IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

15/11/13

CASE NO: 62150/2012

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: ~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED
	DATE: 15 Nov 2013
	SIGNATURE: Jansen

In the matter between:

EMFULENI LOCAL MUNICPALITY Applicant

and

KHULU MEDIA GATEWAY VEREENIGING (PROPRIETARY) LIMITED Respondent

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JUDGMENT

JANSEN AJ

Background:

[1] This application relates to signs and accessories erected within the area of jurisdiction of the Emfuleni Local Municipality. The applicant is the Emfuleni Local Municipality.

[2] The respondent is an entity called Khulu Media Gateway Vereeniging (Pty) Ltd, formerly known as Lighthouse Advertising (Pty) Ltd.

[3] The application is for a mandamus ordering the respondent to remove structures with or without advertising boards, erected by it and listed in an annex to the notice of motion.

[4] The respondent reached an agreement with the applicant's "partial" predecessor (the terminology used in the supporting affidavit) namely the Lekoa/Vaal Metropolitan Council during or about May 2000 in Vereeniging, as well as in terms of an addendum to the said agreement entered in on 11 July 2002 (at the time the Sedibeng District Control), which related to cellular phone masts only.

[5] In terms of the agreement, the applicant was given the sole and exclusive right to erect outdoor advertising structures on all of the Lekoa/Vaal Metropolitan Council's property throughout its entire districts (and cellular masts in terms of the addendum agreement). The duration of this agreement was ten years from the date of signature thereof, namely 26 May 2000. In the addendum, in paragraph 2 thereof, the duration of the agreement was confirmed as being the same as the original agreement.

[6] In paragraph 9.2 of the agreement, it is stated that on termination of the lease agreement, whether by effluxion of time or otherwise, the respondent shall remove the signs and all accessories thereto and shall at its own costs make good any damage to the property caused by the erection and/or removal of the signs.

[7] It was further alleged by the applicant that the agreement was never extended by the respondent and that no new agreement was reached between the parties in terms whereof the respondent currently has any rights bestowed upon it akin to those in terms of the original agreement.

[8] It was stated by the applicant that the agreement had terminated by effluxion of time on 27 May 2010 and that, notwithstanding, the respondent erected further sheet pole advertisements on 26 April 2011 in the area of jurisdiction of the applicant. If the respondent failed to remove the signs within three months of the termination of the lease, the council was entitled to charge a penalty of R5 000.00 per month until the signs were removed.

[9] On 25 August 2011 the applicant requested the respondent to remove the street pole advertisements but the respondent's attorneys of record wrote to the applicant indicating that any attempt by the applicant to remove the advertising boards would be met with a spoliation application. The respondent's stance was that

the agreement had allegedly been extended by agreement with an applicant's representative (or employee).

[10] The applicant proceeded to remove the boards and the respondent brought a spoliation application on an urgent basis, which application was struck from the roll for lack of urgency.

[11] This was followed by a letter from the respondent's attorneys to the effect that the spoliation application would be placed on the ordinary court roll. This never transpired. The applicant afforded the respondent a one month period within which to remove the newly erected boards but no response was forthcoming to this letter. The respondent was also forewarned that the applicant would have no option but to launch this application which it then proceeded to do.

[12] In terms of the contract the applicant's "partial" predecessor permitted the respondent to erect outdoor advertising structures on the council's property which was defined as certain roads, including the R42, against payment of a remuneration or rental, being 10% of the net monthly profit made by the respondent on the structures.

[13] As stated, the original contract was for a ten year duration from the date of signature – from 26 May 2000. The contract provided that the structures remained the property of the respondent. On

termination of the lease agreement, as set out above, the respondent undertook to remove the signs and make good any damage to the council's property.

[14] On the applicant's version the agreement lapsed by effluxion of time – presumably on 27 May 2010. Thereafter the respondent erected some street pole advertising during 26 April 2011 which the council removed during July 2011. On 25 August 2011 the council's attorneys of record addressed a letter to the respondent's attorneys of record stating that the "remaining signs" would be removed, and claimed R60 000.00 as penalty damages.

[15] The respondent seeks to argue that the applicant has not proved that the advertisements set out in annex "**A1**" to the notice of motion, and the accompanying photographs of the advertisement referred to in annex "**A1**" reflect advertisements belonging to the respondent. This argument is untenable. If this were the case, then one wonders why the respondent brought a spoliation application on an urgent basis (which was not heard due to the fact that it was held not to be urgent.) It is also not explained why the respondent would have threatened to launch a spoliation application. It is held that one can safely assume, given the sole and exclusive rights which were granted to the respondent to erect advertising sign posts, that the billboards and street poles set out in annex "**A1**" belong to the respondent. It is nowhere denied by the respondent

that they belong to the respondent, and the correspondence addressed to the respondent's attorneys (to which no reply was forthcoming) makes it crystal clear that the allegation is that the billboards and street poles belong to the respondent.

The issue to be determined

[16] The nub of the issue between the parties revolves around the interpretation to be attached to clauses 1 and 2 of the addendum agreement. For ease of reference, these paragraphs are quoted in full.

> "*1. **Effect and validity of the original agreement:***
>
> ***The parties agree that the original agreement will remain in force and remain valid for the duration of that agreement. This Addendum is to be read in conjunction with and as part of the original agreement as if incorporated therein, save where this addendum amends the original agreement, in which case the Addendum will take precedence.***
>
> *2 **Duration:***
>
> ***This Addendum will remain in force and effect for the same period as the original agreement whereafter the lessee will be granted 1 (one) month from the***

<u>termination date of the original agreement</u>, to in writing, to the lessors domicilium indicate that it wishes to extend the rights conferred upon it in <u>this</u> Addendum for a further period of 10 (ten) years. Should the lessee not extend this Addendum and the 1 (one) month period elapses, this Addendum will terminate and be of no further force and effect." [emphasis added]

[17] The addendum relates pertinently to the erection of cellular phone masts and not to advertising poles and accessories.

[18] A reading of the original agreement of lease does not indicate that the parties agreed that the lessee had the right to extend the agreement, or to novate it.

[19] The wording to be found in clause 2 of the addendum agreement, namely that the addendum would remain in force and effect for the same period as the original agreement whereafter the lessee would be granted one month <u>from the termination date of the original agreement</u> to, in writing (*sic*) indicate whether it wished to extend the <u>rights conferred upon it in the addendum</u> for a period of ten years, only makes sense when read as stating that the addendum agreement terminates on the date that the original agreement terminates, whereafter the lessee is granted one month within

which <u>to extend the addendum agreement</u> for a further period of ten years. Any endeavour to read it in another way is forced, and renders the phrase "***whereafter the lessee will be granted 1 (one) month from <u>the termination date of the original agreement</u>***" unintelligible. [emphasis added]

[20] Had the intention of the parties to the addendum agreement been that it was to endure for ten years then they could have stated that expressly (as they do regarding the period for which the addendum may be extended). One would also be left with the strange situation that the right to extend the agreement had to be exercised upon the termination of the original agreement, namely one month after 27 May 2010. If the addendum agreement was intended to endure for ten years then such a stipulation would be wholly unnecessary.

[21] Further, and in any event, if the addendum agreement was intended to endure for ten years, the addendum agreement would only have terminated on 12 July 2012. Why an option to extend it should have been exercised a month after 27 May 2010, is therefore puzzling. This in itself demonstrates that the construction of the addendum agreement by counsel for the respondent is simply not feasible.

[22] As stated by Kellaway ***Principles of Legal Interpretation of Statutes, Contracts and Wills*** **Butterworths** 1995 at page 415: –

> "***In earlier interpretation of instruments the trend was to look first to the language used as the dominant determining factor, and then to other possible considerations, for instance whether the literal meaning led to an absurdity. What I consider to be the proper approach to the interpretation or construction of all instruments is embodied in what I have termed the triple synthesis; of the language used in context; the intention of the parties; and the purpose of the transaction. <u>This is not a sequential approach to the interpretation of any instrument, and it would appear that the Earl of Halsbury LC would have supported this submission.</u>***[1]
>
> ...
>
> ***It will be appreciated from what follows that in recent years, particularly in South Africa and England, courts have examined the whole instrument, taking their stand as to its meaning on any one or more of the aspects***

[1] *Cf Jaga v Dönges, NO and Another; Bhana v Dönges, NO and Another* 1950 (4) SA 653 (A).

making up the triple synthesis even if the language the parties have used appears to be clear.

The essence of the triple synthesis approach is to combine these separate elements of thought (pertaining to what the parties committed to writing, with what contractual intention they acted, and for what purpose they concluded the contract) into on whole, each being relative and correlative to the other.

Interpretation, it is submitted, cannot be exact if each factor or aspect of the triple synthesis is taken in isolation and reliance is placed on any one without consideration of the others, the true meaning of a contract or instrument is determined when the combination of all the aspects of the triple synthesis points to its meaning."

[23] Clause 2 of the addendum *sub. cap.* "Duration" can also not be read as granting the respondent the right to extend the original agreement for a period of ten years. In any event, it is not for a deponent to interpret an agreement (especially a person who did not enter into the agreement). It is for the court to interpret the agreement. Most certainly the addendum did not "extend" the original agreement, nor could it be renewed in terms of any clause of the addendum agreement.

[24] Furthermore, the respondent argues that the lease agreement was extended by way of a tacit relocation. This argument is similarly without merit. The original agreement specifically stipulates that it will terminate "whether by effluxion of time or otherwise". It also runs counter to the letters of the applicant's attorneys of record in which it is pertinently stated that the agreement came to an end on 27 May 2010.

[25] As argued by counsel for the respondent: —

> "***A tacit relocation is an implied agreed to re-let and is concluded by the Lessor permitting the Lessee to remain in occupation after the termination of the lease and accepting rent from the Lessee for the use and enjoyment of the property***
>
> > ***'... both parties adopt and continue the position which the termination of the lease found them in; ... the Lessor is content that the Lessee should remain, and the Lessee is content to remain (Bowhay v Ward 1903 TS at 772 per Innec CJ).***" (Cooper ***Landlord and Tenant*** 2nd ed page 350)

[26] This argument is trumped by clause 14 of the original agreement which reads as follows: —

> "*14.* ***VARIATION***
>
> ***No addition to or variation, consensual cancellation or novation of this agreement and no waiver of any right arising from this agreement or its breach or termination shall be on any force or effect unless reduced to writing and signed by all the parties or their duly authorised representatives. ...*** " [emphasis added]

[27] The original agreement terminated by effluxion of time and the fact that the applicant only enforced its rights in 2011 cannot detract from this fact. As stated, the applicant articulated its stance regarding the non-existence of a lease agreement expressly in its correspondence to the respondent.

[28] There is no necessity to deal with the dispute as to whether the addendum agreement's right to extension of the lease agreement had been exercised as the addendum relates to the erection of cellular phone masts only. In any event, any right to extend the rights conferred by the addendum had to be exercised in writing and delivered to the applicant's *domicilium citandi et executandi* as set out in the in the original agreement namely: —

"12 <u>DOMICILIA AND NOTICES</u>

12.1 ...

12.1.1 ...

12.1.2 The lessor at: —

Lekoa/Vaal Metropolitan Council

Cnr Beaconsfield Avenue and Leslie Street

Vereeniging"

[29] This was never done.

[30] Furthermore, had the respondent wished to rely on a tacit relocation, it should have annexed proof of payment of rental which it failed to do.

[31] The letter which is annexed to the respondent's founding affidavit, purportedly extending the original agreement and the addendum was delivered to a Sorrious Manela at Box 3, corner Klasie Hauenoa and Frikkie Meyer Boulevard, Vanderbijlpark, Gauteng, 1900 which is not the designated *domicilium citandi et executandi.* In any event the said alleged renewal did not take place within one month as stipulated by the addendum in clause 2 thereof.

Order

In the event, the following order is made: —

1. Compelling the respondent to remove the signs and all accessories thereto and make good any damage to the property caused by the erection and/or removal of the signs referred to in annexure "**A1**" of the founding affidavit of Jacob Teke Sesing on behalf the applicant, within thirty (30)days.
2. Allowing the applicant to appoint a sub-contractor to remove the signs and all accessories thereto and make good any damage to the property caused by the erection and/or removal of the sign as listed in annexure "**A1**" should the respondent not comply with prayer 1.
3. The respondent is ordered to pay the sub-contractor as appointed in terms of prayer 2.
4. Ordering the respondent to pay the costs of this application.

Jansen

MM JANSEN AJ
ACTING JUDGE OF THE HIGH COURT

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