

AN OVERVIEW OF THE LEGAL ASPECTS OF OUTDOOR ADVERTISING

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1. INTRODUCTION :

With the promulgation of the Regulations on Advertising on or Visible from National Roads, 2000, new attention has been focussed on the outdoor advertising industry as National Roads have now been opened to the lucrative outdoor advertising market. The National Roads, due to the heavy volumes of traffic they carry on a daily basis are much sought after and due to the large network and area they cover, the South African National Roads Agency Limited (“the Agency”) have a statutory duty to ensure both the safety of the motorist using the National Road, by ensuring that the motorist is not overly distracted as well as to protect the environment through which the National Roads pass. By giving the Agency the authority to regulate advertisements on or visible from National Roads, they can also regulate the types of advertisements that are displayed in different areas, and in this manner protect the environment.

The display of advertisements on or visible from Public Roads (which in terms of the Advertising on Roads and Ribbon Development Act, number 21 of 1940 – hereinafter referred to as “the Road and Ribbon Act” is defined as any road declared a Public Road in terms of any law, but excluding a National Road) has been governed since 1940 by the Roads and Ribbon Act. The National Road Traffic Act number 93 of 1996 sheds further light on the definition of a Public Road and defines it as “any road, street or thoroughfare or any other place which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access”. By definition this includes all Municipal and Provincial Roads. The Authorities governing Provincial and Municipal roads have a similar duty to the Agency : to ensure the protection of the environment and the safety of the motoring public.

The South African Manual for Outdoor Advertising Control (SAMOAC) was researched and published by the Department of Transport and Environmental Affairs and Tourism and has been relied on in the drafting of new subordinate legislation (Regulations and By-Laws) by most regulating authorities, including the Agency and many municipalities.

2. THE DISPLAY OF ADVERTISEMENTS ON OR VISIBLE FROM NATIONAL ROADS

The display of advertisements on National Roads was previously governed by the National Roads Act, number 54 of 1971 (specifically Section 14 thereof). This Act has subsequently been repealed and replaced with the South African National Roads Agency Limited and National Roads Act, number 7 of 1998 (“the Act”) in terms whereof the South African National Roads Agency Limited was established (“the Agency”). The Agency performs a public function in terms of the Act and since

it's sole shareholder is the State, it can be regarded as an Organ of State in terms of Section 239 of Chapter 14 of the Constitution of the Republic of South Africa (Act number 108 of 1996). In *Directory Advertising Cost Cutters vs Minister for Posts, Telecommunications and Broadcasting (1996 3 SA 800 T)* Judge van Dijkhorst found that an Organ of State is "limited to institutions which are an intrinsic part of Government ... – and those institutions outside the public service which are controlled by the State. In short, the test is whether the State is in control." It is therefore generally accepted that the Agency is an Organ of State.

2.1 The display of advertisements in terms of Section 50 of the Act

Section 50 of the Act governs the display of advertisements on or visible from National Roads. Section 50(1)(a – c) of the Act states in clear unequivocal terms that no person may display advertisements or, visible from or adjacent to a National Road in urban or rural areas or give permission to do so.

Section 50(1) is however qualified by Section 50(2) of the Act which states that an advertisement may be displayed in terms of the exceptions or in terms of an authorisation by or under the Regulations. The most important exception is that contained in Section 50(2)(a) in terms whereof an advertisement may be displayed (without authorisation), where it is displayed on a building (and therefore attached to the building) in which that business or undertaking is carried on and contains no more than the name of the business or undertaking or a description of its nature and the name of its proprietor. Any further information (such as telephone numbers) have to be authorised in terms of the Regulations.

2.2 The Regulations on Advertising on or Visible from National Roads, 2000

The Regulations were first promulgated in Government Gazette number 21352 on 13 July 2000. However, many practical problems were encountered in the implementation of the Regulations, resulting in a variety of amendments which were incorporated in the Gazette number 21924 of 22 December 2000, which Gazette repealed the initial Regulations and brought to force a new set of Regulations that are more practical in application.

The Regulations have emphasised road safety and traffic considerations, which are at all times the overriding factors in deciding whether or not to grant approval for a proposed advertisement. Other factors that are of extreme importance are the designation of areas in terms whereof all areas have been designated into natural, rural or urban areas of partial, minimum or maximum control, which terms have been borrowed from the SAMOAC document and which have been assigned similar meanings.

The most important Regulation that effects other regulating authorities is Regulation 5 which allows a Municipality [which has by-laws dealing with substantially the same matters covered by the Regulations and which are applicable to National Roads in that area or in an urban area where the Minister of Transport has declared the Regulations inapplicable (by notice in the Government Gazette)] to approve an application for the display of an advertisement visible from a National Road that is smaller than six (6) square metres. Where an advertisement will be six (6) square metres or larger the Municipality may conditionally approve the display of such an

advertisement subject to the applicant also obtaining the approval of the Agency. However, no specific criteria are prescribed for the Agency to consider when such an application is received save for the fact that Road Traffic, Road Traffic Sign and Safety Considerations must be considered.

Regulation 40(16) which deals with approvals by the Agency states clearly that where no specific criteria are provided, the Agency must consider inter alia, any other matters set out in the Regulations, environmental considerations, the visual content of the advertisement, whether the advertisement complies with the Act and/or the Regulations and with the requirements and standards of the Agency and finally, the requirements and guidelines published by The South African Advertising Standards Authority. It therefore stands to reason that notwithstanding the provisions of Regulation 5, the Agency are nevertheless obliged to look at all the relevant factors pertaining to the specific type of advertisement for which permission is sought.

Permission that is granted by a Municipality (pursuant to Regulation 5) will only be valid once supplemented by the permission of the Agency and the structure may only be erected and the advertisement displayed once permission from both authorities has been obtained.

3. ADVERTISING ON ROADS AND RIBBON DEVELOPMENT ACT

As discussed hereabove, this Act is applicable to Provincial and Municipal Authorities, although many Municipal Authorities have promulgated by-laws that deal with outdoor advertising. Furthermore, Section 156 of the Constitution affords a Municipality the right to administer any matter assigned to it by National or Provincial Legislation and in order to do so, such a Municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer, which includes, in terms of part B of Schedule 5 of the Constitution, “billboards and the display of advertisements in public places” Section 151(4) of the Constitution states clearly that neither National nor Provincial Government may compromise or impede a Municipality’s ability or right to exercise or perform its powers or functions. The inclusion of Regulation 5 in the Agency’s Regulations was therefore an imperative as the powers of the Municipalities in terms of the Constitution could not be ignored.

Section 156 (3) furthermore confirms the prevailing legal position regarding the interpretation of statutes by stating that “a by-law that conflicts with National or Provincial Legislation is invalid”. When interpreting a by-law, one therefore has to keep in mind that the National Legislation will take precedence over the by-laws to the extent that the by-laws conflict with the National Legislation, although it is not conceivable that this type of situation could easily arise.

Section 3 of the Roads and Ribbon Act is the National Legislation which confers upon a controlling authority the mechanism to grant or refuse permission (in its discretion) to display advertisements, which permission may be made subject to certain conditions. Section 4 of the aforesaid Act further makes provision for the removal of advertisements that are displayed without the requisite authorisation. This Section is extremely broad and goes as far as authorising a controlling authority to enter upon any land for purposes of removal of an illegal advertisement. It is dubious whether such a provision could stand up in a court of law, having

regard to the provision of Section 25 of the Constitution, contained in the Bill of Rights, which entrenches a persons right to their property.

No provision, at National, Provincial or Municipal Level may deprive a person of their property. An authority must always first obtain a court order prior to entering upon any person's property and prior to removing a structure or advertisement that belongs to someone else. To illustrate this point, you are referred to the case of *Ad Outpost (Pty) Ltd vs Municipality of Cape Town (unreported, case number 2589/99)*, where the Municipality removed a billboard advertisement from a structure situated on a certain erf under the jurisdiction of the Municipality. The applicant was the owner of the billboard who erected same without first obtaining the permission of the Municipality. The Municipality directed a Notice to Ad Outpost advising them that the erection of the structure was unlawful in terms of it's by-laws and since Ad Outpost did not react to the notice, the Municipality decided to exercise it's powers under it's by-laws and remove it's advertisements. Ad Outpost therefore brought a Spoliation Application (*mandament van spolie*) to restore to it possession of the billboard, of which it had had undisturbed use and possession. The *mandament van spolie* remedy is aimed at preventing persons from taking the law into their own hands. The Court found that the Municipality was required to first obtain a court order before it was entitled to remove the billboard and had therefore acted unlawfully in removing the billboard without a court order.

4. APPLICATION OF ADMINISTRATIVE LAW TO APPROVAL PROCEDURE

In terms of Section 33 of the Constitution everyone has the right "to administrative action that is lawful, reasonable and procedurally fair". Section 33(2) further states pertinently that everyone whose rights have been adversely affected by administrative action has the right "to be given written reasons".

Since the Agency is, similarly to Provincial and Municipal Authorities, an Organ of State, it is of the utmost importance that all administrative procedures are transparent, as they will be subject to scrutiny. Furthermore, where an application is declined, the authority so declining the application cannot refuse to provide the Applicant with written reasons of why the application failed. An Applicant will be entitled to have the decision of the Authority reviewed where an administrative Act is invalid due to a failure to comply with statutory and formal requirements. Grounds for review will be established where the applicant can show that an official failed to apply his mind to the relevant issues in accordance with the mischief of the statute and the tenents of natural justice. This can be shown by providing proof that the decision was arrived at "arbitrarily or capriciously or in bad faith (*mala fide*) or as a result of the unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose" or where the official misconceived the nature of the discession and took into account irrelevant considerations or did not consider relevant ones, or that the decision of the official was so grossly unreasonable that one can only infer that he failed to apply his mind as he should have. (*Johannesburg Stock Exchange vs Witwatersrand Nigel Limited – 1988 3 SA 132 A* refers.)

An unsuccessful applicant may therefore either bring a review application (in the High Court) or he may challenge the constitutionality of the Administrative Act by relying on Section 33 of the Constitution by proving that his right to lawful, reasonably, and procedurally fair administrative action has been infringed.

5. CONCLUSION :

Although it is not possible to address all issues facing authorities that regulate the outdoor advertising industry, I have attempted to provide an overview of the most important legal aspects. Other important considerations that have not been addressed but which should be kept in mind by all authorities are the following :

- 5.1 the person(s) making the decisions on behalf of the authority must be duly authorised to do so;
- 5.2 such person(s) may not act out of the scope of the Act / Regulations / By-Laws as they will then be acting *ultra vires* and their actions will be invalid;
- 5.3 a statutory duty may not be delegated to a third party;
- 5.4 in terms of Section 32 of the Constitution everyone has the right of access to any information that is held by the State, which means that no information may be withheld by the authority when requested by the Applicant;
- 5.5 permission in terms of the Agency's Regulations and the Municipal By-Laws is in addition to and not in substitution of any other authorisation that the applicant may require in terms of any other statute or subordinate legislation;
- 5.6 the question of building restriction areas and building lines must also be considered when evaluating an application for the erection and display of an advertisement.

The outdoor advertising industry is an extremely lucrative market and all acts of the authorities will no doubt be closely scrutinised. The implementation of Regulations and By-Laws in an administratively correct manner, will assist the authorities in controlling road traffic safety and pollution of the environment and with the assistance of such organisations as the Outdoor Advertising Association of South Africa and it's members will help to achieve a balance between the interests of the State and those of individuals without entering into unnecessary and costly litigation.

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Work Experience: Commenced articles at Friedland Hart & Partners in January 1998. After admission as an Attorney, became a Professional Assistant and thereafter an Associate at Friedland Hart Attorneys. Whilst in the employ of Friedland Hart, assisted the South African National Roads Agency Limited (Northern Region) with a number of legal matters, specifically those relating to outdoor advertising on or visible from National Roads. Resigned from FHInc at end of March 2001. Currently employed by a Medical Collection Bureau in Brooklyn, Pretoria.