IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Constitutional Court Case No. ____________

Western Cape High Court Case No. **4838/2021**

In the matter between:

CITY OF CAPE TOWN Applicant

and

INDEPENDENT OUTDOOR MEDIA (PTY) LTD
(REG. NO.: 1990/003700/07) First Respondent

BODY CORPORATE OF THE OVERBEEK BUILDING,
CAPE TOWN Second Respondent

MINISTER OF TRADE, INDUSTRY AND COMPETITION Third Respondent

CITY'S NOTICE OF APPLICATION
IN TERMS OF SECTION 172(2) (d) OF THE CONSTITUTION AND RULE 16(4)
FOR CONFIRMATION OF CONSTITUTIONAL INVALIDITY

TAKE NOTICE that the applicant (**the City**) intends to apply to the Constitutional Court on a date to be determined by the Registrar for orders in the following terms:

1. Confirming the order made by the Western Cape Division of the High Court, Cape Town on 21 January 2022, declaring in terms of s 172(1)(a) of the Constitution that s 29(8) of the National Building Regulations and Building Standards Act 103 of 1977 is constitutionally invalid.

Ref: Quinton Williams, QJ Williams & Associates Inc. Attorneys
quinton@qlaw.co.za, 021 762 5701

2. Directing that there be no order as to costs in respect of prayer 1 against any party who does not oppose that relief, and that any party who does oppose must pay the City's costs, including those of two counsel, jointly and severally.

3. Further and/or alternative relief.

TAKE FURTHER NOTICE that the accompanying affidavit of **QUINTON WILLIAMS** will be used in support of the relief sought in this notice.

TAKE NOTICE FURTHER that if you intend to oppose the relief set out in this notice, or to file any submissions with the Constitutional Court, you are required to –

(a) deliver a notice of opposition, or appropriate notice, within five days of receiving this notice;

(b) deliver any answering affidavit within 15 days of delivering your notice.

TAKE NOTICE FURTHER that if no notice of opposition is delivered as set out above, the City requests the Registrar to place the application before the Chief Justice to be dealt with in terms of rule 11(4) of the Constitutional Court's Rules.

TAKE NOTICE FURTHER that the City has appointed the offices of **QJ WILLIAMS & ASSOCIATIONS INC**, as set out below, as the address at which it will accept notice and service of all documents in these proceedings.

DATED AT CAPE TOWN ON 11 FEBRUARY 2022.

Q.J. WILLIAMS & ASSOCIATES INC
Per: Q.J. Williams
1 Egham Road
WYNBERG
Tel: 021-7625701
Email: quinton@qlaw.co.za
Ref: QJW/RA/fd

C/O: HIGGS ATTORNEYS INC
258 Smit Street
Fairland
RANDBURG
Tel: 010 – 5906257
Ref: C Higgs
Email: charlie@higgsattorneys.co.za

TO: **THE REGISTRAR OF THE CONSTITUTIONAL COURT**
Constitutional Court
BRAAMFONTEIN

AND TO: **BICCARI BOLLO MARIANO INC**
Attorneys for the first respondent
5 Leeuwen Street
CAPE TOWN
Tel: 021 – 422 2173
Email: simon@bbmlaw.co.za
Ref: S.Thomson/K11613

AND TO: **PRESHNEE GOVENDER INC**
Attorneys for the second respondent
36 On Long, 6th Floor, 36 Long Street
CAPE TOWN
Tel: 021 – 072 0901
Email: monica@pgainc.co.za
Ref: Ms Steyn/018

AND TO: **THE STATE ATTORNEY**
Attorneys for the Third Respondent

Floor 4, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 – 441 9200
Email: AKondlo@justice.gov.za
Ref: A. Kondlo

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Constitutional Court Case No. ______________

Western Cape High Court Case No. **4838/2021**

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
INDEPENDENT OUTDOOR MEDIA (PTY) LTD (REG. NO.: 1990/003700/07)	First Respondent
BODY CORPORATE OF THE OVERBEEK BUILDING, CAPE TOWN	Second Respondent
MINISTER OF TRADE, INDUSTRY AND COMPETITION	Third Respondent

CITY'S AFFIDAVIT IN SUPPORT OF ITS APPLICATION FOR CONFIRMATION OF THE INVALIDITY OF SECTION 29(8) OF THE BUILDING ACT

I, the undersigned,

QUINTON WILLIAMS

do hereby make oath and say that:

1. I am the attorney of record of the applicant (**the City**). I am duly authorised to depose to this affidavit and to bring this application on behalf of the City.

2. The facts in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are, to the best of my belief, both true and correct. Where I make averments not directly within my knowledge, I do so based on information made available to me (including the affidavits previously filed in this matter, which will, where relevant, be made available to this Court). I believe such information to be true and correct. To the extent that reliance is placed on any hearsay evidence, I submit that it is in the interests of justice for it to be admitted in terms of s 3(1) of the Law of Evidence Amendment Act 45 of 1988.

INTRODUCTION

3. The City applies in terms of s 172(2)(d) of the Constitution for confirmation of a declaration of constitutionally invalid made by the Western Cape Division of the High Court, Cape Town (**the High Court**) in respect of s 29(8) of the National Building Regulations and Building Standards Act 103 of 1977 (**the Building Act**).

4. Section 29(8) states:

> '(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.'

5. Section 29(8) –

5.1. requires a municipality to submit the draft of any by-law 'which relates to the erection of a building' to the third respondent (**the Minister**);

5.2. requires a municipal by-law to receive national ministerial approval before it is promulgated; and

5.3. empowers the Minister to exercise a veto over any municipal by-law that falls within the ambit of s 29(8).

6. Section 29(8) is unconstitutional for several reasons. In summary –

6.1. **Section 29(8) infringes the constitutional legislative autonomy of municipalities.** The Constitution gives municipal councils original, exclusive and autonomous legislative authority to make by-laws regulating the local-government matters in Schedules 4B and 5B to the Constitution. Inconsistently with the Constitution, s 29(8) compromises and impedes a municipality's ability and right to exercise its legislative powers by requiring prior ministerial approval for the making of by-laws regarding 'the erection of a building'.

6.2. **Section 29(8) exceeds Parliament's competence.** While Parliament has certain legislative powers in relation to local government matters such as 'building regulations', its legislative authority is limited. It may only play a

supporting role and, in providing that support, may go no further than create norms and guidelines regulating *executive* decision-making. Parliament has no power to regulate municipal legislation.

6.3. **Section 29(8) infringes the separation of powers.** The making of by-laws is the exclusive terrain of a municipality's legislature (i.e. its municipal council). However, s 29(8) empowers the Minister – a member of the executive branch in the national government – to veto a municipality's legislation. Section 29(8) therefore contravenes the constitutionally enshrined separation of powers between both different branches and different spheres of government.

6.4. **Section 29(8) usurps the powers of the courts.** Section 29(8) provides that a by-law that does not comply with its terms is 'void'. But under the Constitution, only a court of law has the power to declare legislation invalid and determine the consequences of that invalidity (including whether it is 'void' in the sense that the invalidity operates retrospectively).

6.5. **Parliament is not competent to legislate on a Schedule-5 functional area.** There are several functional areas in Schedule 5 to the Constitution which 'relate to the erection of a building'. These include the City's Outdoor Advertising and Signage By-Law, 2001 (**the Advertising By-Law**), which initially gave rise to this matter (a sign is a building under the Building Act). The Advertising By-Law hence falls within the ambit of s 29(8). However, the Constitution bars Parliament from legislating on a Schedule 5 matter

(apart from certain exceptions which do not apply). Section 29(8) hence exceeds Parliament's competence for this reason too.

7. The High Court (per Wille J) duly declared s 29(8) inconsistent with the Constitution and invalid. I annex copies of the High Court's order ('**FA1.**') and judgment ('**FA2.**').

8. The City now requests this Court to exercise its exclusive jurisdiction to confirm that s 29(8) is constitutionally invalid in its entirety.

9. In the remainder of this affidavit, I describe the parties; this matter's litigation history; why s 29(8) is constitutionally invalid; and the appropriate relief.

PARTIES

10. The applicant (second respondent in the High Court) is the City of Cape Town, a metropolitan municipality.

11. The first respondent (first respondent in the High Court) is Independent Outdoor Media (Pty) Ltd (**IOM**). Its main business is erecting and hiring-out of advertising signs to third parties for the display of commercial advertising.

12. The second respondent (applicant in the High Court) is Overbeek Body Corporate (**Overbeek**), the body corporate in terms of the Sectional Titles Act 95 of 1996 of the Overbeek Building on the corner of Kloof and Orange Streets, Cape Town.

13. The third respondent (third respondent in the High Court) is the Minister of Trade,

Industry and Competition (**the Minister**). He is the executive authority responsible for the administration of the Building Act and is the Minister contemplated in s 29(8).

LITIGATION HISTORY

14. Overbeek applied to the High Court for an order directing IOM to remove certain large signs from the Overbeek Building in the Cape Town Central Business District. Overbeek based its relief on the fact that the signs are unlawful because IOM lacks requisite approvals under the Advertising By-Law.

15. In response, IOM counter-applied for a declaration that the Advertising By-Law is void *ab initio* in terms of s 29(8) because the Minister had not granted prior approval for the Advertising By-Law. IOM contended that outdoor advertising in Cape Town is 'completely unregulated'.

16. The City brought its own counter-application for the removal of the Overbeek signs based on their lack of approvals under both the Advertising By-Law and the Building Act.

17. Initially, the City could not directly challenge the validity of s 29(8) because the Minister was not yet a party and the City had not engaged with the Minister in a spirit of cooperative governance. At first therefore, in a collateral challenge, the City then asked that s 29(8) be declared invalid for purposes of deciding the validity of the Advertising By-Law in IOM's counter-application.

18. Subsequently, the City joined the Minister, and the City and the Minister completed

their cooperative governance engagement. They agreed that the constitutional validity of s 29(8) should be ventilated in full before the High Court by means of a direct challenge. Before any of the parties had responded to the City's collateral challenge, the City then amended its relief to no longer seek a collateral challenge but instead to directly challenges 29(8). The City sought an unqualified declaration of constitutional invalidity.

19. None of the parties opposed the City's direct challenge, although the Minister made submissions regarding the interpretation of s 29(8). The High Court declared s 29(8) constitutionally invalid.

20. The High Court also ordered the removal of the Overbeek signs. Since those orders are not relevant to this application for confirmation of the invalidity of s 29(8), to reduce this Court's record, the City intends to exclude parts of the High Court record regarding Overbeek's and the City's removal applications and IOM's counter-application.

SECTION 29(8) IS CONSTITUTIONALLY INVALID

21. Below, I outline the primary reasons why s 29(8) is constitutionally invalid. While many of the submissions are legal, I include them to inform this Court and any interested party of the broad framework of the City's submissions. The City intends to elaborate on these submissions in written and oral argument, should this Court so allow.

Section 29(8) unconstitutionally infringes the City's legislative power and autonomy

22. The Building Act is old order national legislation that was assented to on 22 June 1977. Section 29(8) came into force on 30 May 1989. During that time, before the

Constitution, municipalities had no original powers to legislate. They exercised only delegated powers and were always subordinate to national and provincial authorities. In that sense, a municipal by-law was akin to administrative action and no different from ministerial regulations.

23. That changed in 1994. The Interim and then the Final Constitution re-established local government as a co-equal sphere of government with its own elected decision-makers, its own deliberative legislative powers and its own exclusive executive and legislative powers. In some functional areas, such as building regulations, municipalities are the primary repositories of legislative power (through making by-laws) and exercise exclusive executive and administrative powers (through enforcing those by-laws and other laws).

24. The Constitution gives the power to make a by-law for a particular municipality exclusively to the relevant municipal council. It may exercise that power autonomously. It needs nobody's approval.

25. In this regard, s 156(2) of the Constitution provides that a 'municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer'. Under s 156(1)(a) of the Constitution, a municipality has the right to administer any local government matter listed in Schedule 4B (which includes 'building regulations') and Schedule 5B. Under ss 43(c) and 151(2) of the Constitution, a municipality's legislative authority is vested in its municipal council. Thus, a municipal council has original legislative power.

26. The Constitution gives nobody authority to constrain the autonomy of a municipality's legislative power. In fact, s 151(4) provides that the national government 'may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions'. That includes a municipality's ability to exercise its legislative powers. Section 41(1)(g) requires that Parliament and the Minister 'must ... exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere'.

27. It is not constitutionally competent for national legislation to seek to control how a municipal council promulgates constitutionally-authorised by-laws. While s 155(7) of the Constitution permits national legislation to regulate (to a limited degree) a municipality's discharge of its executive functions, that regulation may not extend to the discharge of a municipality's legislative functions.

28. Contrary to this Constitutional scheme, s 29(8) infringes municipal councils' legislative authority for building regulations, billboards and public advertising, and several other Schedule 4B and Schedule 5B competences:

    28.1. Section 29(8) obliges a municipality to submit a draft by-law to the Minister who, by exercising a statutory approval over that by-law, can determine its content and direct a municipality to alter the provisions of a draft by-law to secure approval.

    28.2. Section 29(8) purports to make the Minister the ultimate legislative authority regarding any by-law 'which relates to the erection of a building' by

conferring a legislative veto on the Minister.

28.3. Without prior ministerial approval, such a by-law is 'void'.

29. Under the Constitution, it is no longer permissible for an organ of state in the national sphere to exercise such authority over municipal law-making. The Constitution does not authorise Parliament to make a law requiring a municipality to obtain a national minister's permission to make a constitutionally-authorised by-law. Yet that is precisely the effect of s 29(8).

30. Because s 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 competences. In addition to the obvious area of 'building regulations', other functional areas which relate to the erection of a building include 'billboards and the display of advertisements in public places', 'amusement facilities', 'facilities for the accommodation, care and burial of animals', 'fencing', 'local amenities', 'local sports facilities', 'markets', 'municipal abattoirs' and 'pounds'.

31. In the High Court, the City explained that s 29(8)'s wide application jeopardises several operational by-laws that were promulgated without the Minister's consent (and no doubt many similar by-laws in the country's other 277 municipalities). The following examples were provided:

31.1. The City promulgated its Community Fire Safety By-Law on 28 February 2002 'to promote the achievement of a firesafe environment for the benefit

of all persons within the area of jurisdiction the [City]'. The Fire Safety By-Law's 'relates to the erection of a building' in that it prescribes various approvals and requirements for the construction of different types of structures that qualify as 'buildings' under the Building Act, such as 'new installations', 'existing structures', tanks, flammable stores and spray rooms.

31.2. On 31 July 2020 the City promulgated its Coastal By-Law, 2020 'to provide for, among other things, measures for managing and protecting the coastal zone' and 'protecting the natural environment of the coastal zone'. The Coastal By-Law 'relates to the erection of a building' in that it regulates the erection of buildings (such as 'sea defences' i.e. structures to respond to rising sea levels) that may be built within the coastal zone.

31.3. The Cape Town Building By-Law prohibits the erection of a boundary wall or boundary fence above a prescribed height and of certain proscribed materials. The Building Act expressly includes 'any wall' in paragraph (b) of its definition of 'building'.

32. Copies of the relevant provisions of the above by-laws are annexed to the City's High Court papers and will be included in the record of proceedings to be filed in due course.

33. The above by-laws (in addition to the Advertising By-Law) are only some examples that fall within the ambit of s 29(8). No ministerial approval was ever sought or obtained for those by-laws because the City was unaware of s 29(8) when the by-laws were adopted. Section 29(8) appears never to have been enforced by the Minister or his

predecessors. The provision achieved prominence only on 18 February 2020 in a judgment of the Gauteng Division of the High Court in *South African Property Owners Association and Others v City of Johannesburg Metropolitan Municipality and Others* (unreported case number 19656/18) (***SAPOA***).

34. It is untenable for national legislation to void constitutionally-authorised municipal by-laws because they lack ministerial approval.

Section 29(8) exceeds Parliament's competence

35. Since 'building regulations' fall within Schedule 4B, it may also be legislated by both national and provincial governments 'within the limits of the Constitution'. Each sphere may legislate only according to what is permissible for that sphere. Several constitutional provisions narrowly circumscribe the ambit of permissible national legislation about 'building regulations'.

36. The introduction to Schedule 4B provides that any national or provincial legislation in respect of a Schedule 4B functional area may only be 'to the extent set out in section 155(6)(a) and (7)'. (Section 155(6)(a) does not apply to national legislation.) Section 155(7) provides that the national government has '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)'.

37. The section 155(7) power is confined to 'the supervision, monitoring and support of municipalities'. In addition to national government's constitutional obligation not to impede municipalities, s 154(1) of the Constitution provides that the national

government must use its legislative powers to 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions'.

38. National legislation is therefore limited to playing a supporting role and, in providing that support, may go no further than regulating executive decision-making. As set out above, national legislation may not regulate municipal legislation in respect of a Schedule 4B (or a Schedule 5B) functional area.

39. This Court has confirmed that the national legislative competence for 'building regulations' can go no further than setting norms and guidelines, and supporting and strengthening municipalities. It is a hands-off, light-touch power. Certainly, it does not allow a provision such as s 29(8), which empowers the Minister to approve by-laws, determine their content and veto their coming into force.

40. Section 29(8) exceeds 'the extent set out in … section 155(7)': section 29(8) restricts municipalities' legislative powers, rather than regulating their executive ones; it is not the 'hands-off' regulation of norms and guidelines which is permitted; it curtails municipalities' ability to manage their own affairs and exercise their own functions; and most obviously, voiding otherwise good and necessary law is not supportive.

Section 29(8) infringes the separation of powers

41. Under the doctrine of separation of powers, legislative authorities are responsible for making and repealing laws, executive authorities are responsible for formulating policy and implementing laws, and judicial authorities are responsible for determining

disputes about laws. It is impermissible for one branch of government to exercise the powers of another branch of government.

42. The effect of s 29(8) is to give the Minister, both in a different sphere (national) and a different branch (the executive) of government, the power to prevent a municipality from exercising its constitutionally conferred legislative powers, and in fact to exercise those powers himself. Section 29(8) of the Building Act is therefore unconstitutional because it infringes the separation of powers between both different branches and different spheres of government.

Section 29(8) usurps the powers of the courts

43. Section 29(8) provides that a by-law which has not been approved in accordance with the procedure it prescribes is 'void'. In the High Court, IOM argued that the effect of this 'voidness' is that any non-compliant by-law is a nullity from the moment it is promulgated, and can be disregarded as if it does not exist. That is untenable.

44. The rule of law provides that legislation may only be set aside in one of two ways: the legislature that originally made the law in question can repeal the law, or a court may quash the law in review proceedings.

45. A legislature in one sphere of government may not invalidate legislation promulgated by another sphere of government, much less declare it void from inception or pre-emptively invalid. That would allow one sphere of government to usurp the functions of another, in breach of the principles of cooperative governance.

46. The Constitution regulates conflicts between national legislation and municipal by-laws. Section 156(3) provides that 'a by-law that conflicts with national or provincial legislation is invalid'. However, only a court of law can determine whether such invalidity exists and what its consequences are.

47. Furthermore, the application of s 156(3) of the Constitution is expressly subject to s 151(4) of the Constitution, which proscribes the national government from compromising or impeding a municipality's ability or right to perform its functions. Again, only a court of law can determine whether the section 151(4) prohibition trumps any apparent conflict between national and municipal legislation.

48. Section 29(8) attempts to bypass the role of the courts in deciding questions of legislative validity. That is unconstitutional.

49. It is impermissible for national legislation to determine that a municipal by-law is automatically void without the intervention of the courts. Among other things, it would invite administrative chaos, as the courts would not be able to perform their duty as the sole arbiter of legality or to discharge their stabilising role of determining the just and equitable consequences when a law is determined to be invalid.

Parliament is not competent to legislate on a Schedule-5 functional area

50. The City promulgated the Advertising By-Law pursuant to its Schedule-5 competence for billboards and public advertising. Many other municipalities in the country have promulgated similar by-laws pursuant to the same constitutional competence.

51. Section 44(1)(a)(ii) of the Constitution allows the Parliament to legislate on 'any matter … excluding … a matter within a functional area listed in Schedule 5'. That exclusion is subject to various provisos that are not relevant. Hence, it is generally not open to Parliament to legislate on the functional areas set out in Schedule 5 to the Constitution.

52. Section 44(4) of the Constitution requires Parliament, when exercising its legislative authority, to act within the limits of the Constitution. Such a limit includes the abovementioned exclusion of Schedule 5 functional areas.

53. Since billboards and public advertising is a Schedule 5 functional area, the national legislature may not pass legislation on billboards and public advertising.

54. The courts have determined that billboards and public advertising are regulated under the Building Act and that their structures constitute 'buildings' for purposes of the Building Act. Billboards and public advertising – and the municipal by-laws that regulate them – are therefore subject to s 29(8) of the Building Act.

55. Section 29(8) is accordingly national legislation that purports to apply to billboards and public advertising. This is unconstitutional because Parliament is expressly prohibited by the Constitution from passing legislation on such a functional area.

Conclusion regarding the invalidity of s 29(8)

56. Section 29(8) is old-order legislation which reflects its genesis in a time when municipalities had no original legislative power and were subject to ministerial control. The new constitutional dispensation introduced a new scheme of powers.

57. Section 29(8): infringes the exclusivity authority of municipalities to make by-laws in respect of several functional areas; breaches municipal autonomy; encroaches on local government's functional and institutional integrity; and undermines municipalities' ability to discharge their functions fully and effectively.

58. Section 29(8) is therefore wholly and irredeemably unconstitutional.

APPROPRIATE RELIEF

59. None of the parties disputed, and the High Court found, that s 29(8) is inconsistent with the Constitution. Section 172(1) of the Constitution – which regulates the powers and duties of a court when faced with a law which is constitutionally inconsistent – states:

> 'When deciding a constitutional matter within its power, a court –
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including –
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

60. It is well-established that s 172(1)(a) is mandatory: law that is inconsistent with the Constitution <u>must</u> be declared invalid to the extent of its inconsistency.

61. The entirety of s 29(8) is unconstitutional: paragraphs (a) and (b) cannot be separated from each other. Both are inconsistent with the Constitution. The whole of s 29(8) must therefore be declared invalid.

62. Nothing in s 29(8) serves a constitutionally-justifiable objective and no legitimate

purpose would be served by allowing s 29(8) to continue in operation. This was conceded by the Minister in the High Court, and was not disputed by the other parties.

62.1. Section 29(8) is unnecessary: municipalities are fully able to pass local legislation without the Minister exercising his powers in terms of s 29(8).

62.2. Section 29(8) is an isolated provision, which can be excised without affecting the rest of the Building Act's regulatory regime. The declaration of invalidity sought by the City will therefore not affect the general legislative framework for building regulations.

63. The extent to which s 29(8) imperils existing by-laws has been mentioned above. However, the provision also undermines future municipal law-making. So long as s 29(8) remains in force, the City will not be able to legislate in respect of any of the wide-ranging competences that relate to the erection of a building without obtaining the Minister's prior approval. Section 29(8)'s continued existence therefore directly and unconstitutionally undermines the City's ability to discharge its constitutional functions exclusively, autonomously and effectively.

64. This unconstitutional impact is not limited to the City but extends to all 278 municipalities in South Africa. For example:

64.1. In *SAPOA*, the High Court set aside the City of Johannesburg's by-law on outdoor advertising. It reached the following conclusion at paragraph 69:

> 'The COJ was compelled to procure the requisite approval from the Minister of Trade and Industry in terms of section 29(8)(a) of the

> Building Regulations Act, prior to the promulgation of the 2018 by-laws. The fact that this was not done renders the 2018 by-laws void.'

64.2. The decision in *SAPOA*, which was reached without considering the constitutional invalidity of s 29(8), evidences the existential threat which s 29(8) poses to constitutionally-authorised by-laws.

64.3. The decision in *SAPOA* is also indicative of the fact that s 29(8) does not appear to be used by organs of state to achieve any legitimate public-interest objective. Instead, it is used by private parties to avoid regulation: the litigation in *SAPOA* was not initiated by the Minister, but by private property owners and outdoor advertising companies.

65. Accordingly, the s 172(1)(a) declaration of invalidity should be given its ordinary legal effect in accordance with the doctrine of objective constitutional invalidity, *viz* s 29(8) is declared invalid, which invalidity came into effect when the Constitution came into force (i.e. as from 4 February 1997). As from that date, the provision cannot have had the effect of voiding any by-law – including the Advertising By-Law.

'READING DOWN' DOES NOT SAVE SECTION 29(8)

66. Before the High Court, the Minister suggested a reading-down of s 29(8) such that it does not apply to the Advertising By-Law. However, such an interpretation would not address any of the grounds of constitutional invalidity outside of the Advertising By-Law. The High Court therefore correctly dismissed the Minister's suggested interpretation. Section 29(8) is too extensively riddled with constitutional invalidity to be saved by a restrictive interpretation. If necessary, this point will be addressed in

greater detail during argument.

COSTS

67. The City's challenge to the constitutionality of s 29(8) is necessitated by the continued existence of that old-order legislation. The City therefore does not seek costs against any party if this confirmation application is unopposed.

68. However, given the clear constitutional invalidity of s 29(8), and the fact that none of the parties to the litigation disputed the City's claims before the High Court, the City asks for costs, including the costs of two counsel, against any party who opposes the confirmation sought before this Court or seeks alternative relief.

CONCLUSION

69. The City asks for an order in accordance with the accompanying notice, confirming that s 29(8) of the Building Act is constitutionally invalid.

QUINTON WILLIAMS

I certify that the deponent signed the affidavit in my presence and declared that the deponent knows and understands its contents, has no objection to taking the prescribed oath and considers the oath to be binding. Thus signed and sworn before me on **11 February 2022** at the address set out below.

220612

COMMISSIONER OF OATHS

POLLSMOOR BEVELSAREA
GEMEENSKAPKORREKSIES
KORPORASIESTRAAT 17
11 FEB 2022
KAAPSTAD/CAPE TOWN 8000
17 CORPORATION STREET
COMMUNITY CORRECTIONS
POLLSMOOR COMMANDING AREA

"FA1"

AMENDED ORDER

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 4838/2021

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
CAPE TOWN: Thursday 21 January 2022

BEFORE THE HONOURABLE MR JUSTICE WILLE

In the matter between:

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
Private Bag X9020, Cape Town 8000
2022 -02- 08
WCD-009
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN

THE BODY CORPORATE OF THE OVERBEEK BUILDING, CAPE TOWN — Applicant

And

INDEPENDENT OUTDOOR MEDIA (PTY) LTD (Registration Number: 1990/003700/07) — First Respondent

THE CITY OF CAPE TOWN — Second Respondent

THE MINISTER OF TRADE, INDUSTRY AND COMPETITION — Third Respondent

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Having heard the Legal Representative for the Applicant and Respondents and having read the documents filed of record;

IT IS ORDERED:

1. That it is hereby declared that sections 29(8)(a) and (b) of the Building Standards Act, 103 of 1977, are inconsistent with the Constitution of the Republic of south Africa, 1996 and, are accordingly hereby struck down as being invalid to the extent of their inconsistency.
2. That the first respondent's counter-application is dismissed.
3. That the first respondent's supplementary challenges are dismissed.
4. That in respect of all the advertising structures and signs erected on the Overbeek Building situated on the Long Street façade and on the south-western façade of the Overbeek Building, situated at Erf 94836, Number 1 Kloof Street, Gardens, Cape Town, (the "Overbeek Signs"), the following declarations are issued out, namely:

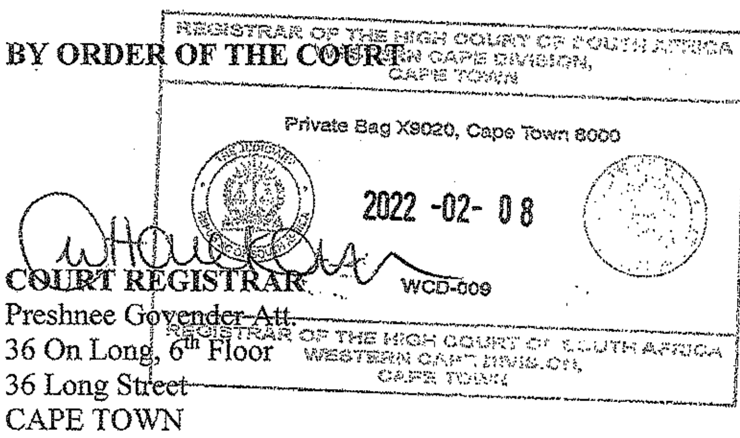
   4.1 That it is declared that the 'Overbeek Signs' are not approved under the Building Standards Act or under any of the applicable municipal by-laws.

4.2 That it is declared that the 'Overbeek Signs' are accordingly unlawful.

4.3 That the first respondent is hereby ordered to remove at its own costs the offending 'Overbeek Signs' and any advertisements that they may support, within (15) court days from the date of the service of this order upon the first respondent by the second respondent.

5. That in the event that any of the offending 'Overbeek Signs' and the remaining parts thereof (if any), are not removed in terms of this order, then in that event, the Sheriff of the High Court (Cape Town-West), is hereby authorised and directed immediately to remove all the offending 'Overbeek Signs', and the remaining parts thereof (if any), at the sole cost of the first respondent.
6. That there is no order as to costs in respect of the order made in paragraph 1 hereof.
7. That the first respondent shall be liable for the second respondent's costs of and incidental to the first respondent's counter-application, including the costs of two counsel (where so employed), on the party and party scale, as taxed or agreed.
8. That the first respondent shall be liable for the second respondent's costs of and incidental to the first respondent's supplementary challenges, including those of two counsel (where so employed), on the party and party scale, as taxed or agreed.
9. That there shall be no order as to any further costs of and incidental to both these applications and no costs are awarded in favour of, or against the applicant.
10. That no further orders are made in accordance with the provisions of section 172(1)(b) of the Constitution of the Republic of South Africa, 1996.
11. That in accordance with the provisions of section 172(2)(a) of the Constitution of the Republic of South Africa, 1996 the Registrar of the High Court, (Western Cape Division), is hereby directed to forthwith file a copy of this judgment and order upon and with the Registrar of the Constitutional Court.

BY ORDER OF THE COURT



COURT REGISTRAR

Preshnee Govender-Att.
36 On Long, 6th Floor
36 Long Street
CAPE TOWN

/avz

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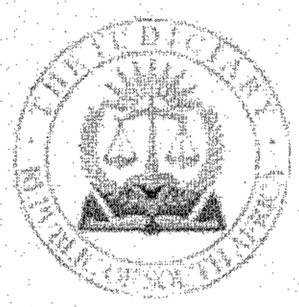

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 4838 / 2021

Case Number: 3491 / 2016

In the matter between:

THE BODY CORPORATE OF THE OVERBEEK BUILDING, CAPE TOWN	Applicant
and	
INDEPENDENT OUTDOOR MEDIA (PTY) LTD (Registration Number: 1990/005700/07)	First Respondent
THE CITY OF CAPE TOWN	Second Respondent
THE MINISTER OF TRADE, INDUSTRY AND COMPETITION	Third Respondent

Coram: Wille, J

Heard: 1st of December 2021

Delivered: 21st January 2022

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This matter is concerned with two opposed applications about two outdoor advertising signs which are displayed on two different facades of a building.[1] The applicant and second respondent seek an order directing the first respondent to remove the signs from the building falling under the body corporate management of the applicant. This, because it is averred that these advertising signs contravene the second respondent's laws and regulations dealing with advertising of this nature.

[2] By contrast, the first respondent takes the position that the second respondent's laws and regulations fall to be struck down as void because they were promulgated without complying with the National Building Regulations and the Building Standards Act.[2] The second respondent seeks an order to declare a certain section of the Act to be unconstitutional, invalid and of no force and effect. The

[1] The building is the 'Overbeek Building' in Long Street in Cape Town.
[2] Specifically section 29(8) of the Building Standards Act.103 of 1977 (the 'Act' and the 'impugned' section).

most important portion of this judgment deals with this latter direct challenge chartered by the second respondent against the validity of the impugned section.

RELEVANT BACKROUND FACTS AND CHRONOLOGY

[3] The applicant leased certain advertising space to the first respondent during 1999 and 2000 in terms of certain advertising contracts for financial gain. In accordance with the relevant advertising by-laws and regulations applicable at that time, authorisations were given by the second respondent for the utilization of these (2) advertising spaces for a period of (5) years respectively. The first respondent's core business is, *inter alia*, connected with the display and management of advertising signs and space on behalf of various clients for monetary reward.

[4] The initial authorization periods of (5) years lapsed on the 3rd of March 2004 and on the 5th of November 2005, respectively. Both the applicant and the second respondent take the position that any further use of this advertising space is and remains unlawful. The first respondent takes the position that these authorisations have not lapsed and remain valid in perpetuity.

[5] On the 1st of March 2016, the second respondent initiated proceedings[3] against the applicant and against the first respondent for the removal of these outdoor signage advertisements from the building. Relief was sought against the first respondent because it had erected the advertising and against the applicant because it was the body corporate responsible for the building on which this advertising had been displayed. In these latter proceedings, both the first respondent and the applicant

[3] The initial proceedings which shall hereinafter be referred to as the 'enforcement' proceedings (Case number 3491 / 2016).

opposed the relief sought by the second respondent. After discussion and agreement with the legal representatives of the parties, I ordered that these initial proceedings be determined together with the current application piloted by the applicant.[4]

[6] As far as the current proceedings are concerned the applicant launched an application for the first respondent to remove the subject advertising signs from the building. This application deals with the same signage space which featured in the initial enforcement proceedings. The applicant sought the relief on the basis that the approvals for the signage had lapsed due to the effluxion of time and that the said advertising was in breach of the relevant municipal 'by-law' and was therefore unlawful.

[7] No doubt this triggered the counter-application by the first respondent to declare the 'by-law' void on the basis that the second respondent did not obtain the necessary approval from the third respondent as indicated in the impugned section. The first respondent's current position on this counter-application remains unclear. This, because the second respondent subsequently adopted the stance that the impugned section failed constitutional muster for a number of reasons.

[8] The second respondent, in the spirit of co-operative governance engaged with the third respondent and undertook to complete its engagements with the third respondent before it directly launched a constitutional challenge against the impugned section. Further, in a belt and braces approach, so it seems, to shield the appropriate 'by-law' from the attack launched upon it by the first respondent, the second respondent also sought a declaration to the effect that the impugned section found no application to the by-law under discussion. In the alternative, it chartered for the position that the impugned section had no legal force and effect.

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[4] The parties agreed that all the applications should be heard together absent a formal consolidation application.

[9] Thereafter, the third respondent and the second respondent completed their engagement in connection with the impugned section and agreed that the constitutional validity thereof fell to be ventilated by means of a direct challenge by the second respondent and that the constitutional procedural requirements had been so satisfied.[5]

THE 'DIRECT CHALLENGE' BY THE SECOND RESPONDENT

[10] The impugned section 29(8) indicates as follows:

> *'(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.'*

[11] The third respondent takes no issue with the direct challenge chartered by the second respondent, but the third respondent avers that a declaration of constitutional invalidity is wholly unnecessary on the facts of this case. Neither the applicant, nor the first respondent take issue with the position taken by the second respondent on this score, save for costs. The first respondent however contends for a period of grace prior to any immediate interdictory relief and accordingly for a suspended enforcement mechanism.

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[5] This, in terms of sections 40 and 41 of the Constitution of the Republic of South Africa, 1996 (the 'Constitution').

[12] The first respondent in essence seeks a further and additional opportunity to obtain approvals for the two offending signs, *de novo*. As alluded to earlier, the direct challenge piloted by the second respondent is the core issue that falls to be determined herein. The third respondent takes the position that the relief contended for as a result of the direct challenge by the second respondent, was only sought as an alternative prayer and makes some mileage with this complaint. On this, I disagree.

CONSIDERATION

[13] The core proposition is that the impugned section is constitutionally inconsistent and invalid, because it impermissibly infringes upon a municipalities power to legislate, is beyond parliamentary competence, usurps the powers of the courts, impermissibly regulates constitutional matters[6] and accordingly infringes upon the doctrine of the separation of powers.

[14] These are the challenges that bear further analysis and scrutiny. It is contended by the second respondent that the impugned section is the subject of a previously established unlawful leash of parliamentary supremacy. This, because it treats municipal by-laws on the same footing as administrative decision-making. Put in another way, this means that it permits the third respondent to control and enjoy a veto in respect of original municipal legislation. The argument is made that the impugned section is untenable under our new constitutional democracy and also infringes upon the framework which vests local governments with independent and original legislative powers.

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[6] As set out in Schedule 5B of the Constitution.

[15] The Act came into being well before 1994. This, when municipalities were sub-ordinate to provincial and national authorities and exercised no original powers. Section 29(8) was introduced into the Act on the 30th of May 1989. There is accordingly no doubt that the impugned section is 'old order' legislation as constitutionally defined.[7] Under this previous order, municipalities exercised only delegated powers and all municipal by-laws were in essence 'sub-ordinate' legislation. Municipalities are no longer limited to sub-ordinate legislation and now enjoy original law-making powers, on a similar footing with those of the national and provincial legislatures.[8] In this connection, the following is provided for in terms of section 156(2)[9], namely that:

'*...a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer...*'

[16] Similarly, a municipality has the 'right to administer' any local-government matter listed in Schedules 4B and 5B.[10] One of the functional areas in Schedule 4B in respect of which a municipality has original and independent legislative power is in respect of the building regulations.[11]

[17] In order to exercise this law-making function, the second respondent introduced an adopted a plethora of by-laws which are in turn connected and inextricably linked and relate to the erection of buildings. What this in essence means is that the second respondent did not obtain the necessary approval under section 29(8) of the Act, before promulgating these by-laws. The second respondent takes the position that these by-laws are void unless the provisions of section 29(8) of the Act are declared invalid.

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[7] As defined in Item 1 of Schedule 6 of the Constitution.
[8] *Liebenberg NO and Others v Bergrivier Municipality* 2013 (5) SA 246 (CC) at paras 147-148.
[9] In terms of the Constitution.
[10] In terms of the provisions of section 156 (1) (a) of the Constitution.
[11] Section 156 (2) of the Constitution read with section 156 (1) (a).

[18] It is advanced by the second respondent that any adherence with and to the impugned section is constitutionally inconsistent for a number of reasons. The primary argument advanced is that the impugned section infringes upon the exclusivity of the right and power which constitutionally vests in various municipalities to make by-laws. This exclusive right and power now exists as our constitutional democracy shepherded in a new order in connection with the organisation of public power and legislative authority.

[19] This new order is set out, *inter alia*, by way the following constitutional provisions, namely; that the legislative authority of the national sphere of government is vested in the legislature of parliament; that of the provincial sphere of government is vested in the provincial legislatures and that of the local sphere of government is vested in the various municipalities.

[20] The independent and exclusive legislative authority of municipalities is constitutionally buttressed in unambiguous terms in that it is indicated that the executive and legislative authority of a municipality is vested in the various councils of the municipalities. Put in another way, there are no constitutional provisions that empower anyone else other than the municipalities to make by-laws or approve any by-laws made by municipalities.

[21] Undoubtedly, the impugned section violates this independent and exclusive legislative authority in that the third respondent is obliged to be provided with a draft of any by-law for approval. Most importantly, a by-law is rendered void in the event that it is not approved by the third respondent, prior to its promulgation.

[22] The constitutionally enshrined mutual respect clauses provide for an arena where all spheres of government and all organs of state, within each sphere, are obliged to respect the constitutional

status, institutions, powers and functions of government in the other spheres. These mutual respect provisions are violated by the impugned section.

[23] The impugned section also desecrates the non-encroachment constitutionally enshrined provisions which provide that both the law-makers and the executive are mandated to exercise their powers and perform their functions in a manner that does not encroach upon the geographical, functional or institutional integrity of government in another sphere. It must be so that the constitutional status of local government, as a matter of logic, must translate into the security of municipal autonomy. This is precisely why constitutionally, a national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

[24] This autonomy must inform any and all interpretation of municipal powers. To stipulate that municipalities are obliged to obtain ministerial approval for by-laws relating to the erection of buildings which they are empowered to make independently, most certainly compromises and impedes a municipality's ability and right to exercise its powers and perform its functions.

[25] Besides, municipalities are obligated to discharge their functions fully and effectively. The impugned section peculiarly provides for the third respondent to receive a copy of any proposed by-law so that the content thereof is subject to external control. This in effect means that the third respondent has a legislative veto over by-laws and this is constitutionally impermissible in our new democracy.

[26] The impugned section deals in the main with regulations in and to the building trade. It is so that there may be a 'competence area' where there may also be applicable national and provincial

legislation.[12] However, the national legislation that may be applicable is not unbridled. It must be so that the impugned section exceeds these constraints and is accordingly beyond parliamentary and provincial competence. These national and provincial powers cannot be interpreted to be concurrent with the exclusive legislative powers constitutionally bestowed on municipalities. The parliamentary legislative powers in this connection are by their very nature limited.[13]

[27] The national government only has the power to regulate the exercise of a municipality's executive authority.[14] It does not authorise any intrusion in connection with a municipality's legislative authority in any manner or form. The impugned section manifestly exceeds this sacrosanct legislative competence.

[28] In accordance with our new democratic order, the power vested in the national government is further diluted in that it is essentially confined to a monitoring, supervising and a support function over municipalities. In addition, solely in certain peculiar and extreme circumstances, the provincial executive is authorized to assume some of a municipalities executive powers, but this notwithstanding, there exists no power to intervene in a municipalities legislative powers.

[29] To illustrate this point further, specifically in connection with the building regulations, constitutionally there are in existence no provisions that allow executive interference in the exercise of the constitutional powers exercised by municipalities. Besides, no intervention is permitted in a municipalities legislative powers. It is argued that the impugned section has the direct effect of restricting a municipalities' legislative powers, as opposed to regulating their executive powers. This

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[12] Section 44(1)(a)(ii) of the Constitution.
[13] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 25.
[14] Section 155 (7) of the Constitution.

must be so as the impugned section cannot be interpreted as simply a 'hands-off' regulation with reference to norms and guidelines which, in turn, is permissible.

[30] The municipalities' ability to manage their own affairs and exercise their own functions is severely curtailed by the provisions of the impugned section. The argument advanced is simply that a municipality cannot be obliged to obtain a national minister's approval for a by-law, which has already been constitutionally authorized. This can only mean that the impugned section is constitutionally inconsistent and therefore is invalid.[15]

[31] Turning now to the doctrine of the separation of powers. The impugned section operates to immerse the third respondent into the municipalities' legislative process. This because the third respondent essentially has a right of veto, which contravenes the doctrine of the separation of powers. What this really means is that the impugned section is constitutionally unsound because it imposes a different legislative process and a different legislator from that which is constitutionally envisioned.[16] Moreover, the provisions in the impugned section could never be ruminated as a valid species of delegation because the second respondent did not elect to divest itself of any of its own constitutional authority.

[32] Our courts have an exclusive and essential constitutional role in that they are the sole arbiters of legality.[17] They are vested with a broad discretion to grant any just and equitable remedy when invalidity is proven, including limiting retrospectivity and deciding whether a declaration of invalidity should be suspended or not. The impugned section and its provisions euthanize these essential judicial

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[15] *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC) para 46.
[16] As set out sections 43 (c), 151 (4) and 160 (2) of the Constitution.
[17] *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 147.

functions. This, by expressly stipulating that any contravention renders the offending by-law void and so excludes the power of the courts to adjudicate on any invalidity so as to grant a just and equitable remedy.

[33] As alluded to earlier, municipalities now are vested with an original power to make by-laws in respect of certain functional areas that are constitutionally listed.[18] This in turn ,validates once more, the prohibition on the legislature to deal with any of these 'ring-fenced' and listed functional areas. The impugned section, as formulated, allows for and contemplates impermissible national legislation in this sacrosanct functional area.

[34] The third respondent concedes that in the event that the impugned section does find application in connection with billboards and public advertising, then in that event, it would be unconstitutional. However, the third respondent advances that billboards and public advertising are not subject to regulation under the Act and that their structures and components do not fall within the definitions as set out in the Act. I disagree with this argument. I am rather persuaded by the reasoning in the judgments of *IOM*[19] and *SAPOA*[20] on this score. These authorities dictate that the Act indeed does apply to billboards and public advertising for the considered reasons set out therein.

[35] In addition, the third respondent advances that it is wholly unnecessary to strike down the impugned section for want of constitutional compliance. Again, I disagree. This because of section 172(1)(a) of the Constitution, which indicates as follows:

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[18] In Schedule 5B to the Constitution (section 156 (2) read with section 156 (1) (a) of the Constitution).
[19] *City of Cape Town v Independent Outdoor Media (Pty) Ltd* 2012 JDR 0109 (WCC) paras 16-20.
[20] *South African Property Owners Association and Others v City of Johannesburg Metropolitan Municipality and Others* paras 58-65. (Unreported case number 19656 / 18 (ZAGPJHC)

'When deciding a constitutional matter within its power, a court ... must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'

[36] The argument by the second respondent is that this court is constitutionally obliged to issue out a declaration of invalidity.[21] The unlawfulness of the impugned section is mostly undisputed in connection with the extent of its inconsistency, which runs well beyond its 'competency infringement' with reference to billboards and public advertising. On this I again agree, because if the impugned section is allowed to remain, it will also, as a matter of logic, jeopardize the second respondent's current and future law-making, as well as a number of other by-laws of other municipalities, countrywide.

[37] In my respectful view, the *SAPOA* judgment did not go far enough so as to get rid of, once and for all, the impugned section of this 'old-order' statute that reflects its origins in the bygone legislative order of supremacy. Further, court orders should also be practical of implementation and in my view it would be wasteful of judicial resources for these same grounds of constitutional invalidity to be re-visited in any further discrete legal proceedings in the future.

[38] The required and appropriate co-operative governance engagements have been embraced and the third respondent is four-square a party to these proceedings.[22] The third respondent has also elected not to oppose any of the additional grounds of invalidity advanced by the second respondent.

[39] The position taken by the third respondent is that these impugned provisions should rather be 'interpreted' so that they do not apply to billboards or public advertising. This, they say is the complete

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[21] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA331 (CC) paras 63-66.
[22] The appropriate notice in terms of Rule 16A of the Uniform Rules has also been appropriately issued out.

solution without a declaration of constitutional invalidity. In my view, this 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. This, not even taking into account a violation of the doctrine of the separation of powers. The court process in the result could also stand to be undermined.

[40] At the heart of the argument by the third respondent is reliance on the doctrine of avoidance. The argument is that if it is possible to decide any case without touching a constitutional issue, that is the preferred course to be followed. By contrast, we are dealing here four-square with a constitutional dispute about the powers that may lawfully be conferred upon the third respondent. As it was pointed out, the doctrine of avoidance only applies if the dispute is capable of being decided differently in its entirety. The interpretation chartered for by the third respondent does not decide all the constitutional issues raised by the second respondent.

[41] Reliance was also sought in the grant of a 'reading-down' of the impugned section. However, this court is obligated to determine each constitutional issue that has been raised and its findings in this connection, in turn, fall to be constitutionally confirmed or rejected. In my view, there is nothing hypothetical about the direct challenge launched by the second respondent. This because the first respondent has specifically sought refuge in the impugned section so as to void the by-law.

[42] A determination of the validity of the impugned section has real consequences for a number of extant by-laws. The argument advanced is that if the second respondent's direct challenge is not determined, many of the exercises of municipal law-making will be subject to uncertainty, as it will be unclear whether the impugned section has any legal effect or not. On this, I also agree. Further, I

do not see any value in adopting a 'band-aid and aspirin' approach to an acute case of a severe constitutional violation as set out in the provisions of the impugned section.

[43] The counter-application piloted by the first respondent seeks a declaration that the by-law be declared void. In this connection, a law may only be declared invalid to the extent of its constitutional inconsistency. In my view, the supplementary challenges by the first respondent have regrettably not been sufficiently pleaded or engaged with and do not in any manner exhibit that any particular provision in the advertising by-law is constitutionally unjustifiable. Besides, the first respondent seems to have largely abandoned any opposition to the direct challenge chartered for by the second respondent. A comprehensive supplementary challenge in respect of the by-law by the first respondent, is absent these papers before me. Put in another way, this challenge has not been meaningfully pleaded and engaged with by the first respondent.

[44] Moreover, the second respondent's case against the first respondent in the enforcement proceedings was that the approvals for the advertising granted under the relevant by-law had lapsed due to the effluxion of time[23] and, that the continued advertising on the facades on the building thereafter was therefore unlawful.

[45] The first respondent identifies and contends for various criteria as shields to the unlawful advertising on the building. It is argued that the approvals granted to it were granted in perpetuity because the advertising structures were classified as 'buildings' under the Act. This may be dealt with swiftly. This, because they admit that the approvals under the by-laws were in force and were granted

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[23] In 2004 and 2005.

for a period of five years and moreover that the approvals in respect of the utilisation of the structures for third party advertisements, had also lapsed.

[46] In a final throw of the dice they advance that because they, *inter alia*, at times displayed 'political' messaging on the building, this does not constitute outdoor advertising under the by-law. Put in another way, they contend for the position that no commercial advertisements were displayed on the building. This despite the express concession that the first respondent had erected other third party advertising in this space from time to time.

[47] As a matter of logic the impugned section stands to be irrelevant for the duration of any approval issued under the by-law. These two functional areas are aimed at achieving different objectives. The administration of building regulations is particularly focused on generic concerns of building safety, building materials, aesthetics and impact on property values.[24] By contrast, the administration of billboards and public advertising is primarily focused on concerns specifically related to that functional area, such as the prevention of visual pollution, the furtherance of road safety and the protection of the second respondent's cultural history.

[48] Most importantly, building regulation approvals and public advertising approvals are issued pursuant to discrete processes, take into account different considerations and, result in different authorisations that are completely independent of one another. The impugned section is a very different animal from the by-law and can only result in further authorisation being required and necessary. It must be so that no approval under the Act could alter the terms of a public-advertising

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[24]. Section 7(1)(b)(ii) of the Act.

authorisation that is subject to any by-law. Furthermore, the by-law provides for a range of considerations that are not covered in the Act, including, *inter alia*, locality and landscape,[25] the number of existing signs,[26] traffic, environmental and heritage concerns,[27] the outcome of any public-participation process,[28] whether the advertisement will cause offence[29] and illumination requirements and energy efficiency.[30]

[49] The duration of advertising authorisations granted by the second respondent are regulated by the by-law as it indicates as follows:

'Any approval of third party advertising granted by the Municipality in terms of this By-Law, shall endure for a maximum period of 5 years, calculated from the date of approval, unless extended in writing prior to the expiry of the approval period. The Municipality must receive a written application for extension of the approval period at least six calendar months prior to the lapse of the approval period'[31]

[50] The first respondent's contention that some of the provisions in the Act had the effect of chameleonically transforming the five-year authorisations issued by the second respondent, under its advertising by-law, into perpetual approvals, is simply not sustainable.

[51] The approvals granted to the first respondent in respect of the building were expressly limited to five-year terms. At the time of the launching of the enforcement proceedings any approvals that may have been issued by the second respondent would have since expired due to the effluxion of time.

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25 Section 10.2.
26 Section 10.3.
27 Sections 10.4 and 29 to 42.
28 Section 10.6.
29 Section 10.9.2 .
30 Section 25.
31 Section 47.

[52] Undoubtedly, the advertising and supporting structures on the building fall within the definitions of 'signs and advertising structures' as set out in the by-law and may not be displayed, erected or used without an approval from the second respondent. Further, any approval that may have been obtained by the first respondent under the Act, could not have legally extended the term of an advertising approval under the by-law.

[53] Besides, factually the first respondent is possessed of no approvals under the Act. The plans exhibited by the first respondent were solely for the subject of scrutiny in terms of the then applicable advertising by-law and not authorised in terms of the Act. From the material before me it overwhelmingly establishes that there are no approvals in existence in respect of the signs on the buildings under the Act.

[54] Another argument advanced by the first respondent is that the signs currently display information that amounts to a 'community information' board.[32] This notwithstanding, the fact remains that the structures themselves require authorisation. As alluded to earlier, neither of these required authorisations were obtained.

[55] It cannot be the subject of any vigorous dispute or debate that the second respondent is possessed with a clear right to enforce the provisions of its by-laws and accordingly to seek interdictory relief in the event of a failure to comply with the terms thereof. The first respondent argues that the second respondent's remedy touches a criminal prosecution. This approach has been since rejected in strong terms by the SCA.[33]

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[32] It displays a sign in connection with the current pandemic.
[33] *Independent Outdoor Media (Pty) Ltd and Others v City of Cape Town* [2013] 2 All SA 679 (SCA) paras 35-36.

[56] The by-law stipulates that unlawful advertising may only be forcibly removed pursuant to a court order.[34] In this connection it is submitted that the first respondent's disregard for the legal constraints applicable to public advertising is motivated by its appetite for the large revenues it generates from this unlawful conduct. On this, I agree. The amount of advertising fees generated in connection with the advertising on this building, at one stage, amounted to approximately R345 000, 00 per month. Undoubtedly, the first respondent has substantially benefited from years of the lack of regard for the second respondent's by-laws.

COSTS

[57] The second respondent's direct challenge remains mostly unopposed. The second respondent has accordingly wisely elected not to seek costs from any of the other parties in this connection. The costs of and incidental to the enforcement application remain a totally discrete issue. The applicant now concedes that the advertising in question was at all relevant times illegal. In my view, this concession could and should have been made at a much earlier stage in the litigation. This election, as a racing certainty, should have been made at the commencement of the enforcement proceedings. However, in view of the nature of the 'consolidated' proceedings before me, I have elected in my discretion, judicially exercised, to give the applicant the benefit of some doubt on this score.

[58] The first respondent piloted a counter-application to declare the by-law void. This application was to a degree 'still-born'. As far as the first respondent's supplementary challenges to the constitutional validity of the by-law are concerned, the process may have been to a limited extent, abused by the first respondent. However, taking into account, *inter alia*, the peculiar circumstances

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[34] Section 76.

of this matter, this in my view does not warrant a punitive costs order. Lastly, because of the complexity of the constitutional issues at stake, the costs of two counsel, in my view, were warranted.

ORDER

[59] In the result, the following order is issued out, namely;

1. That it is hereby declared that sections 29(8)(a) and (b) of the Building Standards Act, 103 of 1977, are inconsistent with the Constitution of the Republic of South Africa, 1996 and, are accordingly hereby struck down as being invalid to the extent of their inconsistency.

2. That the first respondent's counter-application is dismissed.

3. That the first respondent's supplementary challenges are dismissed.

4. That in respect of all the advertising structures and signs erected on the Overbeek Building situated on the Long Street facade and on the south-western facade of the Overbeek Building, situated at Erf 94836, Number 1 Kloof Street, Gardens, Cape Town, (the 'Overbeek Signs'), the following declarations are issued out, namely:

   4.1 That it is declared that the 'Overbeek Signs' are not approved under the Building Standards Act or under any of the applicable municipal by-laws.

4.2 That it is declared that the 'Overbeek Signs' are accordingly unlawful.

4.3 That the first respondent is hereby ordered to remove at its own costs the offending 'Overbeek Signs' and any advertisements that they may support, within (15) court days from the date of the service of this order upon the first respondent by the second respondent.

5. That in the event that any of the offending 'Overbeek Signs' and the remaining parts thereof (if any), are not removed in terms of this order, then in that event, the Sheriff of the High Court (Cape Town-West), is hereby authorised and directed immediately to remove all the offending 'Overbeek Signs' and the remaining parts thereof (if any), at the sole cost of the first respondent.

6. That there is no order as to costs in respect of the order made in paragraph 1 hereof.

7. That the first respondent shall be liable for the second respondent's costs of and incidental to the first respondent's counter-application, including the costs of two counsel (where so employed), on the party and party scale, as taxed or agreed.

8. That the first respondent shall be liable for the second respondent's costs of and incidental to the first respondent's supplementary challenges, including those of two counsel (where so employed), on the party and party scale, as taxed or agreed.

9. That there shall be no order as to any further costs of and incidental to both these applications and no costs are awarded in favour of, or against the applicant.

10. That no further orders are made in accordance with the provisions of section 172(1)(b) of the Constitution of the Republic of South Africa, 1996.

11. That in accordance with the provisions of section 172(2)(a) of the Constitution of the Republic of South Africa, 1996 the Registrar of the High Court, (Western Cape Division), is hereby directed to forthwith file a copy of this judgment and order upon and with the Registrar of the Constitutional Court.

E. D. WILLE
Judge of the High Court
Cape Town

Quinton Williams

From: Quinton Williams <quinton@qlaw.co.za>
Sent: 11 February 2022 10:48 AM
To: 'Simon Thomson'; 'monica'; 'AKondlo@justice.gov.za'
Cc: 'rashieda@qlaw.co.za'; 'QLaw Info'; 'info@qlaw.co.za'
Subject: City's Notice of Application in terms of section 172(2)(d) of the Constitution dated 11 February 2022
Attachments: City's Notice of Application in terms of section 172(2)(d) of the Constitution dated 11 February 2022.pdf

Dear All

Herewith enclosed please find the Notice of Application in terms of section 172(2)(d) dated 11 February 2022.

Kindly confirm receipt.

Thank you.

Kind Regards,
Quinton Williams

Egham Road Chambers, 1 Egham Road, Wynberg
T : (021) 762 5701
F : (021) 762 5702 | 086 516 9850
E : quinton@qlaw.co.za
W: www.qlaw.co.za

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