

The Constitution, by-laws and billboards

City of Cape Town's By-law 1959 of 1966 requires any person, intending to display a sign, to make a written application for prior approval by the municipality. Displaying or attempting to display a new sign without prior approval constitutes an offence. Because of the conditions for approval, which require the sign to describe the trade or activity, conducted *on the site*, the by-law effectively prohibits *third-party* advertising (save in certain circumstances, which did not apply in this case).

Ad Outpost Pty (Ltd), had erected two signs without applying for, or having received permission. City of Cape Town (further: Cape Town) obtained an order from the Cape High Court that interdicted Outpost from displaying the sign and interdicted the owner of the relevant site from allowing the display on any of its property in Cape Town. In *City of Cape Town v Ad Outpost (Pty) 2000(2)* BCLR 130 (C), Cape Town applied to the Cape High Court for the order to be made final. Outpost levelled four attacks against the by-law: one on the basis of the scope of Cape Town's competencies and three on the basis of the Bill of Rights.

Cape Town's competency to regulate billboards

Outpost argued that the by-law effectively prohibits third party advertising and that it was therefore *ultra vires*, in other words, that Cape Town did not have the legal competence to prohibit third party advertising. The competencies of Cape Town, as laid down in section 10C and Schedule 2A of the LGTA, include "the control of billboards and the display of advertisements in public spaces". Outpost submitted that Cape Town was empowered to *control* billboards and the display of advertisements, but that it was not empowered to *prohibit* such advertising. The Court agreed that the power to regulate cannot be extended to authorise a total prohibition. However, in this case, the Court said, the prohibition is a *partial* one. The by-law did not constitute a blanket ban on advertising but curtailed a *par-*

ticular form of it, namely the construction of third party advertising. Cape Town has the power to regulate advertising and has used that power for a lesser purpose, namely to regulate by a partial prohibition.

Equality

The second argument, levelled by Outpost against the by-law was based on the constitutional right to equality (s 9). The differentiation between third party advertising and advertising of goods and/or services that are sold on the site was alleged to lack a rational connection with a legitimate government purpose and alleged to unfairly discriminate against Outpost. The Court dismissed both arguments. The rational connection between the different treatment of the two categories existed in that preventing own party advertising, namely advertising your own products on your own premises, would be a far more serious invasion of a person's rights than third party advertising. Furthermore, the by-law did not discriminate because the basis of differentiation - third party as opposed to own party advertising - did not relate in any way to human characteristics while the differentiation between these human characteristics forms the basis of the equality jurisprudence (see *LGL Bulletin 99(3) 4*).

Freedom of trade and occupation

The other constitutional attack on the by-law was based on the right to freedom of trade and occupation (s 22). Outpost contended that the by-law effectively prohibited the trade that it pursued, namely the erection of billboards for the purpose of advertising. The Court considered that section 22 was of no assistance to Outpost because the right contained therein is granted to individual citizens as opposed to juristic bodies.

Freedom of expression

The final challenge to the by-law was based on the right to freedom of expression (s 16). The Court observed that this type of expression, notwithstanding its commercial nature, stands to be protected by the Constitution. It

continued by making clear that the by-law did in fact breach the respondent's right to freedom of expression by prohibiting any form of a particular mode of advertising which is seeking to communicate to a segment of the public. The breach of this right could only be 'saved' by section 36(1) of the Constitution. Under certain circumstances, section 36(1) allows violations of constitutional rights by legislative provisions (see *LGL Bulletin 99(3) 5* for a discussion of the factors to be taken into account). However, in this case, section 36(1) was of no avail to Cape Town. Firstly, from the papers, it appeared that Cape Town conceded that the by-law was inadequate and that a new by-law was required to deal with the issue of third party advertising. In fact, the new policy that was being developed, envisaged a differentiation between environmental quality and sensitivity of different parts of the city and a permit scheme for third party advertising. Secondly, the Court considered that Cape Town should (and it appeared that it *could*) have employed means, less restrictive than a blanket prohibition on third party advertising. For those reasons, the Court found that the by-law could not be justified in terms of section 36(1) and that it was therefore unconstitutional.

The order

In deciding on the order, the Court took into consideration that (1) an unqualified invalidation of the by-law could result in uncontrolled third party advertising to the detriment of Cape Town's environment and (2) Outpost's conduct in putting up billboards without permission. The order declared section 6 of the by-law invalid but suspended the declaration of invalidity for six months to enable Cape Town to cure the defects. Further, both Outpost and the owner of the relevant site were ordered to refrain from displaying or allowing the display of any sign in contravention of the by-law for the same period.

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