REPUBLIC OF SOUTH AFRICA

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

CASE NO: 18810/2016

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

17 JUNE 2016 **FHD VAN OOSTEN**

In the matter between

STRAWBERRY WORX POP (PTY) LTD **APPLICANT**

And

CEDAR PARK PROPERTIES 39 (PTY) LTD **FIRST RESPONDENT**

FUSION GEN COMMUNICATIONS (PTY) LTD **SECOND RESPONDENT**

Mandament van Spolie – requirements of - lease of advertising space on rooftop of building in terms of advertising agreement - two advertising signs erected - removed by first respondent without court order - whether the applicant was in peaceful actual possession of the advertising space at the time of the alleged spoliation - terms and conditions of advertising agreement examined - all requirements for possession met - order for restoration of possession granted

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J U D G M E N T

VAN OOSTEN J:

[1] This application is based on the *mandament van spolie* and comes before me by way of urgency. The subject matter of the application is an advertising space on the rooftop of a building at the intersection of 5th street and Rivonia road, Sandton. The first respondent is the owner of the building and holds the rights to allow advertising

from the open rooftop area. The applicant is a turnkey outdoor advertising solution agent in respect of advertising on billboards, building wraps and hoarding. Two advertising signs erected on the advertising space are relevant to this application: the first, an Alexander Forbes sign and, the second, an H&M sign. The Alexander Forbes sign was erected in November 2014 through the agency of the applicant, pursuant to the first respondent's letter of mandate, dated 12 November 2014, in terms of which the applicant was informed that 'we intend mounting an advertising sign above the podium on site, with advertising faces facing the intersection of 5th street and Rivonia road' and consent given to the applicant to 'market the advertising for this position'. On 20 November 2014 the applicant, acting in terms of its mandate and having sourced an advertiser for that position, concluded a written Advertising Agreement with the first respondent, providing for the erection of the Alexander Forbes sign. I shall revert to the terms and conditions of this agreement (the advertising agreement). The H&M sign was erected, likewise, through the agency of the applicant, in terms of an oral agreement concluded between the parties during September 2015. The H&M sign was erected on behalf of a fashion retailer for an intermittent campaign which was to end on 31 May 2016.

[2] The dispute between the parties arose in May 2016 when the applicant, in a letter addressed to the first respondent, requested a meeting to be held in order to discuss a perceived impasse that had arisen following 'some issues during construction late 2015'. On the same date the first respondent's attorneys wrote a letter to the applicant, in which the applicant was informed that 'notwithstanding expiry of the agreement (the advertising agreement) you continue to utilise the advertising space illegally for an Alexander Forbes advertisement' and, further, that the H&M sign had been erected without the consent of the first respondent. A demand was made for the removal of the signs by 16 May 2016, failing which the first respondent would launch an application to this court for an order to compel such removal. In a follow-up letter, dated 19 May 2016, the first respondent's attorneys, although no longer taking issue with the H&M sign, in respect of which they alleged a one month authorisation exited, demanded removal of the H&M sign on 31 May 2016 and in regard to the Alexander Forbes sign, advised that they held instructions to continue with the application to compel removal. The letter furthermore records that the first

respondent had received ‘an offer for the site subject to it being cleared and available by 24 May 2016’.

[3] It is common cause between the parties that both signs were removed by the first respondent without recourse to the court and that a new sign, advertising Nike, was erected through the agency of the second respondent. The second respondent has not entered the fray and I shall accordingly henceforth refer to the fist respondent as the respondent.

[4] The crucial dispute between the parties which I am required to determine is whether the applicant was in peaceful possession of the advertising space at the time of the alleged spoliation. Subsidiary disputes exist concerning the duration of the advertising agreement which, of course, because of the restitution *ante omnia* element of the *mandament van spolie*, I need not resolve (*Rosenbuch v Rosenbuch and Another* 1975 (1) SA 181 (W) 183A). To revert to the possession dispute, counsel for the respondent submitted that the applicant had mis-characterised the relationship between the parties. The argument continued along the lines that the applicant merely had a right to market the advertising space, that applicant’s access to the site was limited to the obligations it was to fulfil on site, that the ownership of the signs, and all its accessories, remained vested in the respondent and that on termination of the agreement between the parties, the respondent was entitled to demand from the applicant the removal of the sign and to repair the damage caused by such removal. In support of the argument counsel heavily relied on the judgment of the Supreme Court of Appeal in *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another* [2009] 2 ALL SA 1 (SCA), and submitted that it was on ‘all fours’ with the present matter.

[5] The nature of applicant’s rights and, in particular, whether they constitute the required element of possession necessary for the protection afforded by the *mandament*, must be determined in the context of and based on the terms and conditions contained in the advertising agreement, which governs the contractual relationship between the parties. In clause 2.3 of the agreement the applicant is appointed by the respondent ‘to sub-lease’ a billboard situated at the advertising space. The ‘sub-lease’ entitles the applicant to ‘utilise the advertising space’ which ceases on termination of the agreement (clause 3.2). The applicant is entitled to

access to the site ‘at any reasonable time’ for purposes of changing the advertisement and carrying out repairs, alterations to and general maintenance of the sign provided prior notice thereof is given to the respondent’s development manager (clause 9). Although the respondent’s ownership of ‘sign and all accessories thereto’ is confirmed it may request the applicant, on termination of the agreement, to remove the sign ‘together with its above ground and below ground foundations and accessories’ from the site.

[6] In summary the applicant’s rights are analogous to those of a sub-lessee (see *Nienaber v Stuckey* 1946 AD 1049). The applicant is expressly entitled to use the advertising space, which is exclusively used for advertising purposes. The applicant is further entitled to access, at all reasonable times, for all purposes related to carrying out its mandate. In my view these all constitute incidents of possession of the advertising space. The facts dealt with in *ATM* are vastly different and distinguishable from the present matter. *ATM* was decided on the basis that ‘ATM did not occupy the premises, did not control the ATM and did not have access without the co-operation of Olkru’, which led to the conclusion ’It did not control any part of premises through the presence and connection of the ATM’ (*ATM* para 13). In contrast thereto, and at the risk of repeating, the use of the site was for the limited purpose of billboard advertising in respect of which the applicant held the rights of a sub-lessee. The applicant was entitled to access to the site which, only for practical reasons, had to be pre-arranged, it was moreover in control of and responsible for the maintenance of the signs and, if requested to do so, to remove the signs and clear the site.

[7] Counsel for the applicant referred me to the judgment in *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (EC) 236H-237H, where Addleson J, concerning the rights of a lessee under an agreement of lease, held that the question of possession is one of degree and that the enquiry was whether the conduct of the possessor – minimal as it may be - shows that he did exercise rights or carry out activities consistent with the transfer to him of control of the premises and that he did so with the intention of securing some benefit to himself. Applied to the facts of this matter, those requirements have all been met. For all these reasons I conclude that the applicant was in possession of the advertising space in respect of which it was

spoliated by the respondent.

[8] It remains to briefly deal with the subsidiary disputes. The advertising contract, by the effluxion of time, expired on 15 November 2015. The applicant however, alleges that the agreement was 'renewed' in terms of an 'Out of Home Rental Agreement' concluded with Omnicom Media Group SA (Pty) Ltd, to which the respondent was not a party but which was delivered to its offices. The legality of the alleged renewal was challenged by counsel for the respondent in argument. I am not required to decide this issue. The applicant was in possession of both signs at the time the respondent's act of spoliation was committed. The respondent was well aware of the requirement that a court order was required to compel the applicant to remove the signs, as is demonstrated by the two letters I have referred to. The respondent clearly resorted to self-help and a new sign was installed (*Nino Bonino v De Lange* 1906 TS 120). Lastly, the respondent concedes that its removal of the H&M sign was one day too early, on 30 May 2016. That of course does not avail the respondent: the *status quo* must be restored *ante omnia*.

[9] It follows that the application must succeed.

[10] In the result the following order is made:

1. The first respondent is ordered to forthwith restore the applicant into possession of the advertising space and advertisement signs of Alexander Forbes and H&M.

2. The first respondent is ordered to pay the costs of the application.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV W KROG***
APPLICANT'S ATTORNEYS	***MARAJ ATTORNEYS***
COUNSEL FOR FIRST RESPONDENT	***ADV DC FISHER SC***

FIRST RESPONDENT'S ATTORNEYS	***SMIT SEWGOOLAM INC***
DATE OF HEARING	***14 JUNE 2016***
DATE OF JUDGMENT	***17 JUNE 2016***