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

Case No A205/13

In the matter between:

PETER JOHN VICTOR THROP Appellant

and

THE STATE Respondent

Court: GRIESEL J & SALIE-SAMUELS AJ

Heard: 7 March 2014

Delivered: 10 March 2014

JUDGMENT

GRIESEL J:

[1] After hearing oral argument, on 7 March 2014, we upheld the appeal and set aside the conviction and sentence, indicating that written reasons for our decision would be furnished as soon as possible. These are our reasons.

[2] The appellant appeared in the Parow Municipal Court on a charge of contravening s 65 of the City of Cape Town's Outdoor

Advertising and Signage By-Law, By-Law No. 10518.[1] The relevant section, under the heading 'I. Disfigurement', reads as follows:

'No person shall destroy, harm, damage or disfigure or deface the front or frontage of any street, road traffic sign, wall, fence, land, rock, tree or other natural feature, or the front or frontage or roof of any building or structure in any manner whatsoever during construction or through the display or use of a sign or the writing or painting of any sign, symbol, letters or numerals. Furthermore, no person shall disfigure any sign legally displayed in terms of this By-Law.'[2]

[3] The specific allegations against the appellant were formulated as follows in the charge sheet: 'Disfigurment/damage to road sign or natural features by erecting signage on or over (abotion is evil)' [sic].

[4] The appellant pleaded not guilty to this charge, but was found guilty as charged and sentenced to a fine of R5 000 or 3 months imprisonment, suspended for a period of 5 years. The present appeal, against conviction only, comes before us with leave of the trial court.

Factual background

[5] The appellant is a 66-year-old man, who describes his occupation as 'Jesus Worker'. He has strong feelings against abortion, especially illegal abortions, and makes it his business to actively campaign against any publicity for such abortions. His campaign takes the form of placing

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[1] Published in Provincial Gazette No 5801 of 5 December 2001.

[2] The Afrikaans text reads as follows:

'Niemand mag die voorkant of front van enige straat, padverkeersteken, muur, heining, grond, rots, boom of ander naturlike verskynsel, of die voorkant of front of dak van enige gebou of struktuur op enige wyse hoegenaamd gedurende konstruksie of deur die vertoning of gebruik van 'n advertensie of die skryf of verf van enige teken, simbool, letters of syfers, vernietig, skade aandoen, beskadig, skend of ontsier nie. Daarbenewens mag niemand enige advertensie wat ingevolge hierdie Verordening wettiglik vertoon word, ontsier nie.'

adhesive stickers over any public advertisements for abortions along the streets of the northern suburbs of Cape Town. The stickers are approximately 12.5 x 10 cm in size, headed by the words '*Abortion is Evil'.* It also contains the words '*Value Life'* in the form of a white cross as well as a reference to two internet websites.

[6] According to the evidence that was common cause, one of the City's law enforcement officers, Mr Jaxa, found the appellant on 30 September 2012 near the intersection of Voortrekker and Modderdam Roads in Parow, where he was placing a '*Value Life'* sticker onto an illegal poster advertising abortion. The poster was affixed to a bollard on the pavement**.** When confronted by Mr Jaxa, the appellant conceded that he did not have approval from the municipality to permit putting up the sticker. (Although much emphasis was placed on this aspect during the trial, the appellant was not charged with this offence, which might have formed the basis for a separate charge under section B.1 of the by-law.[3])

[7] Mr Jaxa did not give any evidence to the effect that the 'Value Life' sticker caused any damage or disfigurement to the bollard. Under cross-examination, Mr Jaxa conceded that any disfigurement would have been caused by the underlying illegal poster, and the sticker applied by the appellant did not worsen the situation. Furthermore, Mr Jaxa was unable to indicate how the sticker caused damage, save for vague speculation regarding the effect of removing the sticker.

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[3] 'Other than those signs referred to in Sections 55 to 62 hereinbelow, no person shall display any advertisement or erect or use any sign or advertising structure for advertising purposes without the Municipality's approval in terms of this By-Law and any other applicable legislation.'

[8] In his evidence, the appellant testified that the 'Value Life' stickers are 'not designed to damage or do any harm and it's never ever placed directly onto somebody's property, it is only placed on top of [an] illegal poster that is already been posted'.[4] The appellant also confirmed that the sticker did not spoil the appearance of the bollard, did not damage the bollard in any way, and did not make it any more difficult to remove the illegal poster.

[9] In justification of his conduct, the appellant relied on the absence of disfigurement or damage to any property. He also relied on private defence. Furthermore, it was pointed out that the by-law specifically provides that no person shall disfigure any sign *legally* displayed in terms of this by-law. It is implicit that there is no prohibition on the disfigurement of signs *illegally* displayed. In argument, counsel for the appellant also relied on the invalidity of the by-law in question. In the view that I take of the matter, it is only necessary to deal with the last aspect.

The legality of the by-law

[10] In 1956 a full bench of this Division (Herbstein and Ogilvie Thompson JJ) had occasion in the matter of *R v Sachs*[5] to consider a charge under a regulation, almost identically worded to the by-law currently under consideration. According to the regulation in *Sachs*:

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[4] Record, p 29/20-23.
[5] 1956 (2) SA 569 (C).

'2. Disfigurement: No person shall disfigure the front or frontage of any street, wall, fence, land, rock, tree or other natural feature, or the front or frontage or roof of any building in any manner whatsoever and any person who contravenes the provisions of this section shall be guilty of an offence.'

[11] It would appear that the current by-law has been modelled on the regulation which was under scrutiny in *Sachs*. In that case, Herbstein J came to the conclusion that the regulation was void for uncertainty. This conclusion was based on the following reasoning:

'Merely to enjoin that a person shall not disfigure the front or frontage of any street, etc., does not afford any guidance to persons seeking to avoid a contravention of the regulations. Not only does it give no guidance whatsoever but on the contrary it faces the individual who desires to do something on the front or frontage of "a street or to a wall, fence, land, rock, tree or other natural feature" with the difficult, if not impossible, task of determining whether the result of his actions will be a disfigurement or not. There is no indication in the regulations as to who is to determine this nor as to the basis upon which such determination is to take place. What might to one person appear to be a disfigurement might to another appear very differently. In a large number of cases a question of taste would be involved and *"de gustibus non disputandum"*.

It was contended by Mr. *Beukes*, for the Crown, that whether there had actually been a disfigurement or not would be an issue of fact to be determined by the court in each particular case. In answer to this I cannot do better than quote the words of Ogilvie Thompson J., in *R v Rousseau, supra*[6] at pp. 784, 785:

> "To accede to that submission would in my view be to offend against the cardinal principle that a regulation must itself give sufficient guidance to enable those affected by it to avoid contravening it. An identical submission

[6] 1956 (1) SA 783 (C).

> was rejected in *Zacky's* case, 1926 T.P.D. 384 and in *R v Jikwana*, 1952 (2) SA 368 at p. 371, and in my judgment this submission must equally be rejected in the instant case."' [7]

[12] Notwithstanding Herbstein J's admonishment over half a century ago, the present by-law appears to be a repetition of the earlier provision, save for one or two embellishments which are irrelevant for present purposes. The present by-law therefore inevitably suffers from the same defects as its predecessor. We are, of course, bound by the decision in *Sachs* (as was the magistrate) unless we are satisfied that it is clearly wrong. Suffice it to say that I am not so satisfied; on the contrary, I respectfully align myself with the reasoning of the court in that case. Moreover, in the Constitutional era which we live, the doctrine of vagueness is now also underpinned by the principle of legality.[8]

[13] It follows, on this basis alone, that the charge based on dis-figurement should not have been upheld. It is accordingly not necessary to deal with or to express any views regarding the remaining defences advanced on behalf of the appellant.

[14] In conclusion, it is unfortunately necessary to say something about the test applied by the magistrate when granting leave to appeal to this court. In the course of her judgment granting leave to appeal to this court, the magistrate expressed herself as follows:

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[7] At 571E-G.
[8] See *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at [108].

'I want you to know advocate, that I do not think that there is any Court in the land that will arrive at a different decision to what this Court has arrived at and based on the facts of this case, but nevertheless the Court will still GRANT you the LEAVE TO APPEAL based on the ground that you have just said now.'[9]

[15] This is a serious misdirection, on two levels: first, as appears from what has been said above, another court has indeed come to a different conclusion to that of the magistrate. Secondly, if the magistrate was in fact convinced that 'no court in the land would come to a different decision', as she put it, then she was duty-bound to *refuse* leave to appeal; not to *grant* it, simply in order to be proved right. The proper test for granting leave to appeal was restated by the Supreme Court of Appeal in *S v Smith*:[10]

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[16] These remarks were recently quoted with approval in *Kruger v The State*.[11] Leach JA, writing for the court, added:

'The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed. In the present case, it was not,

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[9] Record, p 82/12-17.
[10] 2012 (1) SACR 567 (SCA) para 7.
[11] (612/13) [2013] ZASCA 198 (2 December 2013) para 2.

and this court has had to hear an appeal in respect of which there was no reasonable prospect of success.'[12]

[17] The same considerations apply to this court and the same test laid down by the SCA should be applied by trial courts when considering applications for leave to appeal to this court.

Order

[18] For the reasons set out above, the appeal was UPHELD and the conviction and sentence were set aside.

B M GRIESEL
Judge of the High Court

SALIE-SAMUELS AJ: I agree.

G SALIE-SAMUELS
Acting Judge of the High Court

[12] *Id*, para 3.