

SOUTH AFRICA / JUDGMENT

**Kena Media (Pty) Ltd v City of Johannesburg
Metropolitan Municipality, In Re: City of Johannesburg
Metropolitan Municipality v Kena Media (Pty) Ltd
(3703/2018) [2019] ZAGPJHC 208 (27 June 2019)
[2019] ZAGPJHC 208**

COURT

South Gauteng High Court, Johannesburg

BEFORE

Goodman

CASE / FILE NUMBER

3703/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case

number: 3703/2018

In

the matter between:

KENA
MEDIA (PTY)
LTD APPLICANT
and
CITY
OF JOHANNESBURG
RESPONDENT
METROPOLITAN
MUNICIPALITY
In

re :

CITY
OF
JOHANNESBURG APPLICANT
KENA
MEDIA (PTY)
LTD RESPONDENT

JUDGMENT

GOODMAN, AJ:

Introduction

1. This is an interlocutory application to compel the City of Johannesburg to produce certain documents allegedly referred to in its founding affidavit in the main application. The present applicant, Kena Media, claims that it is entitled to the production of those documents under Rule 35(12) of the Rules of this Court. The City, by contrast, contends that it is under no obligation to produce the documents because they are irrelevant to the main application.
2. To understand their respective positions, it is necessary to outline briefly the main dispute between the parties.

The main application

3. In the main application, the City applies to declare unlawful and to interdict certain advertising signage that Kena Media has erected on the eastern tower of the Orlando Cooling Towers (the Eastern Tower), and to compel Kena Media to restore the Eastern Tower to its original state within 15 days of any order granted in the main application.
4. The City claims that the signage is unlawful in three respects.
5. First, it complains that the signage breaches provisions of the City of Johannesburg Outdoor Advertising By-Law (the By-Law), namely:
 - 5.1. section 3(1), which prohibits any person from erecting, using or continuing to use any advertising sign, structure or device unless it has obtained prior written approval from the City. The City alleges that Kena Media has failed to procure such approval, and that the signage is consequently unauthorised;^[1] and
 - 5.2. section 6(2)(a), which precludes two advertising signs being erected within 100 metres of one another. According to the City, JC Decaux has been authorised to put up advertising on the Western Tower pursuant to the award of a tender to it. But the proximity of the Eastern and Western Towers means, according to the City, that no signage can be allowed on the Eastern Tower.^[2]
6. Second, the City alleges that the signage is in breach of the provisions of the National Heritage Resources Act 25 of 1999 (the Heritage Act), which preclude alterations being made to various categories of heritage sites or resources unless they are undertaken by a person who holds a permit issued “by the relevant provincial heritage resources authority” (that is, the Provincial Heritage Resources Authority, Gauteng (the Heritage Authority)).^[3] The City suggests that Kena Media does not hold, or does not properly hold, such a permit.

7. Finally, the City avers that Kena Media required its consent, as the owner of the Eastern Tower, to erect the advertising signage.[4]
8. On each of these grounds, the City contends that the advertising on the Eastern Tower was and remains unlawful, and must be removed.

The request for documents

9. In the course of setting out the background facts to the main application, the City's deponent to the founding affidavit makes the following allegations:

"33. The facts giving rise to these proceedings is that, during May 2012, a tender was advertised for a bid of a 10-year branding lease on the western tower. Kena Media who at the time had a joint venture with Adbrite (Pty) Ltd, also tendered but lost only for the Applicant to accept the JC Decaux bid.

34. In terms of the tender and/or the bid terms and conditions, only the western tower was to remain as an advertising billboard whereas the eastern tower which contained the largest mural painting in South Africa and a subject matter of these proceedings, remained protected in terms of its heritage status as per the Act."
10. On 14 March 2018, Kena Media filed a notice in terms of Rule 35(12) calling for the production of a number of documents referred to in the founding affidavit including, pertinently for this application, the following documents allegedly referred to in paragraphs 33 and 34:
 - JC Decaux's bid or tender submission/proposal;
 - The award and/or letter of award of the tender issued by the municipality in respect of the Western Tower to JC Decaux; and
 - The lease agreement concluded between the municipality and JC Decaux in respect of the Western Tower.

(I refer to these collectively as "the requested documents").

11. On 2 May 2018, the City produced for inspection certain of the documents called for but declined to provide others, including the requested documents. It claimed that they were irrelevant or unnecessary to enable the First Respondent to answer the Applicant's

founding affidavit.[5]

12. Kena Media objected to the City's refusal in terms of Rule 30A of the Rules of this Court, and later brought the present application to compel the production of the requested documents. (It does not persist in seeking the other documents identified in the Rule 35(12) notice that the City did not produce.) It pleads that it requires the requested documents:

“to ascertain the correct position since the applicant can only put the towers on tender if there is a consent or delegated authority from the second respondent. The first respondent is suspicious of, and justifiable so, of (sic) the contractual relationship and the legality thereof between the applicant and JC Decaux.

The applicant claims rights and seems to want to exercise rights falling within the jurisdiction of the second respondent in respect of the towers but the applicant can only assert those rights with regard to the towers if it has consent or delegated authority from the second respondent allowing it to do so”.^[6]

13. In reply, it expands on the point, submitting that once the Eastern Tower has been declared a heritage site, they are “under the care and custody” of the Heritage Authority. The City’s By-Law, and its powers of approval, only apply if the Heritage Authority has delegated such powers to the City or otherwise has an agreement with it that the City will administer and manage the Towers. According to Kena Media, this puts the City’s standing to bring the main application into doubt. The lack of clarity, it says, is compounded by JC Decaux’s claim that it has advertising rights over both towers. According to Kena Media, the towers cannot, in light of that, be treated separately from one another.
14. The City belatedly filed an answering affidavit opposing the application to compel.^[7] It claims that the requested documents are wholly irrelevant to the determination of the matter because they relate to the Western Tower, while the main application is concerned only with Kena Media’s conduct in respect of the Eastern Tower. The City alleges that rather than seeking the production of relevant material, this application is designed merely to delay the finalisation of the main proceedings and thereby to prolong the period for which the advertising signage remains on the Eastern Tower (and thus the period for which Kena Media is paid for such advertising). Those allegations are denied by Kena Media.
15. Kena Media has not filed answering papers in the main application and instead awaits the outcome of this application. It initially sought an order, in these proceedings, suspending its obligation to file papers in the main application pending the determination of this application to compel, or condoning the late filing of the answering affidavit to the extent necessary. That relief was abandoned at the hearing of the interlocutory application. I do not deal with it in this

judgment.

The legal approach

16. Counsel for both parties were in agreement on the proper legal approach to the matter. The starting point is whether the documents are referred to in the City's founding papers. If they are, Kena Media has a prima facie entitlement to their production, unless the City can show that the documents are irrelevant. But the City does not bear a strict onus in this regard; rather the Court must determine the case on a conspectus of the facts before it. As the Supreme Court of Appeal has explained:

"the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant."[8]

17. Kena Media's counsel, Mr Fischer, emphasised that I should approach relevance permissively, so as not to impose too heavy a burden on the applicant.

Does the City have to produce the relevant documents?

Reference to the documents

18. The starting point, then, is to consider whether the requested documents are referred to in the City's founding papers in the main application. The requested documents, once again, are:
- The award and/or letter of award of the tender issued by the City in respect of the Western Tower to JC Decaux; and
19. The question was not expressly addressed in the parties' written submissions or dealt with in any detail in argument, and I consequently requested further submissions on this point after the hearing. I am indebted to the parties' counsel for providing these to me expeditiously.
20. Paragraphs 33 and 34 of the City's founding affidavit mention that a "tender was advertised for a bid for a 10-year branding lease on the western tower", and that the City accepted "JC Decaux's bid". JC Decaux's bid submission is clearly and expressly referred to in the founding papers.
21. It is by no means clear that the reference to the lease in paragraph 33 of the founding affidavit, is to the lease agreement actually concluded between the City and JC Decaux, as opposed to the notional lease to be concluded pursuant to the award of the bid. In its supplementary submissions, Kena Media submitted that this was an adequate reference and that, in any event, the lease agreement was referred to in paragraph 39 of the founding affidavit, which states that "the western tower is already leased to JC Decaux". The City did not suggest that the reference to the lease agreement was inadequate to trigger the application of Rule 35(12). I similarly accept that the lease agreement was adequately

referred to for the purposes of the Rule.

22. The City submitted that the founding affidavit made no allegations about the award and/or award letter to JC Decaux, whether in paragraphs 33 and 34 or elsewhere. Kena Media conceded that the award letter was not expressly identified in the main founding affidavit, but submitted that such document was nevertheless referred to by implication, and consequently had to be produced under Rule 35(12) if it was relevant.
23. However, the case law is clear that the reference by deduction or inference is not sufficient to constitute a reference for the purposes of Rule 35(12).[9] Because the award letter was only referred to by implication and not directly, I am not satisfied that it falls to be produced under Rule 35(12).

Relevance

24. The next question is whether JC Decaux's bid and the lease concluded with it are relevant to the disputes at issue in the main proceedings. That must be determined with reference to the pleadings in the main application.
25. I agree with the City that the requested documents are not relevant to deciding whether Kena Media has breached provisions of the Heritage Act or section 3(1) of the By-Law. Whatever JC Decaux's position in relation to the Western Tower, it cannot affect the lawfulness under those provisions of Kena Media's conduct in respect of the Eastern Tower. Nor will JC Decaux's bid or its lease agreement with the City elucidate the City's authority over the Eastern Tower pursuant to its being declared a heritage site, or its standing to bring these proceedings. Those are questions of law to be determined on the facts adduced in the City's papers.
26. But that is not the end of the matter. As outlined above, the City also pleads reliance on section 6(2)(a) of the By-Law, which prohibits two advertising signs being set up within 100 metres of one another. Put differently, the City relies on JC Decaux's advertising on the Western Tower as an additional ground to contend that Kena Media's advertising on the Eastern Tower is impermissible. Once that is so, the basis and lawfulness of JC Decaux's advertising becomes directly

relevant to the dispute between the City and Kena Media in the main application.

27. In its supplementary submissions, the City argued that this Court has already found, in separate proceedings, that the lease concluded between it and JC Decaux is valid, and that it is consequently not open to Kena Media to impugn it in the main proceedings. It submitted that the JC Decaux bid and lease agreements were consequently irrelevant.
28. But that seems to me too strict an approach to relevance at this stage. It may be that Kena Media will be precluded, by this Court's previous order and findings, from challenging the lawfulness of JC Decaux's advertising on the Western Towers in the main proceedings. That is not an issue I can determine at this stage – both because the Court's previous judgment

and order are not before me and because Kena Media has yet to determine and plead whether it will impugn the lawfulness of the JC Decaux advertising. It is, in other words, a matter that has yet to play out in the main application. But for as

long as the City's pleaded case relies on JC Decaux's advertising as a ground for claiming that Kena Media's conduct is unlawful, the basis and terms on which that advertising is undertaken is relevant to the main dispute.

29. I accordingly find that the JC Decaux bid and lease agreement must be produced by the City, in terms of Rule 35(12).

Costs

30. Kena Media has enjoyed substantial success in this application. Costs should, in my view, follow that result.

Conclusion

31. I therefore make the following order:

- (a) The City is ordered to make the following documents available to Kena Media's legal representatives for inspection, within 5 days of the date of this order:
 - (i) JC Decaux's bid submitted in response to the tender for a 10-year branding lease on the Western Tower; and
 - (ii) The lease agreement concluded between the City and JC Decaux in respect of the Western Tower.
- (b) The City is ordered to pay the costs of this application.

I GOODMAN, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

Appearances

Counsel for the Applicant

: Adv. HJ Fischer

Instructing Attorneys

: DMS Attorneys

Counsel for the Respondent

: Adv. T Makgate

Instructing Attorneys

: MMM Attorneys

Date of hearing

: 6 June 2019

Date of judgment

: June 2019

[1] FA p 18 para 28; p 27 para 52.

[2] Main FA p 28 para 54.

[3] Main FA pp 26-27 paras 49-50; p 14 para 17.

[4] Main FA p 28 para 55.

[5] Reply to Rule 35(12) notice, TS5 p 92 para 2.

[6] Interlocutory FA p 14 paras 20-21.

[7] Kena Media initially objected to the answering affidavit on the basis that the City had not sought or obtained condonation for its late filing. It nevertheless conditionally filed a replying affidavit joining issue on the matters raised in answer. At the hearing of the matter, Kena Media abandoned its objection, and elected to allow the matter to proceed on the full papers and argument before me.

[8] Centre for Child Law v The Governing Body of Hoerskool Fochville (156/2015)

[2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016

(2) SA 121 (SCA) (8 October 2015) para 18.

[9] Penta Communication Services (Pty) Ltd v King 2007 (3) SA 471 (C) at paras 16-17;
Holdsworth v Reunert Ltd 2013 (6) SA 244 (GNP) at para 12.

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