

In the KwaZulu-Natal High Court, Durban
Republic of South Africa

Case No : 1456/2012

In the matter between :

Maribo Media (Pty) Ltd t/a Maribo
Outdoor Media

Applicant

and

The Body Corporate of the Chartwell
Centre Scheme

Respondent

Judgment

Lopes J

[1] The applicant in this matter carries on business providing a variety of media and advertising services, including the sourcing and leasing of outdoor advertising sites. It concluded a series of agreements with the respondent in terms of which the respondent granted the applicant permission to erect advertising structures on the north and south facing walls of its property known as Chartwell Centre in Umhlanga Rocks, KwaZulu-Natal.

[2] The basis of the agreement was that the respondent allowed the applicant

to erect advertising structures and to advertise for its clients on those structures, and in return the applicant paid to the respondent a monthly rental. The applicant paid the rental to the respondent out of income which it received from an advertising agency (in this case referred to as Rapid Media Outdoor Services (Pty) Ltd ('Rapid')) who in turn procured the ultimate client, Cell C, whose wares were advertised on the billboards.

[3] The contract endured for a number of years with the Cell C advertisements being flighted on the structures erected on the respondent's building by the applicant. On the 16th September 2011 the respondent's attorney addressed a letter to the applicant. That letter was clearly precipitated by concerns which the respondent's insurers had regarding the structures erected on the respondent's building by the applicant. In the letter the respondent requested that the applicant provide certain information to it. In addition it referred to an outstanding amount of rental as at the 31st August 2011 being a sum of R60 499,74 in respect of which the respondent's attorney urged the applicant 'to ensure that the account be brought up to date as a matter of urgency.'

[4] On the 20th October 2011 a letter was addressed to the applicant by the respondent's attorney, purporting to cancel the agreement. The cancellation was on the basis of the applicant's failure to comply with the terms of what it referred to as 'the breach letter' of the 16th September 2011. It recorded that 'the material

breaches of the material terms of the Agreement which we have referred to in the breach letter, have not been rectified’.

[5] As a consequence of the respondent’s purported cancellation of its agreement with the applicant, Rapid was notified that an entity known as Africa Responds Clearly Media Holdings (Pty) Ltd (‘Arc’) claimed to have been given the rights to place advertising on the applicant’s billboards, and Rapid was requested to pay Arc for that advertising as from the 1st December 2011. Rapid had adopted the attitude of a stakeholder and refused to pay either Arc or the applicant.

[6] The upshot of the foregoing is that the applicant would be denied its income from Rapid. According to the applicant’s Director of Development, one Dwarikapersadh, this revenue represents the applicant’s largest single source of income and is allegedly its only steady and reliable income stream, constituting approximately half of the applicant’s monthly turnover. The applicant is consequently dependant upon that income in order to continue operating and, in addition were that income to be suspended, the applicant would be compelled to cancel various agreements with independent contractors who operate as its staff.

[7] Accordingly the applicant has brought an application for urgent relief in terms of which it seeks a rule nisi declaring the purported cancellation of the lease agreement to be invalid, with interim relief interdicting and restraining the

respondent from interfering with its rights in terms of the lease agreement and its use of the respondent's building to advertise; and further interdicting and restraining the respondent from claiming or receiving any amounts in respect of the advertising on its building other than rental from the applicant.

[8] The respondent has opposed the interim relief and answering and replying affidavits were delivered and the matter was argued before me. The respondent has raised the following points in opposition to the relief sought by the applicant :-

- a) the citation of the applicant;
- b) the failure of the applicant to join Rapid and Arc in the application;
- c) the fact that the applicant has failed to make out a case for urgency;
and
- d) the fact that the applicant has failed to make out a case for the relief sought.

[9] With regard to the citation of the applicant, the applicant was originally cited in the application papers as 'Maribo Outdoor Media (Pty) Ltd'. In its answering affidavits the respondent pointed out that no such company existed and submitted that 'Until the above issue has been clarified, it is denied that the Applicant is a duly registered company and that it has the necessary *locus standi* to bring this application.' Together with its replying affidavit the applicant filed a notice in terms of Rule 28 to amend the citation of the applicant and to reflect it as 'Maribo Media (Pty) Ltd trading as Maribo Outdoor Media'. The deponent to

the replying affidavit has referred to the incorrect citation of the applicant as being a mis-description which he states was 'bona fide and inadvertent'.

[10] I can see no prejudice to the respondent in allowing the applicant to correct its citation, and I do not view the mis-description of the applicant (which has now been corrected) as a basis for denying the applicant the relief which it seeks. The incorrect citation of the applicant was merely a misnomer. If I were to dismiss the application on that basis alone, another application would simply be brought reflecting the correct name of the applicant. In my view that would be a complete waste of time and the court's resources. The amendment of the citation of the applicant occasions no prejudice whatsoever to the respondent. No adjournment seems necessary in order to deal with the matter.

See *Devonia Shipping Ltd v M V Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369 F – 370 B and *Trust Bank Bpk v Dittrich* 1997 (3) SA 740 (CC).

[11] With regard to the non-joinder of Rapid and Arc :-

- a) annexed to the applicant's founding affidavit is a letter addressed to Rapid, notifying it of the applicant's intention to institute legal proceedings, and enquiring whether it wished to be joined in the proceedings as a third party. Rapid contented itself with replying that per its previous undertaking, it would only pay against an appropriate

costs order, and that if any costs were awarded against it, those would be deducted from any amount outstanding, presumably, to be paid by it. Having been afforded the opportunity to be joined, and having declined to do so, I do not believe it can be validly argued that Rapid should have been joined in the application.

- b) the position of Arc is somewhat different to that of Rapid. It is certainly correct that if an order is granted, the effect of which is to ensure that the payments for the advertising are made by Rapid to the applicant instead of to Arc, that Arc will be deprived of an income;
- c) however, this is only a financial interest, and Arc finds itself in the analogous position of a sub-tenant where a lease is cancelled. In my view the interest of Arc is a financial interest which is only an indirect interest in the current dispute between the applicant and the respondent. Arc does not have a substantial and direct interest in the litigation and in the outcome of it. It is not a party to the contractual arrangements between the applicant and the respondent;
- d) not only does Arc not have a direct and substantial interest in the matter, I do not believe that it can be submitted that Arc is a necessary party to these proceedings. Any order which is made in these proceedings, and particularly because it would relate to interim relief only, does not affect the position of Arc vis-a-vis the respondent and any contractual arrangements which the respondent may have with the applicant.

[12] I am accordingly of the view that the non-joinder of Rapid and Arc in this application is no basis for refusing it.

[13] Mr *Phillips* also submitted that the applicant had not made out a case for urgency. He submitted that this was a matter of 'commercial urgency' and that the applicant should be left to pursue whatever normal remedies for damages which it may have as a result of any unlawful cancellation by the respondent. In addition he submitted that no case had been made out to demonstrate that the applicant would suffer any imminent loss were the application not to be entertained by me.

[14] I am in respectful agreement with the dicta of Goldstone J in *Twentieth Century Fox Corporation and another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586 F - G, where he stated :-

'In my opinion the urgency of commercial interests may justify the invocation of Uniform Rule of Court 6 (12) no less than any other interests. Each case must depend upon its own circumstances. For the purpose of deciding upon the urgency of this matter I assumed, as I have to do, that the applicant's case was a good one...'

See also *Bandle Investments (Pty) Ltd v Registrar of Deeds and others* 2001 (2) SA 203 (SE) at 213 E – F.

[15] In my view the public's constitutionally enshrined right of access to justice would be poorly served were applicants to be barred from bringing urgent applications where they have shown that the very survival of their business, and the livelihood of shareholders, employees and others dependant upon it, are in jeopardy unless an application is heard urgently.

[16] I am satisfied that the applicant has made out a case for urgency. The respondent has delivered its answering affidavits, and the applicant has delivered replying affidavits. There was no request from the respondent's counsel that the matter be adjourned, albeit for a short period of time, to enable further affidavits to be filed. I accept that a fuller and more complete answer to the applicant's application papers will be delivered in due course by the respondent. However, I am of the view that there is no prejudice to the respondent in my hearing this application, and I accept the reasons for urgency set out in the applicant's affidavit to the effect that cutting off the income stream which it hitherto enjoyed pursuant to its contractual arrangements with the respondent, would imperil the very survival of the applicant.

[17] What finally needs to be considered is whether the applicant has established the requisites for an interim interdict. With regard to a prima facie right, I have considered all the affidavits. The contractual arrangements between the parties prior to cancellation appear to be common cause. The cancellation itself has been attacked on the basis that the applicant was not in default and

that the so-called 'breach letter' did not sufficiently comply with the requirements of such a notice as to bestow upon the respondent the right to cancel.

[18] It would appear that the complaints of the respondent in the 'breach letter' were either matters with which the applicant claims to have already complied, or were matters not covered by the terms of the agreement. The outstanding amount alleged of R60 499,74 as at the 31st August 2011 is alleged by the applicant not to have been due at that stage and that the only amount which was 'in arrears' was R30 000, which was paid. The applicant contends that it was in any event not due because it was claimed by the respondent on a basis not covered by the contractual arrangements between the parties. In my view the applicant's right is accurately described as 'prima facie established though open to some doubt' as envisaged in *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D).

[19] There is no doubt that the applicant has a well-grounded apprehension of irreparable harm if interim relief is not granted, and it ultimately succeeds in establishing that the contract was wrongly cancelled by the respondent. It will be left with insufficient operating income to continue its business.

[20] I am satisfied that the applicant has no other satisfactory remedy in that it will be cold comfort to it to recover damages in due course, if its business has, due to a lack of operating capital, collapsed and it has lost its goodwill.

[21] With regard to the balance of convenience, the prejudice to the applicant if the relief is not granted clearly outweighs the prejudice to the respondent if the application is granted. If the application is not granted the applicant is in danger of losing its business. If the application is granted the respondent will continue to receive the rentals to which it was entitled in terms of the contractual arrangements between the parties and which would appear to expire at the end of December 2012.

[22] I am accordingly of the view that the applicant has established its entitlement to interim interdictory relief.

[23] With regard to the form of the order sought, Mr *Phillips* for the respondent criticised the form of prayer 2.3 in which an interdict was sought restraining the respondent from 'diverting monies due to the applicant in respect of the sites'. I raised this matter with Ms *Annandale* SC who appeared for the applicant and she provided me with an alternative prayer which I have incorporated in the relief granted to the applicant.

[24] In all the circumstances I make the following order :-

1. A rule nisi is issued calling upon the respondent to show cause, if any, why an order in the following terms should not be granted :-
 - (a) declaring that the respondent's purported cancellation of the lease

agreement concluded between the applicant and the respondent in respect of advertising sites on the north and south walls of Chartwell Centre is invalid;

(b) interdicting and restraining the respondent from interfering with the applicant's rights in respect of the lease agreement and its use of the sites;

(c) interdicting and restraining the respondent from claiming or receiving any amounts in respect of advertising on the sites, other than rental from the applicant, and that Rapid Media Outdoor Services (Pty) Ltd be directed to continue to pay to the applicant's agents JB Media Connection the revenue applicable in accordance with the contract annexed to the applicant's replying affidavit marked 'AJD4'. Those payments are to be made provided that the applicant continues to pay rental to the respondent timeously and in full.

2. The relief set forth in sub-paragraphs 1(b) and (c) above shall operate as interim orders with immediate effect, and are to continue to apply, and the rule is extended, until confirmed or discharged by an order of this court.
3. The costs of this application and the costs of the opposed hearing on the 20th February 2012 are reserved for the decision of the court finally deciding the application.

Date of hearing : 20th February 2012

Date of judgment : 23rd February 2012

Counsel for the Applicant : A M Annandale SC with K Chetty (instructed by

Maraj Attorneys)

Counsel for the Respondent : D Phillips (instructed by MGD Attorneys)