IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: **36/2022**
WC Case Nos: **4838/2021**
3491/2016

In the matter between:

THE CITY OF CAPE TOWN Applicant

and

INDEPENDENT OUTDOOR MEDIA (PROPRIETARY LIMITED) First Respondent

THE BODY CORPORATE OF THE OVERBEEK BUILDING, CAPE TOWN Second Respondent

THE MINISTER OF TRADE, INDUSTRY AND COMPETITION Third Respondent

---

CITY'S SUBMISSIONS IN ANSWER TO IOM

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

CONTENTS

1. These written submissions answer those of IOM in its appeal.[1] We retain the abbreviations used in the City's main heads of argument.

NO BASIS TO LIMIT RETROSPECTIVITY

2. IOM accepts that section 29(8) of the Building Act can be declared invalid with retrospective effect from 4 February 1997. But its written submissions argue that the Advertising By-Law should not be applied in criminal proceedings pending at the date of the order or in respect of which an appeal or review is pending or an application for leave to appeal is pending.[2]

3. IOM makes this argument without evidence, without having given the High Court the opportunity to engage with its argument and without having foreshadowed its argument in its notice of appeal.

4. IOM dresses up its proposal as protection of the fundamental right to a fair trial. In truth, IOM wants a Get of Out of Jail Free Card to operate indiscriminately without regard to the facts of each case. This would be unjust and inequitable because our criminal law sufficiently protects fair trial rights and because the

---

1 These submissions are filed in terms of Constitutional Court rule 20(4).

2 IOM's heads of argument para 9.

Advertising By-Law, including its criminal sanction, is constitutionally-valid and serves an important public function.

Retrospectivity is unpleaded and unsupported by evidence

5. When a statute is declared unconstitutional and invalid in terms of section 172(1)(a) of the Constitution, the default position is that the invalidity operates from 4 February 1997, being the date on which the Constitution came into effect. The Constitutional Court explained the position in *Moise* more than 20 years ago:[3]

> The order in question here related to invalidation in terms of the Constitution of a statutory provision that had been on the statute book before the Constitution came into force. Upon examination that pre-constitutional provision was found to be inconsistent with the Constitution. That brought into play a principle of law known as the principle (or doctrine) of objective invalidity. In the context of declaring a statutory provision invalid for its inconsistency with a constitution that means that the declaration proclaims the finding that the inconsistency exists. It also means that the inconsistency is proclaimed to have arisen and subsisted since first it arose. Thus, in the case of an inconsistent statute antedating the Constitution, the inconsistency arose on 4 February 1997, when the Constitution came into force and its norms were superimposed on the existing legal system ... As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution.

---

[3] *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) ('***Moise***') at para 11. See also para 13: '*Because the order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date.*'

6. IOM claims that the City failed to address retrospectivity '*pertinently*'.[4] That is a misleading account of the pleadings.

6.1. In its founding affidavit, the City made it clear that section 29(8) served no legitimate purpose and only functioned to perpetuate the constitutionally untenable.[5] The City therefore proposed that section 29(8) should be declared '*invalid and of no force or effect*'[6] and did not propose any limitation on retrospectivity.

6.2. The City correctly understood, in light of *Moise,* that the declaration would operate from 4 February 1997 and did not seek any further relief under section 172(1)(b) of the Constitution.

6.3. The Minister did not claim that section 29(8) served any valid or important purpose.[7] From inception, the only party who responded to the City's application – the Minister – made it clear that, if the grounds of invalidity are accepted, the Court should '*declare the section*

---

4 IOM's heads of argument para 7.
5 City's founding affidavit vol 2 p 132 para 28.
6 City's notice of motion vol 2 p 111 prayer 2.
7 Minister's answering affidavit vol 2 p 198 para 19.2.

unconstitutional without more' and should not grant any limiting or suspensive order under section 172(1)(b) of the Constitution.[8]

6.4. The City, in reply, noted that there was '*accordingly no reason for this Court to shy away from the declaration of invalidity set out in prayer 2.*'[9]

6.5. All parties to the litigation were therefore agreed: there was no reason to grant any relief under section 172(1)(b) of the Constitution, to limit the retrospective effect of a declaration of the provision's invalidity.

7. It was for IOM to have adduced evidence in the High Court regarding retrospectivity if it wished the court to depart from the default. As the Constitutional Court has held, '*[i]t is essential that the Court of first instance receive and if necessary adjudicate on such evidence, and not a Court of appeal or this Court on confirmation*'.[10] IOM did not do so.

7.1. IOM's affidavit before the High Court was silent on the issue of retrospectivity. IOM made no legal submissions to the High Court

---

8 Minister's answering affidavit vol 2 p 198 para 19.2.

9 City's replying affidavit vol 2 p 208 para 25.

10 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 88.

regarding retrospectivity. It expressly elected to make no submissions regarding the constitutional validity of section 29(8) or on remedy.[11]

7.2. In this Court, IOM elected not to file any affidavits. It has adduced no evidence as to why the declaration of invalidity's retrospectivity can or should be limited. Even IOM's notice of appeal contains no mention of a retrospectivity carve-out.

7.3. IOM's written submission before this Court is the first time that IOM asks for a limit on the Advertising By-Law's criminal sanction.

8. Both the City and the Minister have been deprived of the necessary opportunity to marshal and submit evidence as to why there should be no departure from the default position set out in *Moise* and that there should be no limit on retrospectivity. This counts against IOM.[12]

9. In this Court, the submissions of the Minister, the executive authority for administering the Building Act, reiterate his view that there should be no order limiting retrospectivity.[13]

---

11 City's opposing affidavit vol 3 p 278 para 15; p 285 para 37.

12 *Moise* above n 3 at para 6. See also *Mvumvu and Others v Minister for Transport and Another* 2011 (2) SA 473 (CC) at paras 45 and 50 – 52.

13 The Minister's heads of argument para 35.2.

IOM's proposal is not just and equitable

10. In support of its argument for limiting the Advertising By-Law's criminal sanction, IOM seeks to rely on section 35(3)(l) of the Constitution, which provides that an accused person may not be convicted of an offence that did not exist at the time the conduct in question was committed.[14]

11. IOM ignores the doctrine of objective invalidity, which means that '*[a]s a matter of law the provision has been a nullity since [4 February 1997]*'.[15] Since section 29(8) had no legal effect after that date, it never rendered the By-Law void.[16] Accordingly, the criminal offence created by the Advertising By-Law has always been in force.

12. IOM's unapproved retention of the Overbeek signs was an offence under the Advertising By-Law *at the time IOM committed the conduct*. Therefore, a conviction of IOM under the Advertising By-Law would not infringe section 35(3)(l) of the Constitution.

---

14 IOM's heads of argument para 10.

15 *Moise* above n 3 at para 13.

16 Compare the speech of Lord Irvine of Lairg L.C. in *Boddington v British Transport Police* [1998] 2 All ER 203 ('***Boddington***'): 'the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all.' (Emphasis added.)

13. The present proceedings are not concerned with '*reviving*' the By-Law,[17] but recognising that it has always had legal force because it was never voided by section 29(8).

14. We accept that it would be unfair to convict an individual if, at the time of their conduct, they lacked criminal intent because of a belief that the Advertising By-Law is void. But South African criminal law's intention requirement will avoid any such unfair conviction.

    14.1. For criminal liability, the accused must subjectively appreciate the unlawfulness of their conduct and the State must prove this element beyond a reasonable doubt. An accused will escape liability if the evidence shows a reasonable possibility that the accused did not know their act was unlawful.[18]

    14.2. However, if the State proves beyond reasonable doubt that the accused willingly and knowingly (i.e. with knowledge of the unlawfulness) committed the act believing it to be unlawful, they should not escape criminal liability.

---

17 IOM's heads of argument para 12.

18 *S v de Blom* 1977 (3) SA 513 (A). Compare the discussion of *Bugg's* case in the Lord Chancellor's speech in *Boddington* above n 16.

14.3. IOM is an example. In many years of attacking the Advertising By-Law, only recently did IOM rely on section 29(8).

14.3.1. In litigation that resulted in a High Court judgment in December 2011, IOM brought a counter-application setting out numerous challenges to the lawfulness of the Advertising By-Law, but IOM did not raise section 29(8).[19]

14.3.2. IOM took the High Court's decision on appeal and once again raised various challenges to the validity of the Advertising By-Law, but once did not raise section 29(8).[20]

14.3.3. On 1 March 2016, the City applied in the Western Cape High Court to address IOM's failure to obtain the necessary authorisations under the Advertising By-Law for the Overbeek signage. IOM submitted a detailed answering affidavit and IOM, once again, did not raise section 29(8).[21]

---

19 *City of Cape Town v Independent Outdoor Media (Pty) Ltd* 2012 JDR 0109 (WCC) ('***City v IOM***').

20 *Independent Outdoor Media v City of Cape Town* [2013] 2 All SCA 679 (SCA) ('***IOM v City***').

21 City's opposing affidavit vol 3 p 283 paras 30 – 31. WC case 3491/2016 is one of the two cases before this Court.

14.3.4. In the present case, the City made the following allegation in its High Court papers, which remains undenied:[22]

> IOM has not always operated under the assumption that the By-Law is void, and therefore that it is free to do as it wants with billboards and public advertising in Cape Town. For example, when the City initiated enforcement proceedings under the By-Law against IOM in 2016, IOM made no mention at all of s 29(8) of the Building Act. It is only recently that IOM has cottoned on to the notion that the By-Law can be said to be 'void' because of non-compliance with s 29(8).

14.3.5. In May 2011 IOM pleaded guilty to the offence under the Advertising By-Law of advertising without obtaining the requisite approval.[23] Various enforcement steps were taken against IOM in later years.[24] IOM did not raise section 29(8) and, furthermore, accepted its guilt.

14.3.6. In all likelihood, IOM did not mention section 29(8) because, like the City, it was unaware of the provision.

14.3.7. In other words, IOM's unlawful refusal to comply with the Advertising By-Law was not because it believed the By-Law is void or because it thought that its conduct was lawful. Rather, IOM's defiance of the law is motivated by the large sums it can

---

22 City's answering affidavit vol 1 p 71 para 63.17.
23 City's opposing affidavit vol 3 p 282 para 28.1.
24 City's opposing affidavit vol 3 pp 282 – 283 paras 28.2 – 29.

earn from the Overbeek signs (estimated in 2016 to be approximately R4,140,000 per annum).[25]

15. Each prosecution should be decided on its own facts. It will be for a trial court to consider the circumstances of each case and decide whether the accused had the necessary criminal intent. In the present context, it will be for the trial court to determine whether the particular accused held the subjective belief that the Advertising By-Law was void because of the operation of section 29(8). If there is reasonable doubt, the accused will be acquitted.

16. Refusing IOM's request to limit the Advertising By-Law's criminal will not infringe any fair trial rights. Granting IOM's request would unjustly and inequitqably exculpate parties who the State can prove, beyond a reasonable doubt, willfully contravened the Advertising By-Law without any belief that it was void.

17. In effect, IOM asks this Court to use its powers under section 172(1)(b) of the Constitution to render parts of the Advertising By-Law inoperative. However, the constitutional validity of the Advertising By-Law is not impugned, and this Court is not asked to determine whether the Advertising By-Law (including its criminal

---

[25] City's opposing affidavit vol 3 p 280 para 24.

provisions) is invalid. Rather, it is section 29(8) that should be the focus of the section-172 analysis i.e. whether that provision is constitutionally invalid and, if so, whether it should be allowed to retain some legal force.

18. Furthermore, IOM asks this Court to enable old-order legislation – which is indisputably unconstitutional – to void the lawful, reasonable and constitutionally-authorised criminal enforcement framework for the regulation of outdoor advertising. That would require a significant justification, which simply does not exist and which IOM has not proven.

19. The principles of criminal law are sufficient to protect fair trial rights. Accordingly, IOM has not established that it is just and equitable to allow the indisputably-invalid section 29(8) to void the constitutionally-valid criminal sanction in the Advertising By-Law.

REMOVAL ORDERS

20. IOM asks this Court to set aside the High Court's orders to remove the Overbeek signs. Its appeal is bad because, regardless of whether the Advertising By-Law was in operation, the Overbeek signs are unlawful because they lack approved building plans. IOM's refusal to remove the signs, therefore, undermines the rule of law.

21. Its appeal is unsustainable also because, should this Court confirms the invalidity of section 29(8), it will be moot whether the High Court could order removal under the Advertising By-Law. IOM concedes this.[26]

Overbeek signs are unlawful under the Building Act

22. The City applied to have the Overbeek signs removed on two independent bases:

22.1. First: IOM lacked the necessary advertising approvals, because the approvals issued under the Advertising By-Law had lapsed and never been renewed.[27]

22.2. Second: IOM lacked the necessary building-plan approvals, because IOM never sought or obtained separate and independent approval for the advertising structures under the Building Act.[28]

---

26 IOM's heads of argument para 20.

27 City's answering affidavit vol 1 p 55 para 15; p 84 para 110. City's notice of motion vol 2 p 113 para 4.1. City's founding affidavit vol 2 p 133 para 32. City's opposing affidavit vol 3 p 280 paras 23 – 25. None of these allegations has been disputed by way of an affidavit from IOM.

28 City's notice of motion vol 2 p 113 prayer 4.1. City's answering affidavit vol 1 pp 83 – 90 paras 108 – 131. City's opposing affidavit vol 3 pp 279 – 281 paras 22 and 26. None of these allegations has been disputed by way of an affidavit from IOM.

23. The City's notice of motion accordingly asked for a declaration that '*the Overbeek signs are not approved under the Building Act* ***or*** *the By-Law*'[29] (our emphasis).

24. The City's evidence and allegations were not disputed by IOM. The High Court accordingly '*declared that the "Overbeek Signs" are not approved under the Building Standards Act* ***or*** *under any of the applicable municipal by·laws… [and] are accordingly unlawful*'[30] (our emphasis).

25. IOM's submissions refer only to the voidness of the Advertising By-Law to argue that the High Court should not have ordered it to remove the unlawful signage (paragraphs 4 and 5 of the order).[31] But even without the Advertising By-Law, the High Court correctly granted the removal orders because the signs are not approved under the Building Act.

    25.1. It is undisputed that IOM was never issued with approved building plans for the Overbeek advertising structures. The City adduced comprehensive and uncontradicted evidence in this regard. IOM conceded that the advertising structures are '*buildings*' as defined in the

---

29 City's notice of motion vol 2 p 113 prayer 4.1.
30 High Court order vol 3 pp 236 – 237 paras 4.1 and 4.2.
31 IOM's heads of argument paras 3 and 17 – 21.

Building Act[32] and require authorisation under that statute,[33] and was unable to put forward any evidence to show that it had obtained duly approved building plans.

25.2. IOM therefore contravened section 4(1) of the Building Act. The structures are unlawful and must be removed.[34]

26. The High Court – after having discussed IOM's lack of advertising approvals – said the following about its lack of approved building plans:[35]

> Besides, factually [IOM] is possessed of no approvals under the [Building] 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 [Building] 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 [Building] Act. [Emphasis added.]

27. There are also essential safety reasons to require building plan approval for advertising signs.[36] Section 7(1)(b)(ii)(bb) of the Building Act requires the City to be satisfied that advertising structures will not probably or in fact, be dangerous to life or property.

---

32 IOM's answering affidavit vol 1 p 41 para 11.

33 IOM's answering affidavit vol 1 p 42 para 12.

34 *Lester v Ndlambe Municipality and Another* 2015 (6) SA 283 (SCA) at paras 20 and 27; *Serengeti Rise Industries (Pty) Ltd and Another v Aboobaker NO and Others* 2017 (6) SA 581 (SCA) at para 18; *Walele v City of Cape Town and Others* 2008 (6) SA 169 (CC) at para 52. See City's opposing affidavit vol 3 p 281 para 27.

35 High Court judgment vol 3 p 255 para 53.

36 City's answering affidavit vol 1 p 56 para 20. *IOM v City* above n 20 at para 16.

28. Louw J in *City v IOM* held the following about the danger of advertising signs and the need for regulation under the Building Act:[37]

> [T]he evidence on behalf of the City that regulation is necessary because there is a danger of insecure signage structures, some of which are of extensive proportions, collapsing or blowing over from the tops or sides of tall structures in densely populated areas onto sidewalks and areas frequented by the public. This, the uncontested evidence is, shows that the City has a legitimate, substantial and pressing purpose of promoting public safety and welfare by ensuring that outdoor signs comply with applicable building regulations.

29. Advertising signs can endanger lives: several years ago an individual lost her life when large advertising infrastructure collapsed onto her as a result of inadequate safety precautions and strong Cape winds.[38]

30. However, the City has never made the necessary safety determinations in respect of the Overbeek signs which include large structures of galvanised steel,[39] and are '*many metres high and wide*'.[40]

31. Although IOM's notice of appeal initially sought to challenge the High Court's finding regarding the lack of building-plan approval,[41] that has now been abandoned. IOM's written submissions are conspicuously silent about the

---

37 *City of Cape Town v Independent Outdoor Media* n 19 above para 19.
38 *Hirt & Carter (Pty) Ltd v IT Arnsten NO and Others* [2021] ZASCA 85 (18 June 2021) at paras 1, 5 and 17 – 20.
39 IOM answering affidavit vol 1 p 41 para 10.
40 City's opposing affidavit vol 3 pp 279 – 280 para 22.
41 Notice of appeal vol 3 p 262 para 6.

'*overwhelming*' evidence that the Overbeek advertising structures lack any approved building plans and are, for that reason alone, unlawful.

32. Paragraphs 4 and 5 of the High Court's order were therefore competent: IOM's lack of approved building plans contravened section 4 of the Building Act and justified, without more, the High Court's order to remove the unlawful structures.

Rule of law

33. IOM contends that '*[t]here is no reason why the frame of the sign could not remain on the building pending the confirmation proceedings before this Court.*'[42]

34. That is incorrect: the frame is unlawful, and has been since inception. The longer the frame remains in place, the longer IOM perpetrates its unlawfulness, and the longer municipal governance in Cape Town is undermined. IOM should immediately have complied with the High Court's order.

---

42 IOM's heads of argument para 18.

35. It is undisputed that IOM is participating in these proceedings solely to achieve its own narrow commercial ends.[43] We submit that such ends cannot outweigh the harm to the rule of law caused by IOM's conduct.

Mootness of IOM's argument regarding the removal orders under the Advertising By-Law

36. IOM points out that under section 172(2)(a) of the Constitution, the High Court's declaration that section 29(8) is invalid has no force until confirmed by this Court.

37. IOM quibbles about whether the High Court could grant the removal order under the Advertising By-Law or should have granted the same removal order as temporary relief under section 172(2)(b) of the Constitution. But IOM correctly concedes this issue will be moot if this Court confirms the invalidity of section 29(8).[44]

38. In any event, before this Court confirms the High Court's declaration that section 29(8) is invalid, the High Court indisputably had the power to order removal under section 4 of the Building Act.

---

43 City answering affidavit vol 1 p 69 para 63.9. City opposing affidavit vol 3 pp 278, 295 paras 16, 80. Each of these allegations is undisputed.

44 IOM's heads of argument para 20.

IOM'S APPEAL SHOULD BE DISMISSED

39. IOM contends that it '*had no choice but to appeal against paragraphs 4 and 5 of the High Court's order because the City was intent on implementing them*'.[45]

    39.1. It is not apparent what the source of this claim is: it is not made with any reference to an affidavit. Our instructions are that the City has not taken any steps to enforce the High Court's order.

    39.2. In any event, until IOM noted its appeal, the City would have been at large to enforce paragraphs 4 and 5 of the Order: the confirmation proceedings are concerned only with the constitutional validity of section 29(8) and that provision's impact on the Advertising By-Law. This Court's decision on the High Court's declaration of invalidity will not affect the operation of the removal orders under the Building Act.

    39.3. IOM concedes, without being pressed, that its appeal against the High Court's removal order is moot.[46]

40. Thus the only substantive issue addressed by IOM is whether the declaration's retrospectivity should be limited.

---

45 IOM's heads of argument para 19.

46 IOM's heads of argument paras 6 and 20.

40.1. IOM did not oppose the City's application to declare section 29(8) invalid, and did not make any submissions on remedy in the High Court.[47] Its change in approach is unexplained.

40.2. This is a new argument introduced only in this Court, and is calculated to allow people who wilfully contravened the Advertising By-Law to escape criminal liability.

41. IOM neither sought nor obtained leave to file its ostensible appeal, whether from the High Court or from this Court.[48] IOM's supposed appeal against the High Court's order should therefore be dismissed.

COSTS

No basis to interfere with the High Court's order

42. IOM complains that the High Court should not have ordered it to pay costs regarding IOM's counter application and its supplementary challenges. However, IOM fails to set out any basis upon which this Court can interfere in the costs order – it blandly alleges that the High Court '*erred*'.[49]

---

47 City's opposing affidavit vol 3 p 277 para 10.
48 City's opposing affidavit vol 3 p 277 para 12.
49 IOM's heads of argument para 22.

43. The Constitutional Court has explained the position as follows:[50]

> An important principle in this appeal is that courts exercise a true discretion in relation to costs orders. A true discretion exists where the lower court has a number of equally permissible options available to it. An appeal court will not lightly interfere with the exercise of a true discretion. Ordinarily, it would be inappropriate for an appeal court to interfere in the exercise of a true discretion, unless it is satisfied that the discretion was not exercised judicially, the discretion was influenced by wrong principles, or a misdirection on the facts, or the decision reached could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. There must have been a material misdirection on the part of the lower court in order for an appeal court to interfere. It is not sufficient, on appeal against a costs order, simply to show that the lower court's order was wrong. (Emphasis added.)

44. IOM has not set out any '*material misdirection*' on the part of the High Court. It therefore cannot seek to have this Court overturn Wille J's order in respect of costs.

45. The High Court gave a reasoned and balanced decision in respect of costs:

45.1. It did not grant the City costs in respect of the direct challenge to the invalidity of section 29(8), because none of the parties opposed the relief sought.[51]

---

50 *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 144.

51 High Court judgment vol 3 p 256 para 57.

45.2. Although Overbeek should have conceded the case much earlier, the High Court was satisfied that it should be given '*the benefit of the doubt*' and so not made to pay the City's costs.[52]

45.3. IOM launched a '*still-born*' counter-application and a set of supplementary challenges that, to a limited extent, constituted an abuse of process. The High Court therefore ordered it to pay the City's costs, although not on a punitive scale.[53]

46. IOM abused the High Court's processes:

46.1. It repeated arguments that had already been rejected by various superior courts, including in judgments of which IOM had direct knowledge because it was a litigant before the courts in question.[54]

46.2. It raised threadbare constitutional attacks that were never intended to be taken seriously as challenges.[55] It adopted similar tactics in previous litigation, for which it was rightly criticised.[56]

---

52 Id.
53 High Court judgment vol 3 pp 256 – 257 para 58.
54 City's opposing affidavit vol 3 p 297 paras 88 – 89.
55 City's opposing affidavit vol 3 p 284 para 34; p 285 para 38.
56 *City v IOM* above n **Error! Bookmark not defined.**

46.3. It initially claimed to have building-plan approval, despite knowing that it had never applied for such approval.[57]

46.4. Its conduct was motivated by the continued pursuit of commercial profits rather than by any of the constitutional issues it raised. Over more than a decade IOM's conduct has consisted of '*a string of meritless legal challenges that have been raised without any prospects of success and purely to maximise commercial profits while evading legislative compliance*'.[58]

47. If anything, the High Court was generous to IOM, having concluded that it was guilty of an abuse of process but then withholding a punitive costs order. Furthermore, through the 2016 enforcement proceedings, IOM forced the City to utilise scarce public funds to engage in expensive superior court litigation, all in an effort to prolong its years-long pattern of defiance and unlawfulness.

48. IOM's abuse has continued before this Court. As explained in the City's (undisputed) affidavit:[59]

---

57 City's opposing affidavit vol 3 p 298 para 93.

58 City's opposing affidavit vol 3 p 295 para 80. See the discussion in paras 81 – 94 of the City's opposing affidavit vol 3 p 295 – 299.

59 City's opposing affidavit vol 3 pp 287 – 288 para 48.4. IOM does not deny these allegations.

> IOM's sole motivation for its purported appeal is its attempt to prolong legal uncertainty in the regulation of outdoor advertising. Notwithstanding its election to abide the City's direct challenge to section 29(8), and its abandonment of its counter-application and its 'supplementary challenges', IOM wishes to continue arguing – in its engagements with the City and in criminal proceeding[s] before magistrates' courts – that the Advertising By-Law is void and therefore that it cannot be subject to any municipal regulation. IOM has extensive outdoor advertising in Cape Town. Prolonging legal uncertainty to facilitate unlawful conduct is not a legitimate interest as required by section 172(2)(d) of the Constitution.

49. IOM's reliance on *Biowatch* is misplaced: the principle excluding an unsuccessful litigant from costs only applies to genuine constitutional litigation, and does not apply if the litigation is vexatious or manifestly inappropriate.[60]

49.1. IOM's litigation can hardly be said to have been genuine. It raised its supplementary challenges in the High Court only to cloud matters, and never took the necessary steps to prosecute those challenges properly. It has now appealed against the High Court's order without being granted leave, and raised issues that it acknowledges to be moot.

49.2. Its conduct is also manifestly inappropriate, given its harmful implications for public safety and municipal governance.

---

[60] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at paras 23 – 24.

50. The Supreme Court of Appeal has previously concluded that IOM should pay the City's costs because its attacks on the By-Law are motivated by its '*private commercial interests*'.[61]

51. In the present case, it is undisputed that the IOM has been pursuing its profiteering through the current litigation.[62] It has done so in bad faith, and as part of a continued pattern of undermining legitimate, constitutional municipal governance. Absolving IOM from the City's costs would, in the circumstances of this case, incentivise defiance of the law and encourage a culture of impunity.

---

61 *IOM v City* above n 20 para 37.

62 City's answering affidavit vol 1 p 70 para 63.13. IOM never denied this allegation.

CONCLUSION

52. The City asks the Constitutional Court to –

52.1. confirm the High Court's declaration that section 29(8) is constitutionally invalid;

52.2. dismiss IOM's appeal; and

52.3. order IOM to pay the City's costs in the Constitutional Court, including the costs of two counsel.

RON PASCHKE SC
A PILLAY

Chambers, Cape Town
16 September 2022

AUTHORITIES

1. *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at paras 23 – 24.
2. *Boddington v British Transport Police* [1998] 2 All ER 203.
3. *City of Cape Town v Independent Outdoor Media (Pty) Ltd* 2012 JDR 0109 (WCC).
4. *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) at para 11.
5. *Independent Outdoor Media v City of Cape Town* [2013] 2 All SCA 679 (SCA) at para 16.
6. *Lester v Ndlambe Municipality and Another* 2015 (6) SA 283 (SCA) at paras 20 and 27.
7. *Mvumvu and Others v Minister for Transport and Another* 2011 (2) SA 473 (CC) at paras 45 and 50 – 52.
8. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 88.
9. *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 144.
10. *Serengeti Rise Industries (Pty) Ltd and Another v Aboobaker NO and Others* 2017 (6) SA 581 (SCA) at para 18.
11. *S v de Blom* 1977 (3) SA 513 (A).
12. *Walele v City of Cape Town and Others* 2008 (6) SA 169 (CC) at para 52.