

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: ✓ |

Date: **25th November 2022** Signature: _____

A handwritten signature in blue ink, appearing to be "H. L.", is written over the signature line.

CASE NO: 2022-045786

DATE: 25TH NOVEMBER 2022

In the matter between:

PACINAMIX (PTY) LIMITED

Applicant

and

PATINA (PTY) LIMITED

Respondent

Coram: Adams J

Heard: 22 November 2022

Delivered: 25 November 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 25 November 2022.

Summary: Urgent application – Uniform Rule of Court 6 (12) – the applicant should set forth explicitly the reasons why the matter is urgent – self-created urgency, not urgency – application struck from the roll for lack of urgency.

ORDER

- (1) The applicant's urgent application against the respondent be and is hereby struck from the roll, with costs, for lack of urgency.
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JUDGMENT

Adams J:

[1]. The applicant ('Pacinamix') is an advertising agency, providing services in the marketing and advertising fields, and it also provides television production services. So, for example, it recently produced a film entitled 'Shaka Zulu', which is presently showing on a major international streaming service. In this opposed urgent application, Pacinamix applies for an order cancelling an agreement with the respondent ('Patina') in terms of which the latter was to produce a documentary for and on behalf of a client of Pacinamix. An order is also sought by Pacinamix for delivery of that part of the production which has to date been completed and in respect of which, so they claim, Patina has already been duly compensated for the services rendered.

[2]. On 17 January 2022, a big Mining House, Sibanye Stillwater ('Sibanye'), engaged the services of Pacinamix and instructed them to produce a short twenty-three-minute documentary on Marikana, a small mining town in the Northwest Province, which rose to prominence about ten years ago as a result of the shooting and the killing of a number of miners at the hands of members of the South African Police Services. The documentary, which was to incorporate the stories of four persons who benefitted from Sibanye's efforts to contribute to the healing process, was to be released by 16 August 2022, which would have marked ten years from the day of killings.

[3]. On 28 May 2022, Pacinamix 'subcontracted' with the respondent ('Patina') and appointed them to produce the documentary, the trailer and the four stories of the beneficiaries, at an agreed fee of R4.2 million for the production of the

documentary. The terms and conditions of the subcontract were as per the quotation, which had been submitted by Patina and ultimately accepted by Pacinamix, and which therefore governed in the main the contractual relationship between the parties. In terms of the agreement, sixty percent of the agreed fee would be payable before Patina would commence working on the production. On 21 July 2022, despite the agreement that 60% of the agreed fee would be paid up front, only 41% was paid on the understanding that the balance of the 'deposit' would be 'topped up' later and that Patina would immediately commence with the production of the documentary.

[4]. Due to a number of delays in the production schedule, as well as the fact that, because the balance of the 60% deposit was not forthcoming from Pacinamix, Patina refused to continue with their editing of the work, the documentary was not going to be released by the end of August 2022. As between Sibanye and Pacinamix it was therefore agreed that the documentary was to be completed by the latest on 31 October 2022. By 12 October 2022, the balance of the 60% 'deposit' had been paid to Patina by Pacinamix, who was then expecting to have the documentary completed and released by the end of October 2022. However, during September 2022, Patina refused to effect certain changes to the documentary, as had been requested by Sibanye.

[5]. On 27 October 2022, Patina addressed a communiqué directly to Sibanye, advising that the changes which they (Sibanye) requested to be effected to the documentary were of such a nature that it would result in further delays in the finalisation of the documentary and the possibility of incurring further costs. In the same communication a proposal was made by Patina with a view to finding a way forward with the project. In response to this suggestion, Pacinamix proposed that the parties meet to find the way forward, but Patina was of the view that such a meeting would serve no purpose.

[6]. On 09 November 2022, Sibanye demanded the footage from Pacinamix, failing which, so Sibanye threatened, it would 'exercise its legal rights against the [Pacinamix]'. This demand, so it is alleged by Pacinamix, was a direct result of Patina's unreasonable conduct, which is frustrating them, and which could

possibly cause Sibanye to cancel their appointment and claim contractual damages against them (Pacinamix).

[7]. In light of the foregoing, so Pacinamix contends, it is entitled to claim from Patina, as it does in this urgent application, delivery of 'the open files, the raw visuals and the sound footage, the trailer and four beneficiary stories of the twenty-three minute Marikana documentary', as well as an order cancelling the agreement concluded between the parties.

[8]. In my view, the main difficulty which Pacinamix faces is that its application does not disclose a sustainable cause of action for the relief sought – far from it. Even if Pacinamix is to be given the benefit of doubt and it is to be assumed that the intention is to claim cancellation of the agreement and restitution, it cannot possibly be said that a proper case is made out on that basis. None of the essential allegations for such cancellation is made, such as, for example, that there was a material breach of the terms of the agreement. What is more, is that no case is made out for restitution, if indeed, that be the applicant's case.

[9]. There is however a further difficulty which Pacinamix faces, which precedes an assessment of the merits of its claim, and that relates to urgency. In that regard, and, on Pacinamix' s own version, any urgency in the matter is entirely self-created. Firstly, its non-compliance with the terms of the agreement with Patina undoubtedly resulted in the initial delays in the project. Moreover, as far as September 2022, it was indicated by Patina that they would not be effecting the changes requested by Sibanye, unless they were paid the balance outstanding in respect of the agreed fee. This means that Pacinamix ought then to have realised that they need to take action in order to comply with their obligations towards Sibanye. They failed to do so, which, I believe, caused the urgency.

[10]. Pacinamix has therefore failed to demonstrate urgency entitling them to the relief sought in this application of an urgent basis.

[11]. Accordingly, the applicant's urgent application against the respondent falls to be struck from the roll for lack of urgency.

Costs

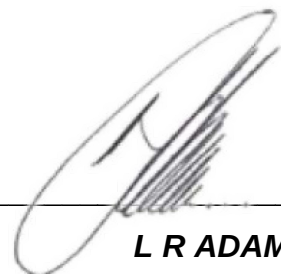
[12]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so.

[13]. I can think of no reason why this general rule should be deviated from in this matter. I therefore intend granting costs in favour of the respondent against the applicant.

Order

[14]. Accordingly, I make the following order: -

- (1) The applicant's urgent application against the respondent be and is hereby struck from the roll, with costs, for lack of urgency.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	22 nd November 2022
JUDGMENT DATE:	25 th November 2022 – judgment handed down electronically
FOR THE APPLICANT:	Advocate Xolani Mofokeng
INSTRUCTED BY:	Majang Incorporated, Fourways
FOR THE RESPONDENT:	Advocate Sechaba
INSTRUCTED BY:	Fluxmans Incorporated, Rosebank, Johannesburg