but that the matter must be referred back to the High Court with guidelines from this Court as to what should be taken into account in order for the High Court to consider the appropriate remedy. They contend that an order limiting the retrospectivity of the declaration of invalidity needs to be carefully crafted to ensure there is no period in which the industry at large would operate without regulation.

[41] The City's response to OHMSA's submissions is similar to its response to IOM. It is superfluous to restate that response.

Issues

[42] Three issues arise for this Court's determination:

(a) Should the order of invalidity be confirmed?

(b) Is the Minister's interpretation of section 29(8) of the Building Act correct? If so, does this preclude this Court from considering the validity of section 29(8)?

(c) Lastly, what is the appropriate remedy in the event that the order of invalidity is confirmed?

The legal framework

[43] Section 151(2) of the Constitution vests the executive and legislative authority of a municipality in its Municipal Council. The powers and functions of a municipality

are regulated by the provisions of section 156 of the Constitution, which provides as follows:

> "(1) A municipality has executive authority in respect of, and has the right to administer–
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> (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
>
> (b) any other matter assigned to it by national or provincial legislation.
>
> (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
>
> (3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for a long as that legislation is inoperative.
>
> (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if–
>
> (a) that matter would most effectively be administered locally; and
>
> (b) the municipality has the capacity to administer it.
>
> (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions."

[44] Section 156(2) provides that a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer. Section 160(1)(a) of the Constitution empowers a Municipal Council to make decisions concerning the exercise of all the powers and the performance of all the functions of the municipality.

[45] In considering the impugned provision, one needs to consider the empowering provisions of section 43(c) of the Constitution, which provides that the legislative authority of the local sphere of government is vested in the Municipal Councils, as set

out in section 156. This entitlement connotes a regulatory and policy-making role more than a mere authority to administer and implement prescripts.[30] This position was confirmed by this Court in *Fedsure*, where it was held that municipal councils are deliberative, legislative assemblies with constitutionally guaranteed legislative powers.[31]

[46] Notwithstanding the powers outlined above, municipal authority is not boundless. A municipality's right to govern is subject to national and provincial legislation.[32] The responsibility to ensure that municipalities adequately perform their functions inheres in the national and provincial spheres.[33] Subject to section 151(4) of the Constitution, by-laws that conflict with national or provincial legislation are invalid.[34] In respect of original legislative powers, municipalities are only competent to legislate on those areas enumerated in Part B of Schedule 4 and 5, save where national or provincial legislation devolves additional legislative competence to local government.[35]

[47] National and provincial governments are not authorised to legislate for the minutiae of Part B of Schedule 4 and 5 competencies but are instead limited to enacting minimum standards and frameworks for municipal legislating and enabling the monitoring of municipal functions (that is, a hands-off or indirect governing role). In

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[30] Steytler and de Visser "Local Government" in *Constitutional Law of South Africa* Service 1(2007) at 44.

[31] *Fedsure Life Assurance Ltd. v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 199 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 26.

[32] Section 151(3) of the Constitution provides: "A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution."

[33] Section 155(7) of the Constitution reads: "The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)".

[34] Section 151(4) of the Constitution provides: "The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

[35] Part B of Schedules 4 and 5 read with sections 155(6) and 156, reveal the following: Schedule 4 Part B enumerates competencies shared by national, provincial and local spheres of government; and Schedule 5 Part B lists competencies vesting jointly in the provincial and local spheres.

Premier, Western Cape, this Court stated that "[l]ocal governments have legislative and executive authority in respect of certain matters but national and provincial legislatures both have competences . . . for *overseeing* its functioning".[36]

Constitutionality of section 29(8)

[48] Section 29(8) overshoots the national government's supervisory role. Exercising a veto or being empowered to block legislation not only interposes the Minister into the legislative process, but also gives the Minister authority over the minutiae of local government competencies – something this Court has determined to be reserved for municipalities. That is a far cry from a "broad managing or controlling rather than direct authorisation function".[37] None of the parties dispute that section 29(8) is unconstitutional.

[49] On a proper reading, section 29(8) usurps the powers of the municipality to exercise its original legislative powers by requiring that prior ministerial approval is given for the making of by-laws relating to the erection of a building. Parliament has no power to cross this constitutional boundary as the exercise of such powers by the municipality is not delegated legislation. Section 29(8) goes even further to state that a by-law which does not comply with its terms is void.

[50] In the light of the aforementioned constitutional provisions, section 29(8) encroaches on the sacrosanct functional areas in Schedule 5 Part B of the Constitution, which are the preserve of a municipal council insofar as those functional areas relate to the erection of a building. Parliament is barred from legislating Schedule 5 matters, except in certain exceptional circumstances. The impugned section 29(8) provision displays the typical traits of old-order legislation which are reflective of an era in which legislative powers were centralised to Parliament. Municipalities have original

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[36] *Premier, Western Cape v President of the Republic of South Africa* [1999] ZACC 2; 1999 (3) SA 657 (CC); 1999 (4) BCLR 382 (CC) at para 51 (emphasis added).

[37] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) 744 (CC), 1996 (10) BCLR 1253 (CC) at para 377.

legislative competence to make and administer by-laws on matters listed in Part B of Schedule 4 and 5 of the Constitution. Sections 43(c), 151(2) and 156(1)(a) of the Constitution support this position. It is impermissible for the Minister to legislate, control and veto legislation that is the sole preserve of the Municipal Councils.

[51] The scenario envisaged in section 29(8) infringes the doctrine of separation of powers, as it gives the Minister powers relating to the legislative process – the Minister's approval is a necessary component for enacting a by-law that "relates to the erection of a building". It is impermissible for one arm of government to exercise the powers of another sphere of government. *Executive Council* held that the legislature may delegate the power to make regulations.[38] However, it emphasised the distinction between delegation of authority to make subordinate legislation within the framework of the statute and assigning plenary power to another body.[39]

[52] A municipality enjoys constitutionally entrenched powers in a co-operative government in terms of section 151(4) of the Constitution. The national and provincial spheres of government may not intrude on its terrain. This Court affirmed this position in *Robertson*:

> "The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, 'inviolable and possesses the constitutional latitude within which to define and express its unique character' subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of a municipality is not always invalid only for

[38] *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 51.

[39] Id.

> the reason that no legislation authorises it. Its power may derive from the Constitution or from legislation of a competent authority or from its own laws."[40]

The Minister's interpretation

[53] The single jurisdictional requirement of section 29(8) – "erection of a building" – brings the Advertising By-Law within the ambit of the Building Act. The Minister accepts that, if section 29(8) of the Act applies to the Advertising By-Law, the provision would be non-compliant with the Constitution. The Minister also accepts that the billboards fall within the definition of "building" in the Building Act.[41] However, the Minister argues that section 29(8) can be interpreted in a constitutionally compliant manner by giving the word "building" in section 29(8) its ordinary grammatical meaning and not the technical and broad meaning of the word "building" as defined in the Building Act.

[54] However, even if the restrictive interpretation advocated for by the Minister was correct (and this is most doubtful), it does not prevent the infringement of municipal powers to legislate autonomously, the infringement of the separation of powers and the encroachment on Schedule 5 Part B functional areas in spheres others than advertising signage. The mischief still remains. The purpose of the Building Act is to regulate the erection of buildings in municipalities across the spectrum. Its impact is felt beyond the erection of billboards and display of advertisements.

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[40] *City of Cape Town v Robertson* [2004] ZACC 21; 2005 (2) SA 323 (CC) at para 60.

[41] In *City of Cape Town v Independent Outdoor Media* above n 19 the High Court held at para 17 that—

> "the connection between a sign erected and used to advertise goods or services to the public is sufficiently close for it to be said that such sign is 'erected or used for or in connection with the display or sale of the goods or the rendering of any service', within the extended definition of 'building' in the Building Act."

In *SAPOA*, above n 18, the High Court commented that large advertising signs affixed to the tops or sides of tall structures are buildings for the purposes of the Act. Billboards as described by IOM are so firmly affixed to the exterior walls of the building that they could be regarded as "part of the building" for purposes of the definition. However, and because it is not in dispute in this case that the billboard structures are "buildings" as contemplated in the Building Act, it is unnecessary to determine the precise basis on which this is so.

[55] The applicability of section 29(8) to advertising signs has no bearing on its constitutionality. The City launched a direct challenge to section 29(8) to the extent that it impacts *all* by-laws that relate to the "erection of a building", and not only in relation to the Advertising By-Law. The Minister contends that his interpretation is "dispositive of the constitutional harm". The interpretation argument misses all of the grounds of unconstitutionality advanced by the City, save for the argument that section 29(8) unconstitutionally encroaches on the Schedule 5 Part B functional area of "[b]illboards and the display of advertisements in public places". The Minister's argument fails to appreciate that section 29(8) deprives municipalities of their legislative autonomy in respect of *all* by-laws that relate to the erection of a building.

[56] The High Court correctly acknowledged the inadequacy of the Minister's proposed interpretation as follows:

> "[T]his approach helps little because the result would be that an unconstitutional law would simply be allowed to remain in force with potential far-reaching and harmful consequences for municipal governance. . . . The interpretation chartered for by the [Minister] does not decide all the constitutional issues raised by the [City]."[42]

[57] The Minister's submission that the declaration of invalidity was not the primary relief sought by the City is incorrect. When the City's direct challenge was launched, it was clear that the challenge was not limited to the Advertising By-Law but also concerned the extent of section 29(8)'s impact on all by-laws that relate to the erection of a building. The Minister's interpretation does not save the unconstitutional provisions of the Building Act. It remains constitutionally offensive.

IOM's notice of appeal

[58] IOM filed a notice of appeal in terms of section 172(2)(d) of the Constitution. The City objected to it on the basis that the appeal was not properly before this Court, among others, because IOM had not sought leave to appeal directly to this Court.

[42] High Court judgment above n 5 paras 39-40.

Furthermore, the issues raised by IOM as grounds of appeal do not fall within the scope of section 172(2)(d). The provisions of section 172(2)(d) only apply to the confirmation or variation of an order of constitutional invalidity. The submission by counsel for IOM that section 172(2)(d) is of wider application is incorrect. The arguments relating to the demolition order and other orders that IOM purported to appeal cannot be entertained without IOM having sought leave to appeal. Counsel for IOM grudgingly conceded that the purported appeal was not before this Court. Consequently, the purported appeal should be struck off the roll.

Remedy

[59] In line with the doctrine of objective constitutional invalidity, section 29(8) was invalid from the date that the Constitution came into effect. This Court explained the doctrine as follows:

> "In the context of declaring a statutory provision invalid for its inconsistency with a constitution that means that the declaration proclaims the finding that the inconsistency exists. It also means that *the inconsistency is proclaimed to have arisen and subsisted since first it arose. Thus, in the case of an inconsistent statute antedating the Constitution, the inconsistency arose on 4 February 1997, when the Constitution came into force and its norms were superimposed on the existing legal system.* If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, *an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution*. As will be shown in the next two paragraphs, however, courts are given the power to qualify this effect of their orders of invalidation."[43] (Emphasis added.)

[43] *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288 (CC) at para 11.

[60] The retrospective effect of the constitutional invalidity of section 29(8) is necessary for the validity of various by-laws that enable municipal governance. However, unqualified retrospective effect gives rise to unfair criminal consequences.

[61] Section 172(1)(b) provides that a court may make a just and equitable order to accommodate potentially harsh effects of the operation of the doctrine of objective constitutional invalidity. This was the approach taken by this Court in *Walters*.[44] *Walters* involved a constitutional challenge to a provision of the Criminal Procedure Act[45] that permitted the use of force, including lethal force, in making an arrest. Although in *law*, conduct that was justifiable under the impugned provision was criminal at the time of commission by operation of the doctrine of objective invalidity, an unqualified striking down "in *effect* retrospectively criminalise[s] conduct that was not punishable at the time it was committed".[46] The Court struck down the part of the provision that justified the use of lethal force in making an arrest, subject to the qualification that the striking down is prospective only.

[62] However, we need not resort to section 172(1)(b). The doctrine of objective constitutional invalidity should be interpreted harmoniously with the Constitution as a whole. Section 35(3)(l) of the Constitution guarantees the right of an accused person "not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed". In *Savoi*, this Court held that the interpretation of section 35(3)(l) must be informed by the right's rationale.[47] The purpose of the rule against retrospectivity in respect of criminal liability is to enable the public to arrange their behaviour so as to avoid falling foul of a criminal proscript.[48]

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[44] *Ex Parte Minister of Safety and Security: In Re S v Walters* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) (*Walters*).

[45] 51 of 1977.

[46] *Walters* above n 41 at para 74 (emphasis added).

[47] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (5) SA 317 (CC); 2014 (5) BCLR 606 (CC) at para 75.

[48] Id.

The retrospectivity occasioned by the doctrine of objective constitutional validity, therefore, cannot include retrospective criminal consequences.

[63] Further, unlike in *Walters*, limiting the retrospective effect of the invalidity in totality is not tenable in this case. The effect of a wholesale limitation on retrospectivity is that section 29(8) would have been valid in the period between the Constitution coming into effect and the order of invalidity and, therefore, would have the effect of voiding a raft of by-laws across the country that relate to "the erection of a building" for want of ministerial approval. I place no qualification on the retrospective effect of the order of invalidity because the operation of the doctrine of constitutional invalidity cannot retrospectively create crimes in the face of section 35(3)(l) of the Constitution.

[64] In respect of suspension, it is clear from IOM and OHMSA's submissions that a number of outdoor advertisers, throughout the country, have been flouting various outdoor advertising by-laws. Suspension is typically ordered to avoid disruption of a legal system.[49] In *J v Director General, Department of Home Affairs*, this Court said that, when contemplating suspension, "the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna".[50] The immediate effect of the order of constitutional invalidity, in this case, is not of such a destabilising nature as to require this Court to limit the prospective effect of its order. As is evident from OHMSA's participation in this matter, outdoor advertisers are aware of the developments surrounding the constitutionality of section 29(8) of the Building Act and are in a position to act to regularise their conduct soon after this judgment is handed down. If a short time must inevitably pass from the date of this order until outdoor advertisers are able to regularise their positions, the authorities will no doubt bear in mind the maxim that the law does not compel the impossible.

[49] Bishop "Remedies" in Woolman et al (eds) *Constitutional Law of South Africa* Service 5 (2013) at 113.

[50] *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) at para 21.

Costs

[65] In respect of the confirmation proceedings in this Court, there is no order as to costs, since the challenge was not opposed by any parties. In respect of the appeal, IOM is ordered to pay the City's costs because its appeal was not properly before this Court. IOM did not, as it should have, apply for leave to appeal the High Court's orders based on non-compliance with the Building Act or the High Court's dismissal of its counter-application or the costs order made by the High Court in respect of the counter-application. Those purported appeals were not covered by the automatic right of appeal conferred by section 172(2)(d) of the Constitution. IOM is not entitled to *Biowatch* protection – it raised no constitutional issues.

Order

[66] The following order is made:

1. The order of the High Court declaring section 29(8) of the National Building Regulations and Building Standards Act 103 of 1977 inconsistent with the Constitution and invalid is confirmed.
2. The first respondent's purported appeal is struck from the roll.
3. The first respondent must pay the applicant's costs occasioned by its purported appeal, including the costs of two counsel.

For the Applicant:	R Paschke SC and A Pillay instructed by QJ Williams & Associates Incorporated Attorneys
For the First Respondent:	H J de Waal SC instructed by Ashersons Attorneys
For the Third Respondent:	I Jamie SC and K Perumalsamy instructed by State Attorney, Cape Town
For the Amicus Curiae:	A C Botha SC and W Krog instructed by Smit Sewgoolam Incorporated