

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 421/2013

In the matter between:

CONTINENTAL OUTDOOR MEDIA (PTY) LTD

1<sup>ST</sup> APPLICANT

ESHISHA MEDIA NETWORKS CC

2<sup>ND</sup> APPLICANT

and

THE MUNICIPAL COUNCIL FOR THE CITY  
OF WINDHOEK

1<sup>ST</sup> RESPONDENT

PRIMEDIA OUTDOOR (PTY) LTD

2<sup>ND</sup> RESPONDENT

ALIANCE MEDIA NAMIBIA

3<sup>RD</sup> RESPONDENT

MEDIA SOLUTIONS GROUP

4<sup>TH</sup> RESPONDENT

OUTTHERE NAMIBIA

5<sup>TH</sup> RESPONDENT

AD OUTPOST

6<sup>TH</sup> RESPONDENT

ANTS ADS CC

7<sup>TH</sup> RESPONDENT

RAMA MEDIA CC

8<sup>TH</sup> RESPONDENT

**Neutral citation:** *Continental Outdoor Media (Pty) Ltd v The Municipal Council for the City of Windhoek* (A 421/2013) [2018] NAHCMD 187 (26 June 2018)

**Coram:** UNENGU AJ

**Heard:** 22 April 2015; 08 December 2015

**Delivered:** 26 June 2018

**Flynote:** Practice – Review application – Applicant seeking from court an order to declare billboards erected by the second respondent unlawful – And be broken up – Application for review dismissed with costs.

**Summary:** The applicant, Eshisha Media Networks CC, brought a review application against a decision of the City Council, (the first respondent) allowing the second respondent to erect LED animated billboards on places they were erected. Applicant alleged that the billboards were erected contrary to the Outdoor Advertising Regulations and Outdoor advertising Policy and asked the court to order the first respondent to give notice to second respondent to dismantle the billboards.

*Held:* City Council took a contractual decision not an administrative decision, therefore not reviewable.

*Held further,* the decision taken by the City Council was in accordance with a standard practice applicable at that time, not contrary to the Outdoor advertising Policy or Outdoor Advertising Regulations. Application dismissed with costs.

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### ORDER

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The application is dismissed with costs.

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### JUDGMENT

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UNENGU AJ:

[1] The applicants in the matter are seeking from the court an order to review and cancel or set aside the decisions taken by the first respondent which are:

‘1. That the respondents are to show cause why the following decisions of the first respondent set out below should not be reviewed and cancelled or set aside:

- 1.1 The approval of the second respondent’s application to erect a Light Emitting Diode (LED) animated billboard at Erf 8085 Katutura, Windhoek.

- 1.2 The approval of the second respondent's application to erect a Light Emitting Diode (LED) animated billboard at Erf 8316 Windhoek.
  - 1.3 The approval of the second respondent's application to erect a Light Emitting Diode (LED) animated billboard on the Airport Road, in the Avis Area, Windhoek.
  - 1.4 The approval of the second respondent's application to erect a Light Emitting Diode (LED) animated billboard on the Ausspannplatz Traffic Circle, in the Central Business District, Windhoek.
  - 1.5 The approval of the fourth respondent's application to erect a Mega Billboard at at the intersection of Shanghai and Mungunda Streets, Katutura, Windhoek.
2. That the respondents are to show cause why the erecting of the billboards referred to in subparagraphs 1.1, 1.2, 1.3, 1.4 and 1.5 thereof, should not be declared unlawful and in contravention of the Regulation and Policies (which are attached to applicants' founding affidavit as "HKF 1" and "HKF 2") and that their immediate dismantling and removal should not be ordered:
3. That the respondents who oppose this application be ordered to pay the cost of this application jointly and severally.
4. Further and/or alternative relief.'

[2] In the meantime, the first applicant, (Continental Outdoor Media (PTY) Ltd) has withdrawn its application leaving only the second applicant pursuing with the relief sought in the notice of motion. It is also only the first and the second respondent's (the City Council and Primedia Outdoor (PTY) Ltd) who are opposing the application and have filed their answering papers.

[3] The application was heard on 22 April 2015. Mr Frank appeared for the second applicant and Mr Marcus appeared for the first respondent respectively. Whereas Mr Van Zyl represented the second respondent albeit on a watching brief only.

[4] At the start of the hearing, Mr Frank, counsel for the second applicant addressed the court and informed the court amongst others, that the relief and prayer sought in para 2 of the notice of motion will not be pursued by the second applicant anymore. Instead, the second applicant asked the court to order the first respondent to give the second and fourth respondents notices to remove the five billboards they have erected because, according to counsel, they were erected in conflict with the Regulations and the Policy for Outdoor advertising.

[5] In addition, Mr Frank argued that should the second applicant be successful, it will not ask for a cost order jointly and severally against the first and second respondents but only for a costs order for the opposition raised by the second respondent. Mr Van Zyl agreed and confirmed Mr Frank's submissions but pointed out that the second respondent did not take a position of common cause with the first respondent but merely for clarification of issues raised in the application, not a genuine opposition.

[6] Mr Frank in his address also informed the court that he would not oppose the condonation application filed by his counterpart, Mr Marcus, counsel for the first respondent for filing written heads of argument two days out of time as prescribed by the Rules and the Practice Directives of this Court. The court, therefore, condoned the non-compliance by Mr Marcus and granted the application. Mr Marcus on his part also abandoned, the point *in limine* of *locus standi* of the second applicant to bring the review application.

[7] It is now common cause at this stage that the court in its judgment<sup>1</sup> found that the second applicant lacked *locus standi* to bring the review application and dismissed the application with costs. The first applicant however, successfully appealed against the judgment to the Supreme Court which set aside the order made by this court with costs and referred the matter back for the determination of the application<sup>2</sup>.

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<sup>1</sup> *Continental Outdoor Media (Pty) Ltd v The Municipal Council for the City of Windhoek* (A 421/2013) [2016] NAHCMD 45 (29 February 2016).

<sup>2</sup> Case No: SA 12/2016 dated 9 October 2017.

[8] That being the case, what follows is the determination of the application on the merits. But, before doing that, I want to deal with the relief sought against the fourth respondent (Media Solutions Group), in respect of the billboard it has erected on Erf 9129 Katutura.

[9] Media Solutions Group was given notice by the first respondent to remove the structure and foundation within seven working days from date of receipt of the letter authored by Ms Steenkamp, Manager of Economic Development. In that regard, it is my view, that the first respondent on its own took steps against the fourth respondent to address the problem. Therefore, the relief the applicant is seeking in prayer 1.5 of the notice in its amended notice of motion is granted that the fourth respondent removes the billboard as directed by the first respondent, in the event it has not done so, with no order as to costs against the first respondent.

[10] That brings me now to a brief survey of the background facts of the matter.

[11] In July 2012 the first respondent as per Tender EDM 001/2012, called for tenders to erect outdoor advertising structures on its land of which one component of the tender invited proposals for the erection of billboards on various proposed sites of Council. The second applicant and other tenderers submitted their bids for the erection of billboards on the proposed sites. On 21 November 2012 the first respondent awarded the tender to Primedia Outdoor Namibia (Pty) Ltd (second respondent) to erect billboards on erf 8085 Katutura, erf 2621 Avis and one at the Ausspannplatz circle while erf 9129 Katutura was awarded to Media Solutions. The second applicant was unsuccessful and was duly informed and reasons were given to it on 19 November 2012 why its application was not successful and accepted.

[12] Even though the second respondent had tendered to install a Trivision-Platform-Prime Billboard measuring 40m on a 2 meter high stone wall on erf 8085 on which basis the tender was awarded to it, the second respondent, however, deviated from the tender proposal and installed a Light Emitting Diode (LED) animated billboard on the erf.

[13] Similarly, when it was found that erf 2621 Avis, awarded to second respondent for the erection of a billboard was not suitable for such purpose, the first

respondent granted permission to the second respondent to erect the billboard on erf RE/6 Avis. Again the second respondent erected a LED billboard on the site contrary to the tender proposal which stated that a Trivision Billboard would be erected.

[14] As already indicated, the second respondent applied for approval from the first respondent to deviate from the tender proposals in respect of all the billboards to be erected on the sites which were granted to it. The request for such deviations were considered and granted during council meeting on 27 November 2013 whereby penalties were imposed as punishment for breach of the original lease agreements.

[15] A penalty for condonation of the deviation in respect of erf 8085 and erf RE/6 was a 15% of the monthly fees or N\$2250.00.

[16] In addition, it was resolved by council to increase the monthly fee for the two LED billboards to N\$15 000.00 or 30% of the revenue generated per month whichever was greater.

[17] With regard to Erf 3816 following the award of tender M46/94 to the second respondent by the Local Tender Board on 5 May 2008, an agreement was entered into between the council and the second respondent to lease various sites to second respondent starting from 1 January 2009 to 31 December 2014. The lease agreement in clause 15.15 provided that the second respondent had to provide advertising exposure to council in the amount of N\$250 000.00 on two prime lights structures that were to be erected on selected first respondent's properties. Erf 8316 was identified as one of the sites where a prime light should be erected.

[18] That being so, first respondent (council) and second respondent on 25 February 2010 concluded an addendum to the 2008 lease agreement, which addendum set out the obligations of the parties with regard to prime lights, amongst others.

[19] As a result, a prime light was erected on erf 8316 during 2010, the same place where the LED billboard is now located. The second respondent applied to first respondent on 16 October 2012 to upgrade the prime light on erf 8316 to an LED

billboard and the approval was granted on 21 January 2013 following a long standing practice.

[20] What I have said above is the spark which ignited this application. These are the events which aggrieved the second applicant to initiate the review proceedings against the respondents on the grounds set out in the notice of motion which grounds the second applicant has amended during the hearing of the application.

[21] It is common facts that the first respondent put out a tender inviting people to tender for the erection of prime light billboards on certain pre-determined sites of which erf 8085, erf 2621 (Avis) the Ausspannplatz Traffic Circle and erf 9126 Katutura under Tender 01/2012 formed part of while erf 8316 under Tender M46/94. It is also not in dispute that the second applicant and respondents two to eight participated.

[22] It is also not disputed that the second applicant was not successful in its bid while the second and the fourth respondents were successful and were awarded the tender to erect the prime light billboards on the sites indicated herein.

[23] At the hearing of the application on 22 April 2015, Mr Frank, counsel for the second applicant argued that apart from the billboard awarded to the fourth respondent in Katutura, all the other billboards were awarded pursuant to tenders which called for prime light billboards.

[24] He further argued that what were erected on the sites and the alternative site though are LED billboards, which are billboards with moving images, operating virtually like a cinema or like a TV screen with moving images. He submitted that the upgrade from prime light to LED billboards were wrongfully approved seeing that the tender was for prime light billboards which are not moving images.

[25] On a question from the bench to clarify what he meant by 'approved by the tender', Mr Frank replied as follows:

'It was a tender put out by the Municipality to invite people for certain . . . to tender in respect of certain pre-determined sites to erect prime light billboards.'

[26] It is thus clear from Mr Frank's submissions above that his client (second applicant) was not happy that the first respondent allowed the second respondent to erect LED billboards instead of prime light billboards which were called for in the tender specifications. However, in spite of this unhappiness, the applicant did not approach the court with a request to cancel the tender award because, in my view, after awarding the tender to the second and fourth respondents, the tender process stopped, and what came into being thereafter, is a different relationship between the first respondent and the successful tenderers. In this instance, a contractual relationship between the first respondent, and the second and fourth respondents only, which are the lease agreements, to lease the sites.

[27] This relationship of employer and employee between the first respondent and the second and fourth respondents on one side was accepted by all other respondents including the two applicants, as they opted not to challenge the awarding of the tender to the two successful respondents. In para 49 of the main heads of argument, the second applicant confirms this and states as follows:

'49. The applicant's case has never been that it takes issue with the award of those tenders. The applicant quite clearly sets out in its notice of motion and the founding papers that the relief sought is against the *implementation of the tender* and more specifically the unlawful decisions in respect to specific billboards on the sites that were awarded to the second and the fourth respondents during the tender process.' (Emphasis added)

[28] It is apparent from the aforesaid, that the second applicant is not happy in the manner the first respondent was implementing the tender or how the second respondent was executing the tender awarded to it.

[29] The first respondent's stance on the decision to condone the second respondent's deviation from its tender proposal is that it is contractual not administrative in nature – and in some respect it was done in accordance with a long-standing practice, they argued. It has not been denied or put in issue by the second applicant that Council could not consider and condone a deviation from an existing agreement with a client under the new Outdoor Advertising Policy and Regulations.



[30] The tender was awarded on the basis that the billboards would be erected in terms of the policy and regulations for which approvals to upgrade the billboards to LED were sought and granted by the first respondent. The approvals by first respondent to upgrade the billboards and in one aspect, the approval to move the site, are, according to counsel, the decisions being attacked. He argued that the application is to review the decisions subsequent to the tenders. To support his point, he referred the Court amongst others, to the judgment of *Kleynhans v Chairperson for the Municipality of Walvis Bay and Others*<sup>3</sup> where Damaseb JP said the following:

'In my view a person is entitled to take up the attitude that he lives in a particular area in which the scheme provides certain amenities which he would like to see maintained. I also consider that he may take appropriate legal steps to ensure that nobody diminishes these amenities unlawfully . . . In the present case the applicant is an immediate neighbour to the property on which the non-conforming garage was built.'

[31] I agree with the sentiments expressed by Damaseb JP in the *Kleynhans* matter above. However, I must point out that the facts in the *Kleynhans* matter are distinguishable from the facts in the instant matter. In the matter at hand, we are dealing with two contracting parties of which one had been permitted by the affected party to deviate from the initial agreement against a penalty for the deviation.

[32] One should not lose sight that, in terms of the law of contracts, there are three remedies available to an innocent party in case of breach of contract by the other party. These are (a) to uphold the contract and insists upon the agreed performance (specific performance) or (b) to uphold the contract and accept the defective performance or (c) to resile from the contract. But, whichever course the innocent party may decide on, that party is entitled to compensation for any damage which he, she or it may have suffered as a result. That is trite law. The first respondent opted for the second choice. I do not think that the first respondent had a duty to involve the applicant in the implementation of the tender by the second respondent.

[33] The first respondent had an option to cancel the lease agreement between it and the second respondent and claim damages suffered but selected to allow the

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<sup>3</sup> 2011 (2) NR 437 (HC) at 447 [29].

second respondent to erect Light emitting Diode (LED).animated Billboards on the sites they have been so erected contrary to the tender proposal. Could this decision be regarded as an administrative or contractual decision? In my view it is a contractual decision.

[34] As already indicated, the first respondent put out tenders to erect billboards on designated erven to which both the second applicant and the second respondent responded and others participated. The second respondent was successful and was granted permission to erect billboards on the sites allocated to it following the terms and conditions stipulated in the tender proposals. The second applicant though was unlucky as its bid was not accepted. The decision to accept or not to accept the bids submitted by the second applicants and respondents who are not parties to the review application is an administrative decision which decision is subject to a judicial review as envisaged in Article 18 of the Constitution.

[35] In the alternative, if the tenders put out by the first respondent for the Outdoor Advertising were done contrary to the Outdoor Advertising Policies and the Regulations, Council would have been ordered to comply with the requirements provided for in the regulations and the policies.

[36] In the matter of *Consolidated Investment Co v Johannesburg Town Council*<sup>4</sup> Innes CJ, stated that primary remedies associated with review are setting aside or correcting and said:

'Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to *review* the proceedings complained of and *set aside* or *correct them*'. (Emphasis added)

[37] In the present matter the first respondent did not disregard important provisions of a statute nor was it guilty of gross irregularity in the performance of its duty. I think second applicant realized later that the remedy for the relief sought in the application was inappropriate, therefore instead of reviewing the decision of the Council and set aside or correcting same, second applicant is now asking the court to order the City Council to give notices to the second and fourth respondent to

<sup>4</sup> 1903 TS III at 115: (Administrative Law in South Africa p 463 Footnote 18).

remove or dismantle the five billboards because, apparently they were erected in conflict with Regulations and Policies for Outdoor Advertising. But the second respondent got permission from the first respondent to do so at additional costs while the fifth respondent was also given notice to dismantle the billboard.

[38] The first respondent denied that the billboards erected from television to light emission diode were done contrary to the Outdoor Advertising Policies or the Regulations. Council acted in accordance with a standard practice which applied at time as the decision was necessary to remedy the breach of the contract by the second and fourth respondents.

[39] Therefore, and for reasons stated above, it is my view that the decision taken by Council is a contractual decision not administrative and as such not reviewable nor is it contrary to the Outdoor Advertising Policy or Outdoor Advertising Regulations. In the result the following order is made:

The application is dismissed with costs.

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E P UNENGU  
Acting Judge

#### APPEARANCES

2<sup>ND</sup> APPLICANT

T Frank (with him J Jones)

instructed by Engling, Stritter & Partners,  
Windhoek

1<sup>ST</sup> RESPONDENT

N Marcus  
of Nixon Marcus Public Law Office, Windhoek

2<sup>ND</sup> RESPONDENT:

C van Zyl (watching brief)  
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