

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE : YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

DATE_____

SIGNATURE

CASE NO:2013/19700

In the matter between:

**BOYCOTT, DIVESTMENT AND SANCTIONS
SOUTH AFRICA**

First Applicant

SWEETWORKS ADVERTISING AGENCY CC

Second Applicant

And

CONTINENTAL OUTDOOR MEDIA (PTY) LTD

First Respondent

THE CITY OF JOHANNESBURG

Second Respondent

THE ADVERTISING STANDARDS AUTHORITY

Third Respondent

JUDGMENT

MAYAT J**INTRODUCTION**

[1] On the 29th of October 2012, the first respondent removed an outdoor advertisement from a billboard on a site alongside the M1 highway, in Johannesburg, near Empire Road. The said advertisement depicted Israel's occupation of Palestine on the basis of three contrasting maps in 1946, 1967 and 2012. The applicants challenge the said removal in the present proceedings on the basis of a number of grounds, including freedom of expression, enshrined in section 16 of the Constitution.

PARTIES

[2] Boycott, Divestment and Sanctions ("BDS") is a global campaign initiated by 171 non-governmental organisations in July 2005, in support of the Palestinian cause for boycotting Israel and promoting disinvestment from Israel as well as imposing international sanctions against Israel. The first applicant, BDS South Africa ("BDSSA"), is a non-profit organisation affiliated to BDS, which was subsequently established in South Africa in 2010. To the extent that it is relevant in this context, the founding papers in this matter indicate that BDSSA is made up mostly of volunteers.

[3] The second applicant is a duly registered close corporation named Sweetworks Advertising Agency CC ("Sweetworks"), which is apparently affiliated to a company named Broadway Sweets (Pty) Ltd ("Broadway Sweets"). There are documents, which form part of the answering papers, which indicate that one of two members of Sweetworks is also a founding member of BDSSA.

[4] The first respondent ("Continental") is a duly registered and incorporated private company, involved in renting out advertising space on thousands of different outdoor billboards in 14 countries in sub-Saharan Africa.

[5] The second respondent (“the City”) is a local authority duly established in terms of the Local Government and Municipal Systems Act 32 of 2009. The third respondent, the Advertising Standards Authority of South Africa, (“the ASA”), is an independent body, established by the marketing industry, which regulates advertisements of its members on the basis of a voluntary code for advertising practices.

RELIEF CLAIMED

[6] The primary relief, which the applicants seek against Continental, is a declaratory order that the removal of the above advertisement by Continental on the 29th of October 2012 was unlawful and unconstitutional.

[7] In terms of the applicants’ notice of motion, the applicants also seek an order directing Continental to reinstate the said advertisement on the billboard at the site (from where it was removed) within 5 days of an order by this court and to maintain the reinstated advertisement for a continuous period of three months against payment of rental for such billboard as envisaged in a rental agreement between Sweetworks and Continental. In reply, the applicants assert that they are not prescriptive with respect to the site where they seek to have the said advertisement reinstated.

[8] In relation to the City, the applicants seek a declaratory order that the provisions of section 9(h) of the Outdoor Advertising By-Laws of the City promulgated in the Provincial Gazette Extraordinary Number 227 on the 18th of December 2009 is inconsistent with the Constitution and invalid.

[9] Continental opposes the relief claimed primarily on the basis that Sweetworks was in breach of the rental agreement, which it had concluded with Continental. Continental also contends the applicants cannot enforce constitutional rights against Continental as a private entity. Whilst the City indicates that it is neutral with respect to the contractual dispute between Sweetworks and Continental, it opposes the relief relating to the constitutional invalidity of the advertising by-laws, referred to above.

RELEVANT FACTUAL MATRIX

[10] By way of background, the director and chief executive officer of Continental, Barry Sayer (“Sayer”) states that Continental has erected billboards at some 2400 sites for the purposes of advertisements. Continental generally enters into agreements with local authorities and owners of sites, where the said billboards are located. Billboards have accordingly been erected by Continental on sites on the M1 highway near the Jan Smuts and Empire Road intersection (referred to by Continental and in this judgment as the “Houghton site”), near Grayston Drive, Sandton (referred to by Continental and in this judgment as the “Grayston site”) as well on the M2 highway (referred to by Continental and in this judgment as the “M2 site”). Sayer accordingly indicates that Continental has concluded a rental agreement with the City, as owner of these sites. Whilst Sayer further states that the terms of Continental’s agreement with the City are confidential, it is not in dispute in these proceedings that Continental has certain contractual obligations to the City.

[11] It is common cause on the papers that on Friday, the 26th of October 2012, an advertisement was displayed on an outdoor advertising billboard alongside the Houghton site. As stated above, the said advertisement, commissioned by BDSSA, depicted three contrasting maps of Israeli occupation of Palestine in 1946, 1967 and 2012. The 1946 map, marked “PALESTINE”, is almost completely shaded with a few white patches. The 1967 map in the middle, is mostly white with two shaded portions (with one shaded area being much larger than another very small shaded strip of land on the left side). It is again stipulated that the shaded portion represents “Palestine Land” and the much greater white portion represents “Jewish Land”, which is marked “ISRAEL”. The 2012 map, again predominantly white, marked “ISRAEL”, reflects patches of shaded area, which are now much reduced. Again, it is stipulated that the comparatively small patches of shaded land represents “Palestine Land” and the white part (comprising virtually the whole map) represents “Jewish Land”. It is written in big letters under the three maps “**Israeli Occupation of Palestine**” and to the right of the three maps, is written also in big, bold letters “**Israel’s Occupation of Palestine is**

Illegal under International Law.” Under these words is stipulated www.bdssouthafrica.com.

[12] It is also not in dispute on the papers that Sweetworks had concluded a rental agreement with Continental on the 27th of February 2012, in terms of which Sweetworks rented space on advertising billboards for the flighting of Sweetworks’ “Artwork” on such billboards.

[13] Unless the context indicates otherwise in this judgment:

- i) the advertisement, which was flighted on the billboard at the Houghton site on the 26th of October 2012, is referred to as “the advertisement”;
- ii) the rental agreement concluded between Sweetworks and Continental on or about the 27th of February 2012, is referred to as the “2012 rental agreement”;
- iii) the Outdoor Advertising By-Laws for the City of Johannesburg Metropolitan Municipality promulgated in the Provincial Gazette Extraordinary Number 277 of 18 December 2009, is referred to as “the advertising by-laws”; and
- iv) the Advertising Practice Code of the ASA is referred to as “the ASA code”.

[14] As already indicated, it is common cause on the papers that the present application was triggered by the removal of the advertisement by Continental on Monday, the 29th of October 2012. It is also common cause that Continental effected such removal, without any notice or reasons to Sweetworks at the time.

[15] The deponent to the founding affidavit is Muhammed Desai (“Desai”), a co-ordinator of BDSSA. His affidavit is supported by a confirmatory affidavit

signed by Nazir Ahmed Osman ("Osman"), who states that he is the duly authorised representative of Sweetworks.

[16] Desai annexes to his affidavit by way of factual background to the advertisement an advisory opinion or judgment by the Judges of the International Court of Justice ("ICJ") relating to the occupied Palestinian Territory. It appears that 13 Judges of the ICJ including the President and the Vice-President handed down the judgment in July 2004. As indicated in the advertisement, the ICJ concluded in paragraph 121 of its judgment that:

"The Court concludes that Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law."

[17] To the extent that it is relevant in this context, it also appears from the said judgment that the ICJ found that Israel had breached various obligations under the applicable provisions of international humanitarian and human rights instruments. Therefore, in relation to the construction of a wall in the Palestinian Territory, the ICJ found in paragraph 155 of its judgment inter alia that:

"Israel is under an obligation to return land, orchards, olive groves and other immovable property seizedin the Occupied Palestinian Territory..."

[18] On this basis of this judgment, Desai asserts that the facts in the advertisement are substantiated. He accordingly also states that the campaign in this matter is aimed at addressing a matter of major international concern by the United Nations General Assembly involving a breach of international law, in accordance with the findings of the ICJ.

[19] Desai further asserts that numerous other advertisements of a similar nature, substance and content to the advertisement in the present matter have been displayed around South Africa by BDSSA. Photographs of other sites where the same or similar advertisements were displayed at unspecified times, are incorporated in the founding papers.

[20] By way of background and surrounding circumstances in relation to the 2012 rental agreement, it appears from documents annexed to Continental's

answering affidavit that Broadway Sweets, trading as Sweetworks Advertising Agency, initially applied for credit facilities to Continental in May 2011. Continental has since ascertained that the directors/members of both Broadway Sweets and Sweetworks are identical. It also appears from the answering papers that pursuant to the above application for credit facilities, Continental concluded a previous rental agreement with Broadway Sweets on or about the 20th of September 2011 for the period October 2011 to September 2012. The said previous rental agreement stipulates the brand to be advertised by Broadway Sweets as a lollipop named “Stumbo pops”. Thereafter, Continental and Sweetworks concluded the 2012 rental agreement commencing from 1 March 2012 for an initial fixed period of 12 months, and thereafter renewable.

[21] It appears from a copy of the 2012 rental agreement that the Sales/Marketing Director of Continental, Adelaide McKelvey, signed the said agreement on behalf of Continental. Kelly Hastings-Brown (“Hastings-Brown”) on behalf of Continental is stipulated to be the “Account Executive” on the agreement. Sweetworks is described as the “Advertiser” in the “GENERAL TERMS AND CONDITIONS” of the said agreement, but the first page of the agreement, which incorporates a summary of the agreement, and makes provision for signature by the parties, makes reference to “CLIENT/ADVERTISER”. In the space provided for “Brand (if applicable)”, it is stipulated “Sweetworks Advertising Agency – renewal”. It is also provided that after the initial period of 12 months (from the 1st of March 2012), the agreement will continue for an indefinite period “if applicable”, subject to either party being able to terminate the said agreement upon four calendar months notice. By agreement between the parties, the 2012 rental agreement was subsequently terminated with effect from the 31st of May 2013.

[22] Clause 2 of the 2012 rental agreement provides as follows:

“The Parties hereby enter into an agreement for the supply of an Advertising Site for the flighting of the Advertiser’s Artwork on the Advertising Sign by Continental Outdoor Media for the Advertiser in accordance with those specifications contained in the Rental Agreement and otherwise subject to the provisions contained herein.”

An “Artwork” in this context is defined in the 2012 rental agreement as:

“the image and all advertising materials approved by the Advertiser or Agency for display by Continental Outdoor Media in accordance with this Agreement...”

The “Advertising Site” is defined as the property on which the advertising signs are situated, as more fully described in an annexure to the 2012 rental agreement. In terms of clause 4, the rental was payable on a monthly basis.

[23] Clauses 6.2.2 and 6.3.1 provide that Continental’s obligations include making the “Advertising Site” available and to allocate to Sweetworks:

“an alternative Advertising Site in the event that the Advertising Site specified in the Rental Agreement not being available....”

[24] Clause 7.1 provides inter alia as follows:

“7.1 The Advertiser provides Continental Outdoor Media with the following warranties in relation to the artwork: -
 7.1.1 it complies in all respects with the requirements of the Advertising Standards Authority of South Africa;

 7.1.4 such display will not contravene any by-law or statute.”

[25] Clause 7.3 further provides in relation to any breach of the above warranties that:

“Should Continental Outdoor Media on reasonable grounds believe that the Advertiser is in breach of the foregoing warranties then, notwithstanding the indemnity provided from (sic) in clause 7.2 above Continental Outdoor Media may decline to authorise the lighting of the Artwork until such time as the Advertiser is able to satisfy Continental Outdoor Media to the contrary, provided that in the interim the Advertiser shall still be liable to Continental Outdoor Media for the payment of rental from the Commencement Date until the date upon which the Artwork is taken out of charge, and the Advertiser shall have no claim whatsoever against Continental Outdoor Media arising therefrom.”

[26] Clause 12 provides that Continental is permitted to remove an advertisement “in the event of any competent authority lawfully requiring Continental to remove from the Advertising Site either the structure or the Artwork”. Clause 13 of the said agreement, provides that in the event that either party is in breach of any of the terms and conditions of the agreement and fails to remedy such breach within 7 days of receipt of notice from the other party, then the other party is entitled either to enforce the provisions of the agreement or to cancel the agreement.

[27] Clause 14 provides that no amendment to the agreement would be binding unless reduced to writing and signed by all the parties.

[28] As indicated in the definition of an “Advertising Site”, the different advertising sites are more fully described in an annexure to the 2012 rental agreement and titled “SWEETWORKS HOLDING SITES FOR 2012”. Whilst the said annexure appears to specify in tabular form, different advertising sites (including the size and place of the relevant billboard) all over South Africa for each month of the 2012 rental agreement, it appears that the Houghton site is not specified in the annexure. Be that as it may, it appears that each site specified in the annexure is available for twelve months. It also appears from the said annexure that details of advertisements for each site allocated for twelve months is not specified, nor is the period of display for an advertisement on each billboard specified.

[29] It is not in dispute on the papers that there were communications between Sweetworks and Continental relating to an advertisement and possible advertising sites for a “community campaign”. Thus, Osman raised the possibility of such an advertisement as part of a “community campaign” with an accounts executive of Continental, Hastings-Brown on or about the 3rd of October 2012. It appears from correspondence on record (including an email dated 18th October 2012 from Osman to Hastings-Brown) that Osman referred to the proposed advertisement as the “Palestine Billboard Campaign”.

[30] After communicating with Osman, Hastings-Brown then took certain steps, including obtaining a higher resolution of the picture file sent to her by Osman from the designers of Sweetworks. She also subsequently sent the email she had received from Osman in relation to the proposed advertisement to Continental’s production department, who had then forwarded the said email, including the artwork relating to the advertisement, to Continental’s printers.

[31] It appears from the papers that pursuant to the above communications from Osman, Hastings-Brown entered into discussions with Sweetworks relating to the proposed advertisement at three possible sites namely, the Houghton site, the Grayston site and the M2 site. However, in a subsequent email from Osman to Hastings-Brown, it appears that Osman made reference only to the Grayston and the M2 sites, and not to the Houghton site. Be that as it may, Hastings-Brown then furnished Osman with a quote and a purchase order for the proposed advertisement.

[32] Against this background, it appears from the papers that during the course of her discussions with Osman, Hastings-Brown received, read and forwarded an email from Osman relating to the proposed advertisement, under the stated subject of "Palestine Billboard". In due course, after the proposed advertisement was apparently pre-approved by Continental, Hastings-Brown procured a contract to display the advertisement at the Houghton site.

[33] In the answering affidavit signed by Sayer (supported inter alia with a confirmatory affidavit by Hastings-Brown) it is stated that Hastings-Brown had failed to check the artwork relating to the proposed advertisement before forwarding it to the printers. It is also stated that she "took no notice of the content of the advertisement." It is further stated that even though Hastings-Brown "viewed" the advertisement, she took "no notice of the description of the artwork", until she was subsequently approached by Sayer. In addition, it is stated that Hastings-Brown "had no idea as to the conflict and controversy which exists between Palestine and Israel" and also that she had no authority to approve the advertisement on behalf of Continental, as she was merely the account executive. Sayer contends in the answering affidavit in these circumstances that Hastings-Brown erroneously flighted the advertisement at the Houghton site, as the said site had already been let to a third party. Whilst the advertisement was never flighted at the Grayston site, Sayer states in his answering affidavit in the context of the reinstatement of the advertisement at a comparable site, that it is well known that a large segment of the Jewish

community in Johannesburg are centered in either Houghton or Atholl near the Grayston site.

[34] As already stated, Continental subsequently removed the advertisement from the Houghton site on Monday the 29th of October 2012. It appears from the papers that Sweetworks was initially informed by Continental's representatives that the advertisement was removed as a result of pressure exerted on Continental by members of the Jewish community. After Sweetworks took issue with the removal of the advertisement, representatives of Continental and Sweetworks communicated with each other from October 2012 onwards, until the present application was instituted in June 2013.

[35] In an email dated the 26th of November 2012, Continental took the view that the advertisement did not comply with the ASA code. It was also indicated at the time that Continental's view in this respect had been confirmed by an entity named the "Association for Communication and Advertising".

[36] Pursuant to further communications between the parties relating to re-flighting the advertisement, on the 11th of December 2012, Continental's Group Legal Counsel, Rishaan Ramkissoon ("Ramkissoon") sent two letters to Sweetworks, one of which was "with prejudice" and the other one was marked "without prejudice". For the purposes of these proceedings Continental has waived its privilege in relation to the letter marked "without prejudice."

[37] In the "with prejudice" letter dated 11th December 2012, some six weeks after the advertisement was removed, Ramkissoon provided "for the sake of completeness", Continental's reasons for the removal of the advertisement. The stated reasons at the time included Continental's obligation to the City, Continental's own internal media policy, the ASA code, and an averred breach of the 2012 rental agreement by Sweetworks. In the "without prejudice letter", also dated the 11th of December 2012, Ramkissoon

proposed settling this matter amicably on the basis of one of three options. The first option proposed was that the parties agree to terminate their contractual relationship. Ramkissoo also indicated at the time that all rights and obligations between Sweetworks and Continental would be extinguished in the event that the dispute between the parties was settled as proposed.

[38] Thereafter, in a subsequent letter dated 12th February 2013, Ramkissoo noted that Sweetworks had not responded to Continental's settlement proposals. Ramkissoo also reiterated at the time that Continental had removed the advertisement due to non-compliance with the City's by-laws. Whilst Ramkissoo also made a demand for payment in February 2013, it is not in dispute in the context of the present proceedings that the removal of the advertisement was not caused by non-payment by Sweetworks in terms of the 2012 rental agreement.

[39] In due course, the applicants attorneys of record, Legal Resources Centre ("LRC") sent a letter to Continental (copied to the City and the ASA) dated the 18th of March 2013, denying that Sweetworks was in breach of the 2012 rental agreement, and calling upon Continental to re-flight the advertisement within 14 days of the date of receipt of LRC's letter. It is asserted in the answering papers in this respect that on or about the 18th of March 2013, Ramkissoo had also received a telephone call from Osman informing him that Sweetworks had accepted the first option of settlement, referred to above. Thereafter, on the 26th of March 2013, Ramkissoo sent a letter to Sweetworks referring to the conversation with Osman on the 18th of March 2013, and confirming inter alia that the 2012 rental agreement would not be renewed, after the 31st of May 2013. Ramkissoo also stated at the time in his letter that:

"For the avoidance of any doubt, Continental shall not have any further obligations to Sweetworks in respect of any advertisement/artworks and shall not be obliged to flight any advertisements/artworks other than those already flighted..."

In addition, Ramkissoo stated at the time that:

"...neither party shall have any claim of whatsoever nature and howsoever arising against the other flowing from the termination of the agreement save for in respect of payment by Sweetworks of Continental's invoices."

[40] Continental's attorneys of record Edward Nathan Sonnenbergs Inc ("ENS") then responded to the letter from LRC on the 2nd of April 2013, confirming inter alia that the 2012 rental agreement "will terminate with effect from 31 May 2013 and Sweetworks and our client have agreed that it will not be renewed."

[41] Sayer explains in his answering affidavit that on the morning of Monday the 29th of October 2012, he was alerted to the flighting of the advertisement on the Houghton site. He states that he walked into his office that morning "straight into the public outcry". He further states that Continental received complaints from the Jewish community and was inundated with calls from radio stations as well as the press. In addition, Continental's website was flooded with comments from as far afield as the United Kingdom.

[42] In these circumstances, it appears that whilst Continental initially indicated that it had acted upon complaints from the Jewish community in October 2012, the removal of the advertisement was subsequently justified in correspondence since December 2012 and in Sayer's answering affidavit, primarily on the basis of breach of contract by Sweetworks. Sayer further justified the removal of the advertisement in his answering affidavit on the basis of Sweetworks' non-compliance with the advertising by-laws, the ASA code as well as Continental's internal policy.

[43] Sayer emphasises in his answering affidavit that Osman is one of two members of Sweetworks and one of six founding members of BDSSA. He also states that he does not express any opinion on the Israeli-Palestinian conflict. However, he indicates that for the purposes of this matter, Continental caused searches to be conducted on Wikipedia and Google on this conflict. Thus, he states that millions of search results are returned in relation to the phrase "Israel's occupation of Palestine is illegal under international law." Sayer accordingly annexes to his answering affidavit a number of printouts from Wikipedia and Google, including inter alia material

on Israel's settlements policy in relation to the West Bank as well as material on Palestinian incitement and material on Israel's actions towards stabilizing the conflict.

[44] As regards the averred breach of the 2012 rental agreement, Sayer distinguishes between two categories of clients namely, "the client/advertiser" (which advertises its own product) and an advertising agency, which advertises on behalf of a third party. Continental contends that both the 2011 rental agreement concluded with Broadway Sweets as well as the 2012 rental agreement constituted "client/advertiser" agreements in the sense that both these agreements were limited to the advertisement of the stipulated brand of "Stumbo pops".

[45] Sayer also avers in answering papers that Hastings-Brown had no authority to approve the advertisement and/or to amend the 2012 rental agreement, except as provided in clause 14. The applicants contend in reply that even though no additional approval was required in terms of the 2012 rental agreement, Hastings-Brown effectively approved the advertisement by her conduct. In addition, the applicants aver in reply that Continental is estopped from denying the authority of Hastings-Brown.

[46] Notwithstanding the averments by Sayer relating to a request by a "competent authority" to remove the advertisement, it appears that neither the City nor the ASA acted against Continental or made any demands or requests to Continental in relation to the removal of the advertisement. The City states in this respect that no official at the City formed a view of the advertisement and the City did not at any stage invoke the provisions of section 9(h) of the advertising by-laws, which prohibits any person from erecting, maintaining or displaying an advertising sign which is "indecent or suggestive of indecency, prejudicial to public morals, or is insensitive to the public or to any religious or cultural group."

[47] Sayer also relies on Continental's internal policy, which provides inter alia that Continental

“avoids abuse of the privilege granted us by the residents of our community to display our outdoor medium on public streets by averting display of political content, or any content that could be reasonably viewed as offensive or controversial by any sector of the community... We also abide by the standards of the Advertising Standards Authority and provide no favour in terms of adherence to our strict policy. Indeed in terms of our contract with the Johannesburg City Council we are expressly forbidden from displaying any advertising considered contentious in nature.”

Sayer avers in this respect that this policy “does nothing more than consolidate the principles of the code, the by-laws, as well as the 2012 rental agreement.” Sayer also contends in his answering affidavit that Continental cannot as a matter of policy carry material, which “could reasonably be viewed as offensive or controversial by any sector of the community”.

[48] Sayer further justifies the removal of the advertisement on the basis that it was not in the interests of Continental and its shareholders to continue to flight the advertisement. He suggests that there will be adverse reaction if the advertisement is reinstated and on the basis of such anticipated reaction, he expects Continental’s direct and indirect revenue loss to be in excess of the sum of R300 million. Sayer further avers that Continental would be in breach of its obligations to the City, if the advertisement is flighted again.

[49] As regards three of Continental’s billboard sites, which are relevant to the present application namely, the Houghton, Grayston and M2 sites, Sayer states that the Houghton site, where the advertisement was erroneously flighted on the 26th October 2012, has been leased by another third party since 2010. He asserts that an advertisement was mysteriously taken from that site at the time when the advertisement was flighted. He further states that there is every indication that the third party concerned will renew its lease for the Houghton site at the expiry of the existing lease at the time. Similarly, Sayer states that Continental has let the Grayston site to a third party until the 30th of June 2014.

[50] As regards the averred settlement agreement between the parties pursuant to the communications between Ramkissoo and Osman in March 2013, Osman admits in reply that Sweetworks and Continental terminated

their relationship with effect from the 31st of May 2013, but avers that such termination did not entail the abandonment of existing rights of Sweetworks.

[51] As regards the averred unconstitutionality of a portion of section 9(h) of the advertising by-laws, the City has filed answering affidavits by its Unit Head of Legal and Contracts, as well as Alwyn Emile Nortje (“Nortje”), an advocate and Senior Legal Advisor of the City. Nortje in his affidavit makes a number of legal submissions relating to the advertising by-laws and contends inter alia that the applicants do not have unfettered freedom of expression by virtue of the limitations imposed by section 9(h).

[52] Nortje also points out that in terms of section 29(2) of the advertising by-laws, it is provided that if in the opinion of an authorised official of the City, any advertising sign is in conflict with any of the requirements with the advertising by-laws, then such official “may” serve a notice to the owner of such sign requiring him or her, at his or her own costs, to remove the said advertising sign or to take such further steps as are specified. Section 5 of the advertising by-laws also permits the City to withdraw any approval granted by it or to impose a condition in respect of such approval if an advertising sign becomes prohibited in terms of the advertising by-laws. However, Nortje points out that prior to taking a decision in this respect, the City is obliged to notify the owner of the advertising sign of its proposed decision and such owner can then make representations to the City within 21 days.

[53] Nortje further avers in relation to section 29, that it accords the designated official of the City to make a value judgment in its discretion in relation to the prohibitions incorporated in section 9(h) of the advertising by-laws. Nortje contends in this respect that the discretion of the authorised official of the City must be exercised objectively and “will not be readily interfered with by the courts”. However, he further suggests that the value judgment in this regard does not oust the “participation/jurisdiction” of the courts, particularly when a court is called upon to confirm the decision of the City, in instances where the City seeks an order for the removal of an advertising sign from a court.

[54] Nortje repeatedly states in his affidavit that no authorised official of the City formed an opinion regarding the advertisement, nor did the City take any steps against Continental and/or any of the applicants as envisaged in the advertising by-laws. Furthermore, the City did not invoke the provisions of sections 5, 9 or 29 referred to by Nortje in relation to the advertisement.

[55] Whilst Nortje asserts that the City is neutral in relation to the contractual dispute in this matter he also contends that if Continental justifiably removed the advertisement, there can be no allegation of a constitutional right to freedom of expression within the ambit of a contract between private parties.

LEGAL ISSUES

[56] An issue, which has to be determined at the outset, relates to whether there was a settlement agreement between Sweetworks and Continental, which extinguished the contractual rights of Sweetworks. If this aspect is determined in favour of Sweetworks, the primary issue in the context of the contractual dispute between Sweetworks and Continental is whether the removal of the advertisement by Continental was justified in terms of the 2012 rental agreement. This issue is of course inextricably linked to whether Sweetworks was in breach of the said agreement, as averred by Continental.

[57] A further related broad issue both within the ambit of the contractual dispute as well as the defences raised by Continental relates to whether Continental was justified in removing the advertisement on the basis of the advertising by-laws, the ASA code and Continental's internal policy.

[58] A separate issue outside the ambit of the averred contractual breach by either Streetworks or Continental is whether the removal of the advertisement was unlawful and invalid in terms of section 16 of the Constitution on the basis of an averred infringement of the applicants' constitutional right to freedom of expression.

[59] In the event that the above aspects are determined in favour of the applicants, a further issue is whether it is appropriate in the circumstances of this case for the court to grant specific performance against Continental, as requested by the applicants.

[60] A final issue in this matter vis-à-vis the City relates to the averred constitutional invalidity of section 9(h) of the advertising by-laws.

[61] It may be mentioned in relation to all the above issues that Continental's counsel averred that there were numerous material disputes of fact on the papers, including at the very least, disputes of fact relating to the whether the 2012 agreement was limited to one brand of sweets and whether there was a settlement agreement between the parties.

[62] I shall deal with the averred disputes of fact in the context of each of the broad issues identified above. Suffice it to state at this stage that it is, of course, well established in our law, that a final order in motion proceedings can generally only be granted, on the basis of material facts stated by the applicant which have been admitted by the respondent, unless the facts stated by the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.¹ I am also cognizant in this respect that the court should generally refrain from making findings on the basis of probabilities in motion proceedings in the face of any conflict of facts on the papers.

[63] It may also be mentioned as a preliminary point that Continental denies that BDSSA has standing to institute the present application in relation to the contractual dispute in this matter by virtue of the fact that BDSSA is not a party to any contract with Continental. In addition, the applicants' *locus standi* in respect of their constitutional claims against Continental is also disputed. To the extent that the applicants' case is premised upon the constitutional

¹ The general rule as stated in the case of *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* has been followed and applied in numerous cases, such as for example the often quoted dicta in the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634

right to freedom of expression, it is my view that both applicants have sufficient interest in these proceedings.² This is particularly so as *locus standi* in terms of section 38(d) of the Constitution can simply be premised upon the public interest in the constitutional right to freedom of expression.

Settlement agreement

[64] As regards the averred settlement agreement, it is not in dispute, as recorded in the letter from ENS to LRC on the 2nd of April 2013, that Streetworks and Continental had agreed that the 2012 rental agreement would not be renewed. However, Ramkissoo states that on the 18th of March 2013 Osman telephonically accepted Continental's initial proposal to terminate their relationship on the basis that all rights and obligations between the parties would also be extinguished. Be that as it may, it is not in dispute that coincidentally on the same day, the 18th of March 2013, LRC sent a letter of demand calling upon Continental to re-flight the advertisement within 14 days.

[65] In these circumstances, the correspondence from Ramkissoo to Osman is undisputed on the papers. It is also common cause that by mutual agreement the parties agreed in March 2013 to terminate the 2012 rental agreement with effect from the 31st of May 2013. The only issue is whether Osman telephonically agreed on or about the 18th of March 2013 to abandon Sweetworks' rights, which accrued prior to the termination of the 2012 rental agreement, as averred in the answering papers. Ramkissoo, a lawyer, conveyed three possible options of an offer of settlement to Osman, who is apparently not legally trained on the 11th of December 2012, on which date Ramkissoo also sent another two and a half page letter to Sweetworks averring inter alia that Continental was obliged to remove the advertisement on the basis of the advertising by-laws. As it turned out, the City did not compel Continental to remove the advertisement as averred by Ramkissoo. Be that as it may, Osman indicates in reply that when he spoke to Ramkissoo on the 18th of March 2013, more than three months later, he

² See for example *Levine v Ferreira NO and others* 1996 (1) SA 984 (CC) and *Vryenhoek and others v Powell NO and others* 1996 (1) SA 984 (CC)

simply conveyed to Ramkissoon Sweetworks' intention to terminate the 2012 rental agreement with effect from the 31st of March 2013. However, he denies that he abandoned any of Streetworks' legal rights at the time.

[66] Ramkissoon only confirmed the telephonic conversation, which he had with Osman on the 18th of March 2013, in a subsequent letter dated the 26th of March 2013. By that stage LRC's letter of demand dated the 18th of March 2013 had already been sent. Thus, Ramkissoon, as a lawyer, made an offer of settlement involving the termination of the 2012 rental agreement to Sweetworks as part of two letters dated the 11th of December 2012. Sweetworks did not accept the said offer for more than three months. Osman, who appears not to be a lawyer, then accepted the offer relating to the termination of the 2012 rental agreement, on behalf of Sweetworks, on the 18th of March 2013, the very day that LRC sent a letter of demand to Continental.

[67] Significantly, on the 26th of March 2013 (after the letter of demand from LRC had been sent) Ramkissoon advised Osman *inter alia* that:

“Continental shall not have any further obligations to Sweetworks in respect of any advertisement/artworks and shall not be obliged to flight any advertisements/artworks other than those already flighted...”

Thus, it appears that even Ramkissoon acknowledged at that stage that in light of the non-renewal of the 2012 rental agreement, the parties would not be obliged to flight any advertisement “other than those already flighted”. More importantly, in light of the letter from LRC, Osman could not have unequivocally abandoned Sweetworks' legal rights. In these circumstances, the papers tenably demonstrate the survival of the averred legal rights of Streetworks beyond the termination of the 2012 rental agreement and the “settlement agreement” between the parties relating to the termination of the 2012 rental agreement clearly did not incorporate the extinction of Streetworks accrued rights.

Contractual breach by Sweetworks

[68] As indicated above, Continental contends that Sweetworks breached the 2012 rental agreement at a number of levels. At a general level, it is averred that Sweetworks was not entitled to place the advertisement with Continental as the said agreement only permitted the advertisement of one brand, which was stipulated in the previous 2011 rental agreement. It is accordingly averred that as the 2012 rental agreement constituted a “client/advertiser” agreement (as opposed to an advertising agency agreement), Sweetworks was not entitled to place advertisements on behalf of BDSSA, a third party. In addition, Continental contends that to the extent that the advertisement did not constitute a brand stipulated in the 2012 rental agreement, Sweetworks required the additional approval of Continental for the advertisement.

[69] Continental’s averments in this respect are not supported by the actual terms of the 2012 rental agreement. It is significant in this context that whilst the previous 2011 rental agreement (for the period October 2011 to September 2012) specifically refers to “Stumbo pops” as the brand, the 2012 rental agreement (for the period March 2012 to May 2013) does not stipulate any brand. As indicated in this respect, the latter agreement merely states in relation to the brand “Sweetworks Advertising Agency – renewal”. There is also no provision in the 2012 agreement for the additional approval by Continental in relation to advertisements other than the stated brand, as suggested by Continental.

[70] It is further significant that the two agreements overlap for a certain time and do not immediately follow each other in time. Thus, to the extent that the two agreements operated simultaneously for a few months, it is my view that Continental’s averments relating to both agreements being limited to the same product were untenable. Furthermore, to the extent that Broadway Sweets and Sweetworks are two separate corporate entities, which concluded two separate agreements with Continental, both agreements cannot be conflated as a matter of law, despite the fact that the 2012 agreement is described as a renewal.

[71] I was also not persuaded that there were any relevant surrounding or background circumstances in relation to the stated brand in the 2011 agreement, which sustains the submissions by Continental to the effect that the 2012 rental agreement was limited to the Stumbo lollipop brand.

[72] For all the reasons given, it appears from the undisputed factual averments relating to the terms of the 2012 rental agreement that Sweetworks was not in breach of any of the clear terms of the 2012 rental agreement, nor was there any obligation on the part of Sweetworks to obtain “additional approval” from Continental in terms of the said agreement for the advertisement.

[73] Whilst it is not strictly necessary for me to determine whether the Continental’s averred “additional approval” of the advertisement was in fact obtained by Sweetworks, I am also of the view that there is considerable merit in the submission by the applicants’ counsel that Sweetworks effectively obtained the additional approval suggested by Continental pursuant to communications between Osman and Hastings-Brown relating to the “community campaign”.

[74] I also find the assertion in the answering papers to the effect that Hastings-Brown “took no notice of the content of the advertisement” to be untenable in the circumstances, as it is not disputed that she received, read and forwarded the email containing the advertisement.

[75] Continental further contended that Sweetworks was also in breach of the agreement with respect to the warranties incorporated in clause 7 of the 2012 rental agreement. Whilst I deal with the specific provisions of advertising by-laws relied upon by Continental as well as the specific provisions of the ASA code separately hereunder, it may be mentioned that clause 12 of 2012 rental agreement only permits Continental to remove an advertisement in the event that any “competent authority” lawfully required Continental to do so. It is common cause that no competent authority required Continental to remove

the advertisement in the present, notwithstanding the suggestion in the correspondence from Ramkisson. Furthermore, clause 7.3 of the 2012 rental agreement does not permit Continental to remove the advertisement unilaterally, even if Continental was satisfied that the advertisement constituted a *prima facie* breach of any of the warranties relating to the advertising by-laws and/or the provisions of the ASA code. This is obviously so as it is clearly provided in clause 7.3 that Continental “may decline to authorise Artwork” until the advertiser is able to satisfy Continental to the contrary. Logically, Continental could accordingly only decline to flight an advertisement or impose conditions in terms of clause 7.3 an advertisement before it is flighted and not afterwards, as in the present case.

[76] Continental also justifies the removal of the advertisement on the basis of the contract between Continental and the City. However, the City states in this regard that no authorised official or the Council of the City formed an opinion at the relevant time relating to the advertisement, nor did the City require Continental to remove the advertisement on the basis of an agreement between Continental and the City.

[77] In the final analysis in this regard, the 2012 rental agreement does not provide a legal basis for the removal of the advertisement, nor was Continental required by a “competent authority” to remove the advertisement, as stated in the correspondence of Ramkisson prior to the institution of proceedings. Moreover, as already mentioned, even if Continental was of the view that there was a *prima facie* breach of one of the warranties in terms of clause 7 of the 2012 rental agreement, and in the absence of a “competent authority” requiring Continental to remove the advertisement (as envisaged in clause 12), then Continental was obliged to give Streetworks notice to remedy the breach in terms of clause 13.

Constitutional rights within the framework of the rental contract

[78] The applicants contend in this context that the removal of the advertisement constitutes an infringement of their constitutional right to freedom of expression. Continental contends, on the other hand, that freedom

of expression has no application in the circumstances of the present case, simply by virtue of the fact that Continental, as a private entity, does not owe any duty to the applicants in relation to the constitutional right to freedom of expression. Thus, it is contended that unlike the enforcement of constitutional rights against the State (which has a duty “to respect, protect, promote and fulfill”³ the rights enshrined in the Constitution), the applicants cannot enforce their constitutional right to freedom of expression against Continental, as a private entity.

[79] It is correct that the positive obligation to enforce Constitutional rights horizontally between private entities is not analogous to the positive duty owed by organs of State such as, for example, a national television broadcaster, which may be obliged for example to permit an appropriate platform for freedom of speech.⁴ As such, the full extent of the positive obligation imposed upon the State (including, of course legislation passed by the executive) to “respect, protect, promote or fulfill” constitutional rights cannot always be extended to private entities such as Continental.

[80] In the case of *Juma Masjid*, the Constitutional Court held in relation to the infringement of constitutional rights by a person other than the State as follows:

“This Court, in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of Court of the Republic of South Africa*, made it clear that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures to diminish that protection.”⁵

Thus, the court went on to say that in applying constitutional rights, private entities “are not to interfere with or diminish the enjoyment of that right”. The

³ section 7(2) of the Constitution

⁴ See the case of *VGT (Verein gegen Tierfabriken v Switzerland)* (2002) 34 EHRR in which a Swiss television broadcaster declined to broadcast an advertisement against experiments with animals and industrial animal production. The European Court of Human Rights found that a ban of an advertisement by an association dedicated to the protection of animals was an unjustifiable violation by the state of an advertiser’s right to freedom of expression

⁵ *Governing Body of the Juma Masjid Primary School and another v Essay N.O and others* 2011(8) BCLR 761 (CC) at para 58

court also indicated that the negative duty imposed on a private entity not to impair existing constitutional rights depends on the “intensity” of the right. Thus, even though a private entity does not have the positive duty or obligation to “promote, protect and fulfill” the constitutional rights of another private entity in the same way as the State, I agree with counsel for the applicants that Continental has the negative duty not to interfere with the platform provided to the applicants to freely express certain facts and/or views (within the framework of the 2012 rental agreement) and “to respect” the existing protection of the applicants’ constitutional right in this respect.

[81] As regards the “intensity” of the right of freedom of expression compared to the right to basic education referred to in the *Juma Musjid* case, the Constitutional Court has repeatedly acknowledged the importance of freedom of expression in a democratic society. Thus, Kriegler J in *S v Mamabolo*, stated as follows:

“Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America.... Therefore, we should be particularly astute to outlaw any form of thought control, however respectably dressed.”⁶

More recently, Davis J in the case of *City of Cape Town v Ad Outpost (Pty) Ltd and others* held that:

“Whatever the role of such speech within a deliberative democracy envisaged by our Constitution, it is clear that advertising falls within the nature of expression and hence stands to be protected in terms of s 16(1) of the Constitution.”⁷

[82] The Constitutional Court has further pronounced in the case of *Print Media South Africa* case that the right to freedom of expression embraces:

“...liberty to express and to receive information or ideas freely. The right also encompasses the freedom to form one’s own opinion about expression received...”⁸

[83] To the extent that that Continental seeks to enforce section 9 (h) of the advertising by-laws on the basis of the warranties incorporated in section 7 of

⁶ 2011(8) SA BCLR 761 (CC) para 37

⁷ 2000(2) SA 733 (C) at p749E

⁸ *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 53

the rental agreement, I deal with the constitutionality of section 9(h) of the advertising by-laws below. Suffice it to mention at this juncture in this regard that the Supreme Court of Appeal has held in the case of *Bredenkamp v Standard Bank of SA Ltd*, in relation to enforcing a term of a contract which implicates an identified constitutional value that:

“The public policy considerations that apply at the enforcement stage are no different from those that apply at the first stage : is the limitation of the identified constitutional value – the right of access to courts – fair and reasonable in the circumstances? [E]nforcement of a *prima facie* innocent contract may implicate an identified constitutional value. If the value is unjustifiably affected, the term will not be enforced. An example would be where a lease provides for the right to sublease with the consent of the landlord. Such a term is *prima facie* innocent. Should the landlord attempt to use it to prevent the property being sublet in circumstances amounting to discrimination under the equality clause, the term will not be enforced.”⁹

[84] Taking all the above *dicta* into account, Continental clearly has a negative duty to respect the fundamental right of free speech of the applicants, indirectly through the platform of the 2012 rental agreement. Whilst it is not in dispute in this context that Sweetworks is obliged to warrant compliance with the advertising by-laws in terms of the said agreement, such by-laws cannot also be enforced to the extent that they are inconsistent with the section 16 of the Constitution. I deal with the constitutionality of the impugned section of these by-laws below.

The requirements of the ASA code

[85] Whilst Continental also suggests that it was required to remove the advertisement on the basis of the provisions of the ASA code, it is common cause on the papers that neither the ASA, nor any other “competent authority” took any steps to have the advertisement removed. To the contrary, Continental confirms that the ASA was unable to express an opinion on the advertisement. Similarly, the City confirms that it received no complaints in relation to the advertisement. Furthermore, the City repeatedly asserts that no official at the City formed a view or took any action in respect of the advertisement.

⁹ 2010 (4) SA 468 (SCA) at paras 46 and 47

[86] The introductory part of the ASA code incorporating inter-alia the preamble and scope of the ASA code (which is also referred to in Sayer's answering affidavit) provides in section 2.4 that "Controversial subjects/Advocacy" advertisements, which express an opinion on a controversial subject, shall not be subject to the provisions of the ASA code relating to misleading claims, except that advertisements containing such controversial statements should:

"

- be readily recognizable as advertisements;
- cause no confusion as to the identity or status of the advertisement."

[87] Section 1.1 of the ASA code provides that no advertisement may

"...offend against good taste or decency or be offensive to public or sectoral values and sensitivities, unless the advertising is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."

Section 1.2 further provides inter alia that:

"Advertisements should contain nothing that is likely to cause serious or wide-spread or sectoral offence. The fact that a particular ...advertisement may be offensive to some is not itself sufficient grounds for upholding an objection to an advertisement...."

[88] Section 2 of the ASA code, relating to honesty in advertising, which is also relied upon by Continental in answering papers, provides that:

"Advertisements should not be so framed as to abuse the trust of the consumer or exploit his lack of experience or knowledge or his credulity."

[89] Section 4 of the ASA code, relating to truthful presentation in advertising, is also referred to in the answering affidavit in relation to the advertisement. Section 4.1 provides inter alia that before advertising is published, advertisers "shall" hold in their possession documentary evidence to substantiate their claims, objectively. Similarly, section 4.2 provides inter alia that advertising must not contain misleading claims, which are inaccurate or exaggerated. Section 4.2.2 permits value judgments as well as matters of opinion in advertisements if it is clear that an opinion is being expressed. Section 4.2.3 permits inter alia hyperbole in the form of harmless parody. Section 4.2.4 provides that expert opinion must be substantiated by independent evidence.

[90] It may also be mentioned at a general level that the papers include a ruling of the ASA in relation to a complaint considered by the ASA in an unrelated matter. It is correctly stated in the said ruling that various committees of the ASA recognise the Constitution as the supreme law of our country. Consequently, it is on record that the ASA is compelled to give effect to the fundamental values of the Constitution, and to impose limitations on the basis of the values of an open and democratic society, based on human dignity, equality and freedom, as envisaged in the Constitution.¹⁰

[91] To the extent that the advertisement is “controversial” as envisaged in the ASA code, I am satisfied that it is readily recognizable as an advertisement and causes no confusion that BDSSA is the advertiser.

[92] As to the provisions of the ASA code relied upon by Continental, it is not in dispute that the directorate of the ASA did not receive any objections to the advertisement, and accordingly did not consider or investigate any complaint as prescribed in the ASA code.¹¹ Therefore, it is common cause that no sanctions were imposed by the ASA against Continental. To the extent that it is suggested that there were objections in relation to the advertisement, section 1 of the ASA code provides that a complaint that an advertisement is “offensive to some” is not sufficient grounds for upholding an objection. Moreover, to the extent that the maps incorporated in the advertisement are based on fact, it appears that the advertisement does not exploit the knowledge or credulity of the consumer, as envisaged in section 2 of the code. In any event, the maps and the statements in the advertisement are capable of objective substantiation in the form of the findings of the ICJ, as contemplated in section 4.1. As such, to the extent that the advertisement is substantiated by independent evidence, it is also not misleading as contemplated in terms of section 4.2.

¹⁰ As recognised in many cases including *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and others* 1998 (12) BCLR 1517 (CC)

¹¹ As prescribed in section 8 of the section on “Procedures and Remedies” of the code

[93] In these circumstances, the advertisement does not contravene the provisions of the ASA code relied upon by Continental, nor was Continental required to remove the advertisement on the basis of any averred contravention of the ASA code.

Continental's internal policy

[94] As regards the suggestion in the answering papers that Continental's internal policy constituted a basis for the removal of the advertisement, applicant's counsel correctly averred that such policy has no application in the circumstances of the present case. This is particularly so as the warranties and indemnities in clause 7 of the 2012 rental agreement do not extend to compliance with Continental's internal policy. In any event, even if the advertisement is deemed to be "contentious" on the basis of Continental's internal policy, the 2012 rental agreement does permit the removal of the advertisement by Continental on the basis of such policy.

Specific performance

[95] Continental asserted in answering papers that it is not appropriate to order specific performance in the circumstances of this case inter alia by virtue of the fact that the three sites relevant to this application were not available when Sayer signed his answering affidavit in June 2013. As such, it is averred that it would be impossible for Continental to comply with a court order in relation to the said three sites, including the Houghton site. The court is accordingly called upon to exercise its discretion against the granting of specific performance as it is contended that the effect of any order granted by the court would be to induce undue hardship on Continental. During argument counsel for the applicants placed on record that the applicants would accept any "comparable" alternative site for the purposes of the requested relief for specific performance, as envisaged in clause 6.3.1 of the agreement.

[96] Continental's counsel also emphasised that in view of the assertion in the founding affidavit that BDSSA had successfully publicised its campaign through other billboards, it can hardly be suggested that BDSSA has no other means to publicise its campaign.

[97] The undue hardship alluded to in Sayer's affidavit was apparently based upon complaints from the Jewish community and an expected loss of revenue in the future. However, the suggestions in this respect are not supported with any evidence in the answering papers. Sayer further indicates that at the time he signed his answering affidavit in June 2013, there was impossibility of performance at the Houghton site on the 31st of July 2013 (when he signed his answering affidavit) as there was every indication at the time that a third party, who had an existing lease with Continental relating to the Houghton site would have renewed its lease for the Houghton site.

[98] Our law relating to specific performance is clear in the sense that specific performance will generally only be granted subject to the court's discretion. The *locus classicus* is the judgment of Innes J in *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 at 350 in which the court stated

"*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE, C.J., in *Thompson v Pullinger* (1 O.R., at p. 301), 'the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt.' It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of *Storey (Equity Jurisprudence, Sec. 717(a))*, 'it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it.' The election is rather with the injured party, subject to the discretion of the Court."¹²

[99] Therefore, in the absence of evidence from Continental, it is not for the applicants to prove that there are no impediments to specific performance.¹³ The only inference in these circumstances is that Continental can perform, if not at the Houghton site then at a comparable or alternative site in Johannesburg as envisaged in clauses 6.2.2 and 6.3.1 of the 2012 rental agreement in the event that the site "specified" in the rental agreement not

¹² at 350

¹³ *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 442B-443F

being available. As already noted in this respect, Continental states in this regard that it has some 2400 sites in the country.

[100] It does not avail Continental to rely on other billboards which BDSSA may have access to at other sites, as counsel for the applicants appropriately drew the analogy in this regard of a hotel refusing access to a guest on the basis of an unconstitutional ground of discrimination and referring the guest concerned to another hotel which did not discriminate in this way.

[101] As regards the time period for specific performance, it is not in dispute that the term of the 2012 rental agreement was from the 1st of March 2012 until the 31st of May 2013. However, it appears that whilst the said agreement provided that rental was to be paid on a monthly basis, the period for an advertisement on a particular billboard is not stipulated. Thus, whilst the schedule to the agreement makes reference to billboards, which would be rented out for twelve months of the contract, the said schedule does not stipulate the period of display of each advertisement. Counsel for the applicants correctly conceded in this regard that the reference in the papers to another advertisement for an unrelated product for a period of three months does not really assist the court. Be that as it may, in view of the fact that the 2012 rental agreement provided for rental on a monthly basis and in view of the fact that billboards at different sites were apparently allocated for twelve months from the 1st of March 2012, it can reasonably be inferred that Sweetworks was entitled to rent the billboard for the advertisement for at least one month.

The constitutionality of section 9(h)

[102] As already indicated, to the extent that any future advertisements similar to the advertisement fall within the ambit of section 9(h) of the advertising by-laws, the applicants contend that the said section is unconstitutional and accordingly infringes their constitutional right to freedom of expression. In argument, applicants' counsel only challenged a portion of the said section, and not the section in its entirety.

[103] Part B of schedule 5 of the Constitution includes “billboards and the display of advertisements in public places” as matters of local government falling within the competence of municipalities such as the City. Thus, it is not in dispute that the City has the necessary authority to regulate outdoor advertising by means of by-laws. Section 8(1) of the Constitution further provides that :

“The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

Therefore, the advertising by-laws can limit the rights entrenched in the Constitution only on the basis contemplated in the Constitution.

[104] Section 9(h) of the advertising by-laws provides as follows:

“In addition to any other prohibition, expressed or implied, in these By-laws, no person may erect, maintain or display any advertising sign which is indecent or suggestive of indecency, prejudicial to public morals, or is insensitive to the public or any portion thereof or to any religious or cultural group.”

[105] As indicated, the applicants do not challenge the above subsection in its entirety in these proceedings. They aver only that the words “or is insensitive to the public or any portion thereof or to any religious or cultural group” is inconsistent with section 16 of the Constitution.

[106] Section 16 of the Constitution, provides as follows:

- “16. (1) Everyone has the right to freedom of expression, which includes -
- (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –
- (a) propaganda for war;
 - (b) incitement of imminent violence;
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

[107] All constitutional rights, including the right to freedom of expression, may be limited by legislation, if such limitation is justified in terms of section 36(1) of the Constitution on the basis of the values of an open and democratic society based on human dignity, equality and freedom. Any limitation must

achieve benefits, which are in proportion to the costs of limitation. In the present case, section 16(2) of the Constitution also incorporates its own internal limitations to the right to freedom of speech. Thus, as already stated, freedom of speech cannot extend to propaganda for war, incitement of imminent violence or advocacy of hatred based on race, ethnicity, gender or religion. It may also be mentioned that neither Continental nor the City suggests in these proceedings that the advertisement falls within the ambit of one of the above exceptions of section 16(2).

[108] As already stated, the Constitutional Court has repeatedly acknowledged the importance of the fundamental right of freedom of speech. Thus, it has been stated that freedom of expression “lies at the heart of democracy”.¹⁴ More recently, in the case of *Print Media*, the Constitutional Court held that freedom of expression

“...promotes and protects the moral agency of individuals. Whether expression lies at the right’s core or margins, be it of renown or notoriety, however essential or inconsequential it may be to democracy, the right cognises an elemental truth that it is human to communicate, and to that fact the law’s support is owed.”¹⁵

[109] In the *Islamic Unity* case, the Constitutional Court also endorsed the freedom to express offensive, shocking or disturbing speech on the basis of case authority from the European Court of Human Rights:

“South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society... In *Handyside v The United Kingdom*, the European Court of Human Rights pointed out that this approach to the right to freedom of expression is -

‘applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb....Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”¹⁶

Therefore, this view accords with the famous maxim attributed to the French philosopher, Voltaire:

¹⁴ *South African National Defence Union v Minister of Defence and others* 1999(4) SA 469 (CC) at para 7

¹⁵ *Print Media South Africa and another v Minister of Home Affairs and other* 2012 (6) SA 443 (CC) at para 53

¹⁶ *Islamic Unity Convention v The Independent Broadcasting Authority and others* 2002 (4) SA 294 (CC) at para 28

“I disapprove of what you say, but I will defend to the death your right to say it.”¹⁷

[110] Whilst it is common cause that the City has not invoked the provisions of section 9(h) of the advertising by-laws in relation to the advertisement, the City nevertheless challenges the submissions by the applicants relating to the averred unconstitutionality of the impugned portion of the said section. The City emphasises in this respect that an authorised official of the Council must determine and enforce the provisions of section 9(h) on the basis of the City’s discretion in this regard. It is also contended that it is not so much the wording of the impugned portion of section 9(h), which “justify any allegation of unconstitutionality but rather the implementation thereof.”

[111] Irrespective of the purport and intent of the City in opposing the relief sought by the applicants in this respect, it is clear that “insensitivity” to a portion of a religious or cultural group referred to in section 9(h) (which it is suggested applies to the present case) sets a far lower boundary than any of the specific limitations in section 16(2) of the Constitution. Stated in another way, the limitations in sections 16(2) as well as 36(1) of the Constitution go far beyond the notion of “insensitivity” towards a portion of a religious or cultural group. In any event, unlike the limitations to free speech in section 16(2) including propaganda for war, incitement of imminent violence, or advocacy of violence against a particular race or religion, and unlike the other limitations in section 9(h), suggestive of indecency or prejudicial to public morals, “insensitivity” in my view is a manifestly subjective feeling. Therefore, some members of a particular religious or cultural group may subjectively feel or not feel that certain expressions of speech are “insensitive”. In these circumstances, I agree with counsel for the applicants that expression must reach the level of one of the categories in section 16(2) of the Constitution (or the unchallenged portions of section 9(h) of the advertising by-laws), before such expression can be prohibited by legislation or a by-law. Therefore, even if the advertisement is “controversial” as suggested by Sayer and Nortje, it

¹⁷ In fact, these words are a later summary of Voltaire’s attitude to the condemnation by the French Parliament to publicly burn the book *De l’esprit* published in 1758 by the French philosopher Helvetius, as given in S.G. Tallentyre’s *The Friends of Voltaire* (1907)

can only be prohibited on the basis of one of the constitutional limitations. In any event, the expression, which is being defended by the applicants, is based on substantiated facts.

[112] Against this background, section 172(1)(a) of the Constitution provides that:

- “When deciding a constitutional matter within its power, a court -
 (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.”

[113] In these circumstances, Nortje’s averment to the effect that the value judgment relating to the criteria set out in section 9(h) falls within the discretion of the authorised official of the City is misdirected. This court is compelled to declare any law, which is inconsistent with the Constitution to be invalid to the extent of such inconsistency. Similarly, Nortje’s averments pertaining to the procedure to be followed in relation to a contravention of the advertising by-laws are also misdirected.

[114] In the final analysis, the words “or is insensitive to the public or any portion thereof or to any religious or cultural group” in section 9(h) of the advertising by-laws go beyond the limitation of permitted free speech in the Constitution and are accordingly inconsistent with the Constitution. As already indicated, “insensitivity” to the public or a portion thereof (unlike other criteria stipulated in section 9(h) such as “indecenty” or “prejudicial to public morals”) is a manifestly subjective notion and cannot be objectively valued, as suggested by Nortje. Thus, even if the impugned portion of section 9(h) is declared to be invalid, the remainder of the criteria set out in section 9(h) is still capable of regulating advertisements, which are suggestive of indecenty or prejudicial to public morals. As already indicated in this respect, both Continental and the City only suggest non-compliance with the impugned portion of section 9(h) and not with the remainder of the provisions of section 9(h) relating to indecenty and public morals.

CONCLUSIONS

[115] For the reasons given, the removal of the advertisement by Continental from the Houghton site was in breach of the 2012 rental agreement and also constituted an infringement of the applicants' constitutional right to freedom of expression.

[116] Specific performance is an appropriate remedy in the circumstances of this case.

[117] The words "or is insensitive to the public or any portion thereof or to any religious or cultural group" in section 9(h) of the advertising by-laws are inconsistent with section 16 of the Constitution.

COSTS

[118] As regards costs, the applicants have been substantially successful against both the respondents and costs must follow the result.

ORDER

[119] Based on the foregoing, the following order is made:

- I It is declared that the removal of the applicants' advertisement entitled "the Palestine Campaign" (hereinafter referred to as "the advertisement") by the first respondent on or about the 29th of October 2012 was unlawful and unconstitutional.
- II The first respondent is directed to reinstate the advertisement on the billboard erected by the first respondent alongside the highway near Empire Road on the M1 N or to allocate to the applicants a comparable, alternative billboard erected by the first respondent at a comparable site, within 10 days of the date of this order and to maintain the advertisement for a continuous period of 30 days, against payment of the agreed rental by the second applicant in terms of the rental agreement between the second applicant and the first respondent, concluded on the 27th of February 2012.

- III (i) It is declared that the words “or is insensitive to the public or any portion thereof or to any religious or cultural group” in section 9(h) of the Outdoor Advertising By-Laws of the second respondent promulgated in the Provincial Gazette Extraordinary Number 227 on the 18th of December 2009 are inconsistent with the Constitution and accordingly invalid.
- (ii) The declaration of invalidity in paragraph (i) above is suspended for a period of 12 months to enable the second respondent to amend section 9(h) to render it consistent with the Constitution.
- (iii) During the period of suspension, section 9(h) shall be read as if the words “or is insensitive to the public or any portion thereof or to any religious or cultural group” did not appear in the said section.
- (iv) In the event that the second respondent fails to amend section 9(h) within a period of 12 months from the date of this order, section 9(h) shall be effective without the words “or is insensitive to the public or any portion thereof or to any religious or cultural group”.
- IV The first and second respondents, jointly and severally, the one paying the other to be absolved, are directed to pay the applicants’ costs.

DATED AT JOHANNESBURG THIS 11th DAY OF SEPTEMBER 2014

MAYAT J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

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Date of Hearing : 1st of September 2014

Date of Judgment : 11th of September 2014