

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 ARGUMENT IN REPLY TO THE MINISTER
IN TERMS OF RULE 20(4)**

1. These submissions reply to those of the Minister.¹ We use the abbreviations used in the City's main heads.

INADEQUACY OF THE MINISTER'S RESTRICTIVE INTERPRETATION

2. The Minister contends that section 29(8) of the Building Act can be made '*constitutionally compliant*' by interpreting it so as not to apply to municipal advertising legislation. He contends that a restrictive interpretation is '*dispositive of the constitutional harm*'.²
3. However, the Minister ignores almost all of section 29(8)'s constitutional harm: he discusses only one of the five constitutional defects listed in the City's main heads.³ Those heads point out the inadequacy of the Minister's interpretation.⁴
4. The Minister argues that the High Court did not consider whether section 29(8) could be saved through a restrictive interpretation.⁵ That is incorrect: the High Court expressly considered the Minister's interpretation, and found it wanting

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

² Minister's written argument paras 30 and 34.

³ The Minister discusses section 29(8)'s impermissible regulation of Schedule 5B matters but ignores its infringement of municipalities' legislative autonomy, exceeding Parliament's competence, infringement of the separation of powers and usurping of the powers of the courts.

⁴ City's written argument paras 76-81 and 86-91.

⁵ Minister's written argument para 4.

because it did not address the numerous (undisputed) ways in which the statutory provision is unconstitutional. Wille J said the following:⁶

The position taken by the [Minister] is that these impugned provisions should rather be ‘interpreted’ so that they do not apply to billboards or public advertising... 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... The interpretation chartered for by the [Minister] does not decide all the constitutional issues raised by the [City].

5. The Minister argues that *‘legislation of the different spheres of government [should] be read harmoniously with each other, so that conflicts are avoided.’*⁷

However, that general principle does not save national legislation that fails to respect municipal autonomy, particularly concerning municipal planning and building regulations.⁸ Section 172(1)(a) of the Constitution expressly requires it to be declared invalid.

6. The Minister’s interpretative ‘solution’ is entirely inadequate. Section 29(8)’s numerous contraventions of the Constitution cannot just be ignored.

⁶ Judgment vol 3 pp 250-251 paras 39-40.

⁷ Minister’s written argument para 25.

⁸ See, for example, *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC), *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) (*‘Habitat Council’*), *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC) and *Johannesburg Metro* above n 9.

THE MINISTER’S INTERPRETIVE ARGUMENTS

7. The narrow textual construction of ‘*building*’ advocated by the Minister is inconsistent with the Constitutional Court’s jurisprudence, which explains that the Building Act ‘*defines a “building” in wide terms, which include any structure used for the “convenience of human beings or animals”.*’⁹
8. The Minister relies on the legislative context and purpose of the Building Act, which is ‘*to provide for the promotion of uniformity in the law relating to the erection of buildings*’.¹⁰
9. However, as explained in the City’s main heads, under the Constitution, neither Parliament nor the Minister can compel every local government to operate under uniform building regulation laws or decide the content of municipal by-laws.
10. ‘Uniform’ legislation concerning building regulations is a constitutionally-offensive purpose. It exceeds the ‘*norms and guideline*’ limits of section 155(7) of the Constitution and impermissibly constrains the ability and right of municipalities to each have their own building regulations by-laws – with different provisions.

⁹ *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC) (‘*Johannesburg Metro*’) at para 4.

¹⁰ Minister’s written argument paras 19-24.

11. Under section 155(7) of the Constitution, the national sphere of government has no power to regulate a municipality's exercise of its legislative powers. The national sphere may only regulate a municipality's executive powers (and even then must do so with a light touch). The national government – whether through Parliament or the Minister – therefore has no power to specify that all municipalities must have uniform building regulation laws.
12. While norms and guidelines may include setting minimum national norms about safety, that does not justify requiring '*uniform*' law. The Constitution permits municipalities to legislate in different ways for safe buildings while still complying with national norms.
13. The Constitution has allocated primary legislative responsibility to the local sphere of government because that is where it is most appropriate for laws on '*building regulations*' to be made.¹¹
14. The constitutional competence for '*building regulations*' can be contrasted with the competence for '*planning*'.
 - 14.1. Schedules 4B and 5B to the Constitution refer to '*provincial planning*', '*regional planning and development*' and '*municipal planning*'.

¹¹ See *Habitat Council* above n 8 at para 14.

Accordingly, various spheres have both executive and legislative competence in respect of different '*planning*' functions.

14.2. There is, however, only one category of '*building regulations*' – there are no regional building regulations or provincial building regulations, in respect of which provincial authorities may exercise executive power.

14.3. Every exercise of executive power in respect of building regulations is exclusively a matter for local government. That being the case, municipalities are also best suited as the primary legislators in respect of building regulations.

15. Deciding building-plan applications is based on highly localised considerations, such as compliance with the relevant municipality's zoning scheme (which sets out various municipal land use rules), consistency with local aesthetics and impact on neighbours and surrounding property values.¹² How those considerations are weighed up, what requirements an applicant must meet in respect thereof and what procedures should be followed to obtain authorisations

¹² See section 7 of the Building Act.

are all matters that municipalities are best placed to determine, through their own by-laws.¹³

16. Municipalities have the constitutional authority to make different legislative choices from each other and from those in the Building Act.

16.1. Permissible differences include the processes and criteria for decision-making; applying the law differently to informal housing and micro builders; cascading levels of approval; where appropriate, relaxing building regulation requirements; and, without compromising safety, having different requirements for different categories of application.

16.2. For example, Cape Town, Johannesburg and eThekweni are all metropolitan municipalities but have very different urban environments. Their respective local governments may well have different approaches to how matters of zoning, aesthetics and land values should impact on building-plan applications. The Constitution grants each of those municipalities the legislative competence to reflect those differing approaches through their by-laws.

¹³ Compare *Habitat Council* above n 8 at para 14.

- 16.3. eThekweni may decide not to require a building control officer recommendation for building plan applications in informal areas. Johannesburg may require that buildings can withstand hail. Cape Town might provide a hearing for neighbours, allow appeals and provide a process to withdraw approvals.
- 16.4. The national sphere of government – whether through Parliament or the Minister – may not proscribe any of these requirements, or force all municipalities to adopt them, in the name of ‘*uniformity*’. Instead, the Constitution empowers each municipal council to legislate based on local requirements and, in so doing, to differ from other governments in the local sphere.
17. Parliament may not require all local governments to have ‘*uniform*’ legislation for ‘*building regulations*’. Instead, the national government must be ‘*hands-off*’ to allow for full municipal autonomy.¹⁴ The national government is limited to enabling municipalities to discharge their own functions and to ‘*capacitating municipalities to manage their own affairs*’.¹⁵ Parliament’s object of ‘*uniformity*’

¹⁴ *Habitat Council* above n 8 at para 21.

¹⁵ *Johannesburg Metro* above n 9 at para 34.

unconstitutionally compromises and impedes municipalities' ability and right to make different by-laws that are appropriate for each local context.

CITY'S DIRECT CHALLENGE TO THE INVALIDITY OF SECTION 29(8)

18. The Minister argues that the City favoured his restrictive interpretation of section 29(8) as the City's '*primary relief*' in the High Court.¹⁶ That is incorrect. The restrictive interpretation was part of the City's initial collateral defence to IOM's challenge. But that was before the City joined the Minister and squarely challenged section 29(8)'s invalidity. By agreement with the Minister, the City formally amended its notice of motion relief to make the direct challenge to section 29(8).¹⁷ The City explained that once the requirements of cooperative governance had been met, it was '*appropriate - indeed obligatory - for a direct challenge to the constitutional validity of s 29(8) to be brought before and considered*'.¹⁸

19. The City pleaded its direct challenge in the founding affidavit thus:¹⁹

[I]t is necessary for this Court to declare s 29(8) unconstitutional even if it upholds the interpretation in prayer 1 [i.e. the interpretation favoured by the Minister]. In other words, s 29(8) is invalid even if it does not apply to the Advertising By-Law

¹⁶ Minister's written argument para 7.

¹⁷ City's founding affidavit vol 2 p 119 para 13.

¹⁸ City's founding affidavit vol 2 pp 118-119 para 12 read with paras 7-11.

¹⁹ City's founding affidavit vol 2 pp 120-121 paras 15.3-15.4.

and for several reasons that have nothing to do with Schedule 58 to the Constitution. Those sources of invalidity, which are discussed further below, will not be addressed by prayer 1 alone.

Accordingly, s 172(1)(a) of the Constitution makes it necessary for this Court to declare that, for all purposes, s 29(8) of the Building Act is unconstitutional, invalid and of no force and effect. Prayer 2 sets out the terms of such a declaration. [Emphasis added.]

20. From the outset – and before the Minister or any other party filed answering papers – it was clear to all involved that the City’s challenge was not merely limited to the Advertising By-Law, but concerned the extent to which section 29(8) impacts all by-laws that relate to the ‘*erection of a building*’.
21. The Minister claims that section 29(8)’s impact on other municipal by-laws, such as the Coastal By-Law and the Community Fire Safety By-Law, is ‘*vague, hypothetical and abstract*’.
22. Once again, the Minister is incorrect. In the City’s founding affidavit in the direct challenge to the constitutional validity of section 29(8), the City expressly alleged that the impugned provision does not only implicate its Advertising By-Law, but also each other by-law that ‘*relates to the erection of a building*’. By way of example, the City referred to the Community Fire Safety By-Law and the Coastal

By-Law,²⁰ annexed copies of both by-laws²¹ and explained how both by-laws relate to ‘*the erection of a building*’ and so fall within the ambit of section 29(8).²²

23. Neither the Minister nor any other party denied the City’s allegations. Similarly, neither the Minister nor any other party advanced any argument as to why the Community Fire Safety By-Law or the Coastal By-Law do not relate to ‘*the erection of a building*’. The fact that each by-law falls within the ambit of section 29(8) was, and remains, undisputed.

23.1. The Community Fire Safety By-Law is concerned with how buildings must be constructed to avoid fire hazards. It deals with, among other things, the submission of building plans and the manner in which structures (including stores and spray rooms) must be designed and constructed.²³ Quite obviously, the Community Fire Safety By-Law ‘*relates to the erection of a building*’.

²⁰ City’s founding affidavit vol 2 pp 126-128 paras 23.1-23.2.

²¹ City’s founding affidavit vol 2 pp 136-165 and 166-182.

²² City’s founding affidavit vol 2 pp 126-128 paras 23.1-23.2.

²³ City’s founding affidavit vol 2 pp 126-128 para 23.1.

- 23.2. The Coastal By-Law regulates where buildings may be constructed and when specific authorisations are required to construct a particular type of structure.²⁴ It undeniably ‘*relates to the erection of a building*’.
24. There is nothing vague about these arguments.
25. There is also nothing hypothetical or abstract about the City’s case because the effect of section 29(8) is clear. The *SAPOA* case²⁵ shows how section 29(8) can be used to void legitimate, lawful and constitutionally-authorized legislation. The very purpose of the Minister’s joinder to these proceedings and the City’s direct challenge was to expand the litigation beyond the narrow ambit of IOM’s application, and to ensure that section 29(8) is stripped of any lawful effect.
26. In any event, the Constitutional Court has determined that the constitutionality of legislation should be dealt with (even if facts have not yet arisen to show the harm caused by the particular statute) to avoid disruptive legal uncertainty – particularly where the statute will have ‘*imminent and adverse effects*’.²⁶
27. In the present case, the constitutionality of section 29(8) must be dealt with:

²⁴ City’s founding affidavit vol 2 p 128 para 23.2.

²⁵ *South African Property Owners Association and Others v City of Johannesburg Metropolitan Municipality and Others* unreported case number 19656/18 (undated) (ZAGPJHC) paras 58-65.

²⁶ *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) at paras 12-13.

- 27.1. The provision has ‘*imminent and adverse effects*’, as is evident from its utilisation in the *SAPOA* matter to invalidate the City of Johannesburg’s by-laws, and IOM’s attempt to do the same in respect of the Advertising By-Law.
- 27.2. The provision’s continued existence creates disruptive legal uncertainty, as it casts a pall of voidness over various essential municipal laws across the country that regulate, among other things, fire hazards, coastal protection and building regulations.
- 27.3. The provision’s continued existence undermines various enforcement regimes in local government functional areas, as individuals argue that they are not required to comply with ‘*void*’ regulatory frameworks.²⁷
- 27.4. Section 29(8) imperils future law-making: for so long as it remains in effect, municipal councils will not be able to discharge their exclusive responsibility for making by-laws as required by the Constitution.²⁸
28. The Minister would have the City (and every other municipality in the country) wait until each of its by-laws is challenged for contravening section 29(8), and

²⁷ City’s opposing affidavit vol 3 p 300 para 98.

²⁸ City’s confirmation affidavit vol 3 p 233 para 63.

then have the constitutionality of the provision considered only with reference to that by-law.

28.1. That, however, would require the courts to repeatedly adjudicate the validity of section 29(8), which would be wasteful of judicial resources.

28.2. It would allow section 29(8) to survive by being restrictively interpreted so as not to apply to the by-law in question, but then to continue jeopardising other municipal legislation and undermining the associated enforcement frameworks.

28.3. This harm would be incurred to serve no legitimate purpose: the Minister cannot identify any benefit from section 29(8)'s continued operation.²⁹

29. The position advocated by the Minister is not only pointless, but also reckless and harmful.

30. The Minister refers to cases where the courts have concluded that national and municipal legislation can '*operate side-by-side*'.³⁰ That quite obviously does not apply to section 29(8), which voids any by-law relating to the '*erection of a building*' promulgated without ministerial consent.

²⁹ City's founding affidavit vol 2 p 132 para 28; undisputed by the Minister.
³⁰ Minister's written argument para 28.

31. The Minister misplaces reliance on out-of-context phrases in *Esau*.³¹ In that case, the SCA was concerned with whether government policy, which had not yet been implemented, can be judicially reviewed. It concluded:³²

As a general rule, policies that have been formulated and adopted by the executive will not be ripe for review until they are implemented, usually after having been given legal effect by some or other legislative instrument. Two principles come into play in this regard: first, that in order for an exercise of public power to be ripe for review, it should ordinarily be final in effect; and secondly, that the decision must have some adverse effect for the person who wishes to review it, because otherwise its setting aside would be an academic exercise which courts generally eschew.

I accept, however, that the mere fact that the impugned conduct involves the formulation or adoption of a policy does not necessarily mean that it is not justiciable. If the application of a policy infringes or threatens rights, it may be challenged on review.

Generally speaking, a challenge to a policy decision before it has been implemented will not be justiciable because it is premature. There are instances, however, in which a policy decision may have the result that a constitutional infringement is likely to occur, and that a court may, in order to prevent that apprehended harm, grant appropriate relief before the policy is implemented. [Emphasis added.]

32. The SCA held that even unimplemented policy can be challenged if it causes a ‘*constitutional infringement*’. Thus *Esau* does not support the Minister’s position.

³¹ Minister’s written argument para 32. The Minister refers only to a challenger showing “‘an adverse effect for the person” [without which] setting aside the regulations “would be an academic exercise which courts generally eschew”.’

³² *Esau and Others v Minister of Cooperative Governance and Traditional Affairs and Others* 2021 (3) SA 593 (SCA) at paras 45-47.

33. In any event, the present case is not concerned with unimplemented policy. Here, a policy was translated into law several decades ago and continues to have direct, substantial and harmful consequences for municipal law-making. On the strength of both *Esau* and the Constitutional Court's decision in *Centre for Child Law*,³³ the City's direct challenge to section 29(8) is ripe for final determination. The Minister cannot elide the constitutional issues.

CONCLUSION

34. The City asks the Constitutional Court to confirm the High Court's declaration that section 29(8) is constitutionally invalid.

**RON PASCHKE SC
A PILLAY**

Chambers, Cape Town
14 September 2022

³³ Above n 26.

AUTHORITIES

(Only authorities not referred to in the City's main heads are listed below):

1. *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) paras 12 – 13.
2. *Esau and Others v Minister of Cooperative Governance and Traditional Affairs and Others* 2021 (3) SA 593 (SCA) paras 45 – 47.