

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 82834/2014

Heard on: 20 June 2019

Date of judgment: 28 June 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
28/6/19
DATE SIGNATURE

In the matter between:

CITY OF TSHWANE METROPOLITAN
MUNICIPALITY

First Applicant

MEC FOR ROADS AND TRANSPORT
GAUTENG PROVINCE

Second Applicant

and

LESEGO MEDIA CC t/a Y MEDIA

First Respondent

JINJA 2 OUTDOOR ADVERTISING (PTY) LTD

Second Respondent

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

[1] This matter commenced as an urgent application before Tuchten J on 14 November 2014. First Applicant (“Tshwane”) sought an order against First Respondent (“Lesego”), interdicting Lesego from proceeding with the erection and installation of gantry structures over Garsfontein Road, and for an order that it should demolish all gantry structures that had been erected in contravention of sections 2 and 29 of Tshwane’s Outdoor Advertising By-Laws, and section 4 of the National Building Regulations and Building Standards Act, Act 103 of 1977 (“the Act”). In the event that Lesego failed to comply with the aforesaid order, Tshwane sought leave to demolish the structures themselves. Tshwane also sought a costs order. At that stage 2nd Applicant (“Gautrans”) and Second and Third Respondents (“Jinja” and “DW” respectively) were not yet parties to the application.

[2] An order was granted simply stating that Lesego was interdicted in terms of prayer 2 of the notice of motion from proceeding with the erection of the structures. Costs were reserved. This judgment relates solely to the costs of this application, the joinder applications, and the urgent application.

BACKGROUND

[3] Lesego did not oppose the urgent application, apparently because it had not come to its attention before the order was granted. Some four weeks weeks after the urgent order was granted, on 17 December 2014, Tshwane formally advised Lesego that its application to erect the gantries had been rejected due to Lesego's failure to obtain the consent of the landowner on which the gantries were to be erected. Nonetheless, Lesego continued with the erection of the structures.

[4] At some stage the order came to Lesego's attention, and during or about September 2015 (the date of service is not clear), it filed an answering affidavit. The issues raised in the answer are not relevant to the order that I intend to make, as the merits of the application are conceded, but are somewhat relevant to the issue of costs.

[5] Lesego took two preliminary points, firstly, that the founding affidavit had been incorrectly commissioned, and secondly, that the application had not been properly served. On the merits of the application, Lesego alleged that Tshwane's by-laws were a nullity. The argument went that the by-laws relating to the erection of advertising structures that were "buildings" as defined by the Act had to be approved by the Minister of Economic Affairs and Technology. The by-laws had not been so approved, and it was contended that the by-laws were therefore a nullity. Lesego also complained that the decision to refuse consent for the erection of the gantries offended the principles of natural justice. It is not necessary to catalogue Lesego's complaints in this regard.

[6] A further point contended for was that, even if the by-laws were not a nullity, the by-laws did not apply to these gantries due to the fact that they were not visible from public spaces within Tshwane's municipal area. Of significance is that in its answer, Lesego produced two letters allegedly written by one Nazreen Sedibeng ("Sedibeng") an employee of Gautrans, the owner of the land which the roads traverse, authorizing the erection of structures on Delmas and Garsfontein Roads. Lesego's contended that the refusal of consent by Tshwane had been based on the incorrect belief that Gautrans had not consented to the erection of the structures on its land.

[7] On 17 March 2016 Gautrans applied to intervene in the proceedings as second applicant on the grounds that as property owner of the land it had a direct and substantial interest in the matter. Sedibeng also stated in the affidavit in support of Gautrans' application that she had not signed the consent letters, and that they were forgeries. Gautrans denied that it had consented to the erection of the gantries. Gautrans was subsequently joined as second applicant.

[8] On 5 July 2016 Tshwane filed its replying affidavit and it took issue with Lesego's contentions, but more importantly, the reply contained an affidavit by Sedibeng in which she categorically denied that she had signed the two letters giving consent for the erection of the gantries. She stated again that the letters were forged.

[9] On 14 March 2017 Jinja and DW applied to join the proceedings as second and third respondents respectively. They contended in the founding affidavit in

support of the application that pursuant to a partnership agreement, they were partners with Lesego in a joint venture for the erection of the gantries. Jinja is apparently responsible for the day-to-day administration of the affairs of the partnership and for the administration of its finances. Jinja and DW had allegedly taken the "consent" letters of Gautrans as sufficient authorization for the erection of the gantries, and had financed the manufacture and erection thereof. They alleged that the affidavit of Sedibeng had come "as a bolt from the blue", that they had confronted Lesego with the allegations of fraud, and had been assured that the consent letters were not forgeries.

[10] Tshwane initially opposed the intervention application, but withdrew its opposition four days later. Jinja and DW were then joined as second and third respondents respectively. In an answering affidavit, Jinja repeated its assertion that the allegation that the consent letters were forgeries had taken it by surprise. Jinja also made the submission that it was unable to respond to the forgery allegations due to Gautrans not having delivered a founding affidavit. The purpose of the answering affidavit is unclear, but it seems to suggest that either the allegations of fraud should be ignored, due to the absence of a founding affidavit by Gautrans, or the dispute should be referred to oral evidence. Furthermore, Jinja recorded that it abided the decision of the Court. I am not certain why Jinja and DW found it necessary to intervene in the proceedings if their intention was all along to abide the decision. I also do not know what the intention actually was in filing the answering affidavit. Jinja did not answer to any of the allegations in the founding affidavit, as one would have expected it to have done, and it did not advance any reason why the interdict should not be granted. DW did not deliver an answering affidavit.

[11] On 7 June 2019 Lesego filed a notice that it abided by the Court's decision. Lesego was not represented at the hearing. Counsel for Jinja and DW did not take issue with the granting of a final interdict. Counsel's only contention was that Jinja and DW should not be mulcted in costs. Applicants' respective counsel argued that a final order should be granted against all three respondents, and that respondents should be ordered to pay the costs of the application, including the costs of the urgent application.

[12] Jinja and DW's suggestion that they were surprised by the allegations of fraud, and that they did not know that they were not entitled to erect the gantries, rings hollow. As far back as 6 February 2015 Tshwane's attorneys advised Jinja of the existence of a court order prohibiting the further erection of the gantries, and demanding their immediate removal. Jinja took a distinctively aggressive view of the demand. In a letter to Tshwane it disputed that the by-laws were at all applicable to the gantries as they were allegedly not erected in a place or on a building that was visible from a public space. Jinja asserted that it had valid consent from Gautrans to erect the gantries, and it contended that its preliminary investigations indicated that Tshwane had not followed proper legal procedures in relation to the promulgation of its by-laws, rendering the by-laws null and void.

[13] Jinja now alleges that it discussed the allegations of fraud with Lesego when the allegations arose. It professes to be surprised and taken aback that Lesego had not replied to the allegations. The question rather is why Jinja and DW believed that it was appropriate to erect large gantries without council consent in the first place. Even if they believed that the land owner had

consented to the construction, they must have realized that Tshwane also had to approve the erection of the structures. Furthermore, once they were advised that the consent letters had been forged, they should have approached Gautrans to determine for themselves where the truth lay.

[14] In my view, from the outset Jinja and DW aligned themselves with the approach taken by Lesego. They joined the proceedings on the basis that Tshwane did not have jurisdiction over the gantries, and that it was consequently not entitled to an interdict. Although Jinja and DW have subsequently abided by the decision of the Court, having realized that they did not have Gautrans' consent, they should have agreed to the granting of the order. It was consequently necessary for applicants to set the matter down on the opposed roll. For that reason I have taken the view that the respondents should be jointly liable for the costs of the application.

[15] I therefore make the following order:

- 15.1 Respondents are interdicted and restrained from proceeding with the erection of 18m x 4.5 m monopole gantry structures over Garsfontein Road at a distance 125 m South East of De Villaboys Mareuil Drive and over Delmas/Rigel Avenue, at a distance of 220m north of Nossob Street, Pretoria.**
- 15.2 Respondents are ordered to demolish any structures that have already been erected in contravention of sections 2 and 29 of the first applicant's Control of Outdoor Advertising by-**

laws and section 4 of the National Building Regulations and Building Standards Act, 1977.

- 15.3 Respondents are ordered to remove any material used for the erection of such gantry structures from the abovementioned sites.
- 15.4 Should respondents fail to comply with this order within 15 days, applicants may demolish the gantry structures and remove same from the sites.
- 15.5 Respondents shall pay the applicants' costs of the application, the urgent application, and the applications to intervene, jointly and severally, the one paying the other to be absolved.



J.J.C. Swanepoel
Acting Judge of the High Court,
Gauteng Division, Pretoria