In the High Court of South Africa

KwaZulu-Natal Local Division, Durban

Case No : 9531/2014

In the matter between :

Outdoor Network Ltd	First Applicant
Autumn Storm Investments 362 (Pty) Ltd	Second Applicant

and

Strawberry Worx Pop (Pty) Ltd	First Respondent
The Passenger Rail Agency of South Africa	Second Respondent

Judgment

Lopes J

[1] This is an application for an interdict. The facts giving rise to the application may be summarised as follows :

(a) the second respondent, the Passenger Rail Agency of South Africa ('PRASA') is the legal successor to the South African Commuter Corporation Ltd and holds all the assets and operations which that entity received originally from the South African Transport Services, together with Metrorail and others;

(b) PRASA accordingly became the owner of a number of immovable properties ('the sites') situated throughout the country including bus stations, railway stations, and areas of land adjacent to railway lines both in built-up and rural areas, where the sites are visible from railway lines and major roads and highways;

(c) in order to capitalise on the use of the sites PRASA and its predecessors leased them to various companies which used the sites for advertising purposes. The various companies would erect an advertising structure on the site leased to them, and flight different adverts for their clients on the advertising structure from time to time;

(d) on the 17th May 2002 the applicant, Outdoor Network Ltd ('Outdoor Network') concluded an agreement of lease in respect of a number of properties belonging to PRASA's predecessor in title. In terms of those lease agreements Outdoor Network was entitled to erect advertising structures and flight adverts thereon from time to time in exchange for the payment of a monthly rental to PRASA. The advertising structures were built and maintained by Outdoor Network at its own expense. The lease agreements provided that, upon termination, Outdoor Network would remove the advertising flights and structures from the sites within seven days from such termination, failing which PRASA would be entitled to employ a contractor to remove those items and be reimbursed by Outdoor Network for the expense in doing so;

(e) The second applicant is Autumn Storm Investments 362 (Pty) Ltd ('Autumn Storm'). Autumn Storm is a subsidiary of Outdoor Network and as their interests completely coincide in this application, where I refer to Outdoor Network Ltd, I intend it to be a reference to both Outdoor Network and Autumn Storm wherever necessary;

(f) the relationship between PRASA and Outdoor Network continued until 2010 when PRASA invited tenders to be submitted by advertising companies to allow them to advertise from all of its sites;

(g) Outdoor Network was unsuccessful in the tender process which was awarded to a third party. The existing lease agreements were terminated, and a dispute then arose between PRASA and Outdoor Network as to the removal of the advertising structures. I understand that this dispute is the subject of litigation before another court. It appears that as Outdoor Network did not initially remove the advertising structures, PRASA indicated that they would do so themselves. They removed two structures, but a dispute arose over this because Outdoor Network regarded the cost of them having done so, which PRASA sought to recover from Outdoor Network, as exorbitant. At a further stage PRASA indicated to Outdoor Network that as it had not continued to pay all the rentals due, PRASA would retain the advertising structures in the exercise of a lien over those structures for the unpaid rentals and/or holding-over damages;

(h) The first respondent in this application, Strawberry Worx Pop (Pty) Ltd ('Strawberry Worx') is a subsidiary of the successful tenderer for the PRASA sites. Outdoor Network then became aware that PRASA was allowing

Strawberry Worx to advertise on the sites using the advertising structures of Outdoor Network;

(i) in its application papers, Outdoor Network put up an email addressed by Strawberry Worx to PRASA recording that it was unable to provide advertising structures because of a shortage of steel due to a strike by steel workers. The suggestion was then made that the advertising material would be flighted upon the advertising structures of Outdoor Network and an indemnity would be provided to both the client on whose behalf the advertising was put up and, presumably, PRASA. Part of the justification was that PRASA's view was that those advertising structures had been abandoned by Outdoor Network. The affidavits in this application and the ongoing litigation make it clear that this is a claim strenuously denied by Outdoor Network;

(j) it is common cause that the advertising structures erected by Outdoor Network and which it claimed still belonged to it, are being used by Strawberry Worx with the acquiescence of PRASA for the purpose of flighting adverts of the clients of the successful tenderer;

(k) in its opposing affidavit, the respondents claimed that PRASA was entitled to allow these structures to be so used, even if they still belonged to Outdoor Network, because PRASA had a lien over the structures for unpaid rental and/or holding-over damages. Mr *Kemp* SC, who appeared for the respondents together with Mr *Naidu,* disavowed any reliance on that defence. In my view they were correct to do so, because a lien for unpaid rental (and, if one existed at all for holding over damages) would not have entitled PRASA to use the advertising structures of Outdoor Network.

[2] Mr *Kemp*, however, submitted that the presence of the structures belonging to Outdoor Network constituted a diminution of the ownership rights which PRASA had in and to the property on which those structures were constructed. His submission was that as compensation for the damages inevitably suffered by PRASA as a result of such diminution, PRASA could allow others to use the structures to flight advertisements.

[3] Mr *Kemp* cited various examples, primarily based on the rental of property which would entitle a lessor to make use of a structure left behind by a lessee after the lease between them had terminated. The problem with the examples cited by Mr *Kemp* is that each one depended on the particular facts of the example, seen in the light of the lease agreement concluded between the lessor and the lessee. I do not believe it is helpful to consider all those examples in order to understand the legal position in this matter. Each case will depend on its own facts, and it is necessary for me therefore to examine the facts of this case.

[4] On the papers before me it is not possible for me to decide the dispute concerning whether Outdoor Network should have removed its structures from PRASA’s property, or whether PRASA was entitled to remove the structures and claim the cost of doing so from Outdoor Network. That dispute is the subject of litigation elsewhere and does not form part of what I am required to decide in this matter, nor is it necessary for me to do so to resolve this application.

[5] What remains to be considered is what PRASA could legally do with the advertising structures which remained after the termination of the leases. There is no doubt that Outdoor Network was obliged to remove the structures within a certain period after the termination of the lease agreements. If they did not do so it was open to PRASA to remove the structures from the sites, store them and tender their return to Outdoor Network upon the payment to PRASA of the cost of removal and storage.

[6] If Outdoor Network did not pay those charges in order to regain their structures PRASA, would no doubt have been able to approach a court for permission to sell the structures in order to offset the damages which they had suffered in having to remove and store them.

[7] Not having followed that legal course, PRASA had no right to allow third parties to flight adverts on the advertising structures which belonged to Outdoor Network, in order to gain financially from so doing. The advertising structures remained the property of Outdoor Network. Given the correspondence between the parties which is contained in the papers in this application I do not believe that Outdoor Network intended to, or did, abandon its rights of ownership in and to the advertising structures. It may even be suggested that they were left there deliberately by Outdoor Network in order to exercise some form of pressure upon

PRASA. Even if that is so, and it is not shown to be so on the papers, that would not have entitled PRASA to behave as it has done.

[8] In my view Outdoor Network has established that it has a clear right not to have its advertising structures used by the successful tenderer to flight adverts of third parties for the financial benefit of the successful tenderer, its subsidiary Strawberry Worx and PRASA.

[9] Mr *Pillemer* SC, who appeared for the applicants together with Mr *Tager,* submitted that the real reason why PRASA allowed the successful tenderer and Strawberry Worx to advertise for their clients on the advertising structures belonging to Outdoor Network, was because they could not obtain the necessary steel in order to have their own advertising structures built and put into place. There is no suggestion by PRASA or Strawberry Worx that there was insufficient place on the sites concerned to build new advertising structures, because of the presence of the advertising structures of Outdoor Network. Nor is it alleged that the advertising structures of Outdoor Network occupied the only place on the immovable property where the advertising flights on structures could be optimally viewed. In those circumstances there is no reason why the successful tenderer and Strawberry Worx could not have constructed their own advertising structures on the property. I agree with the submissions by Mr *Pillemer* that the unfortunate email of the 29th July 2014 is ample evidence of PRASA's motivation for allowing others to use the advertising structures owned by Outdoor Network.

[10] Mr *Kemp* quoted various cases in support of his argument. He referred me to *Bourbon-Leftley v Turner* 1963 (2) SA 104 (C), a case in which the right of a lessee to cancel his lease was challenged, and the lessor sought payment of rental until the premises were vacated. The court found that the fact that the lessee had left behind a large stove meant that the premises had not be vacated, and the lessee was held liable for further rental.

[11] In my view *Bourbon-Leftley* does nothing more than confirm our law that a lessee is obliged to pay rental (or holding-over damages) until the premises are properly vacated. The case does not purport to deal with the situation with which we are faced here, where the lessor makes use of the lessee's equipment for financial reward. The fact that Outdoor Network may have left advertising structures on the various sites belonging to PRASA may have entitled PRASA to various legal remedies, none of which would have, according to our law, entitled it to use the advertising structures for financial gain.

[12] I was also referred to *Chapmans Peak Hotel (Pty) Ltd and Another v Jab and Annalene Restaurants CC t/a O'Hagan's* [2001] 4 All SA 415 (C), an appeal against the refusal of an interdict sought because the respondents had erected an unlawful structure on their property. The interdict had been denied in the court a quo because the applicant had not demonstrated that it had no alternative relief. The Full Court found that once the right in question was a public right, then for continuing

infringements of that right the only effective remedy was an interdict, which was all the more so when the infringement amounted to an offence.

[13] Insofar as the defence of an 'alternative remedy' is applicable in this case, Outdoor Network is unable to remove its structures because of the lien claimed over them by PRASA. The resolution of that dispute is the subject of litigation. I do not believe that any alternative remedy was available to Outdoor Network other than the relief which it seeks in this application.

[14] In my view nothing that was dealt with by Boruchowitz J in the previous litigation between the parties in respect of the judgment handed down on the 30th May 2014, precludes Outdoor Network from obtaining the relief which it seeks in this application. The issue of peaceful and undisturbed possession is not one which is relevant in this matter. Indeed, Mr *Pillemer* eschewed any reliance upon it. The case of Outdoor Network is simply that it owns the advertising structures currently on the PRASA sites, and is entitled not to have them used by PRASA and others for financial gain.

[15] Mr *Kemp* submitted that the presence of the advertising structures owned by Outdoor Network constituted a significant detraction from PRASA's ownership of the sites. In this regard he relied upon *Willow Waters Homeowners' Association (Pty) Ltd v Koka NO and Others (*768/2013) [2014] ZASCA 220 (12 December 2014).

[16] In *Willow Waters* a home owners' association sought to rely upon a condition of title of immovable property which prohibited the transfer of the immovable property without a clearance certificate or the consent of the home owners' association. The trustees of the owners of the property who were sequestrated, sought to sell and transfer the property to a third party. The home owners' association successfully argued that the restrictive condition of title was a real right in favour of the association and the association was entitled to repudiate the trustees' claim that they could pass transfer of the property without the association's consent. Mr *Kemp* relied on this case, as I understand it, to demonstrate the extent to which the ownership of PRASA was interfered with by the presence of the advertising structures of Outdoor Network.

[17] I do not agree. Each case depends upon its own facts and PRASA has not demonstrated in its papers that it is unable to use the sites concerned to allow Strawberry Worx or other successful tenderers to erect advertising structures on the sites. Indeed, the very fact that they are able to do so has necessitated the interdict application by Outdoor Network. In my view there is no detraction from the ownership rights of PRASA which could not be dealt with by the construction of other advertising structures, or alternatively, the removal of the advertising structures belonging to Outdoor Network by a process recognised in law, which is clearly available to PRASA.

[18] In all the circumstances I am satisfied that the applicant is entitled to the order which it seeks. With regard to the question of costs, there would appear to be a lot

more to this dispute than is evidenced in the papers. There seems to have been a complete reluctance by either party to reach what I would have viewed as a sensible commercial settlement of their dispute when the matter cried out for reasonableness on the part of both parties. No doubt each had commercial strategies which they wished to implement in order to create the best advantage for their respective competing positions in the advertising market. It seems probable that Strawberry Worx suggested an indemnity for PRASA because it viewed the costs of inevitable litigation as being a worthwhile cost of the advertising flights they erected for their clients. That the conduct of both parties lacked such reasonableness, disinclines me from making any punitive award of costs in favour of Outdoor Network. I accordingly make the following order :

1. The first respondent is interdicted and restrained from using, for any purpose whatsoever, the advertising structures of the applicants which are situated on the sites on Annexures 'FA1' and 'FA 2' to the founding affidavit of William Thomas Basson;

2. the second respondent is interdicted and restrained from using, for any purpose whatsoever, or permitting the first respondent or any other third party from using for any purpose whatsoever, the advertising structures of the applicants situated on the sites listed on Annexures 'FA 1' and 'FA 2' to the founding affidavit of William Thomas Basson;

3. the respondents are directed to pay the applicants' costs of the application, including the costs of two counsel and all reserved costs in the various hearings, jointly and severally, the one paying the other to be absolved.

Date of hearing : 12th February 2015

Date of judgment : 24th February 2015

Counsel for the Applicant M Pillemer SC with S Tager (instructed by Fluxmans)

Counsel for the Respondents : KJ Kemp SC with R Naidu (instructed by Maraj Attorneys)