

SOUTH AFRICA / JUDGMENT

Primedia (Pty) Ltd and Others v Passenger Rail Agency of SA and Others (6168/2012) [2012] ZAGPJHC 93 (11 May 2012)

[2012] ZAGPJHC 93

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD van Oosten

CASE / FILE NUMBER

6168/2012

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REPORTABLE

SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO 6168/2012

DATE:11/05/2012

In the matter between

PRIMEDIA (PTY) LTD.....FIRST APPLICANT

PRIMEDIA OUTDOOR (PTY) LTDSECOND APPLICANT

COMUTANET (PTY) LTDTHIRD APPLICANT

RANK TV (PTY) LTD..... FOURTH APPLICANT

and

PASSENGER RAIL AGENCY OF SA.....FIRST RESPONDENT

UMJANJI MEDIA CONSORTIUMSECOND RESPONDENT

UMJANJI MEDIA (PTY) LTD.....THIRD RESPONDENT

Practice

- Applications and Motions-Application to strike out - new facts and contentions introduced in replying affidavit - not competent to insert new facts concerning a different or new cause of action in replying affidavit - absence of explanation for late

introduction

of new matter - application granted.

J U D G M E N T

VAN OOSTEN J:

[1] This is an application for the striking out of certain portions of the applicants' replying affidavit in the main application.

The parties are all involved, in some way or another, in the outdoor advertising industry. The first applicant, being the holding entity, conducts its business through various divisions of which it is the sole shareholder, among them the second, third and fourth applicants. The first applicant's primary business activity is to acquire, or, hire facilities or sites, for development into, or to be equipped for advertising space on billboards, which it in turn rents out. For the sake of ease of reference I shall henceforth refer to the applicants jointly, as Primedia. The first respondent is an organ of State, primarily providing rail and bus services and secondary generating income from inter alia, and relevant for present purposes, renting railway premises to advertising entities, such as the applicants, for purposes of billboard advertising to a target market, being railway passengers. The management of the first respondent's properties, contracts and advertising sites is conducted by its appointed agent, Intersite Property Management Services (Pty) Ltd (Intersite). The second respondent is a consortium consisting of three entities. It was awarded the tender to which I shall presently revert. After the award of the tender the consortium was transformed into a company, known as Umjanji Media (Pty) Ltd. At the commencement of the hearing of this application before me, I ordered, by agreement between the parties, the joinder of the last mentioned entity, as the third respondent in the main application.

[2] Primedia has been involved in a business relationship with the first respondent for some 19 years. Their relationship was governed

by contract consisting of master rental agreements together with numerous concomitant schedules which were concluded thereafter, in terms of which various sites, all over South Africa, were hired from the first respondent for advertising purposes. In most instances the agreements were for fixed periods of between 3 and 5 years, at agreed rentals, escalating at an agreed annual rate. By letter dated 16 November 2011, Intersite, on behalf of the first respondent, cancelled the master lease agreements inclusive of all schedules, as listed in an annexure thereto. With the exception of three schedules that remain, all have by now expired. Primedia however, remained in occupation of those sites. The first respondent continued to charge rentals and those were duly paid. Primedia contends that a contract of letting and hiring on a monthly basis, for an indefinite period, came into existence which is disputed by the respondents, with reliance on clause 16.3 of the master lease agreements. During February 2010 the first respondent invited tenders from outdoor and media technology companies, for outdoor advertising and broadcasting services. Tenders were submitted, also by Primedia, and a tender procedure, involving, inter alia, a compulsory briefing session, followed. On 25 February and 1 March 2011 Primedia was informed

by the first respondent that its tender was unsuccessful and that the tender had been awarded to the second respondent. On 15 March 2011, as well as in follow-up correspondence, the first respondent was requested to furnish reasons for the rejection of Primedia's tender proposal and the award of the tender to the second respondent. No reasons, however, were forthcoming. This prompted the third applicant, on 26 July 2011, to launch an application in this court for the review and setting aside of the first respondent's tender award to the second respondent. The only ground for review relied on in the application, is the first respondent's failure to furnish reasons for rejecting Primedia's tender. The second respondent intimated that it intended to "implement the consequences of the cancellation of the master rental agreements", in effect demanding removal by Primedia of its infrastructures at the various sites, which caused Primedia to launch the main application by way of urgency, on 17 February 2012. The urgency of the matter however, abated as certain undertakings were given by the first respondent. The matter proceeded in the normal course and a full set of affidavits has been filed.

- [3] The relief sought in the main application is for an interim interdict aimed at preserving Primedia's contractual status quo ante, pending the final outcome of the review application. At the commencement of the hearing counsel for the first respondent applied for the striking out of certain portions in the replying affidavit, to which I shall revert. Counsel for the second and third respondent joined forces in seeking the same order. Opposing contentions were advanced on whether the application to strike out should be heard separately or as part of the argument in the main application. I ruled the former.
- [4] The respondents in this application seek an order for the striking out of the following paragraphs in the applicants'

replying affidavit: 11, 18.9 to 18.9.7; 18.11 to 18.13, and 19.1 to 19.14; 20.2 and 20.3. I turn now to deal with those paragraphs under separate headings.

PARAGRAPH 11 OF THE REPLYING AFFIDAVIT

- [5] In this paragraph Primedia admits the expiry of the rental agreements but reiterates its contention that those agreements continued indefinitely, on a month-to-month basis. This is followed by a denial that Primedia "can rely" on the "purported"

cancellation of 16 November 2011. The deponent then sets out the contentious allegations, which in summary, are the following. A copy of a letter by Intersite, marked "To whom it may concern", dated 31 November 2011, has "since the issue of the application in this matter" come to the notice of Primedia. The letter informs the reader that "Umjanji has ceded a portion of the contract that relates to outdoor billboards to a company called Strawberry Worx (Pty) Ltd" and that Intersite "has entered into direct contract with each of the entities, namely Umjanji and Strawberry Worx, in relation to their respective portions of the advertising contract". Strawberry Worx, I should mention, like Primedia, was also an unsuccessful tenderer. The letter sparked off a number of wide ranging and contentious accusations made by the deponent, such as that the award of the tender to the second respondent was the "sole basis, cause and rationale" for the "purported" cancellation. Further allegations of untoward conduct by the first respondent are made, in

particular that the first respondent had intentionally withheld this letter from disclosure in its answering affidavit. Finally, the deponent submits that the cancellation letters were “effected” by the first respondent with an ulterior motive, which he maintains was to “accommodate” Strawberry Worx.

[6] Counsel for the second and third respondents was at pains to emphasise that Primedia’s cause of action is based on contract

and that this application must accordingly be considered on that basis. I agree. Departing from this premise the contentious allegations indeed constitute new matter that, if relevant, at the outset should have been inserted in the founding papers, or, at best for Primedia, by way of an application, supplemented the founding affidavit. There is, however, a more compelling reason for holding in favour of the respondents: the rules and practice relating to the introduction of new matter into a replying affidavit are clear and need not be repeated here (see *John Roderick’s Motors Ltd v Viljoen* 1958 (3) SA 575 (O) 578G; *Titty’s Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and others* 1974 (4) SA 362 (T) 369). In this regard the date on which Primedia gained knowledge of the letter is vital. This aspect is scantily dealt with: the reference is merely to “since the issue of the application in this matter”. I do not think it is necessary to comment any further either on the uncertainties arising, or, the unsatisfactory manner in which this has been dealt with. The arguments proffered by the deponent, based on the contents of the letter, are not only far-reaching, but, had they been inserted in the founding affidavit, may well have been explained or refuted by the first respondent. In the absence of an opportunity to deal with those allegations, the respondents, not only in regard to the imputations of dishonesty, but also in regard to the case they are required to meet, would be prejudiced.

[7] I am unable to agree with counsel for Primedia, who, with reliance on the judgment of Vos J in *Gore v Amalgamated Mining Holdings* 1985 (1) SA 294 (C), submitted that there was duty on the respondents to have answered the new matter and only then to proceed with the application for striking out. Insofar as the judgment in *Gore* seeks to lay down, as a general rule, that allegations which are the subject matter of an application to strike out, should in any event be answered, I respectfully disagree therewith. The application of a general rule to that effect may lead to paradoxical results. This case provides a telling example for holding the opposite view: the respondents have furnished sound reasons for not dealing with the contentious allegations at all. To require the respondents now to deal with those allegations would not take the matter any further and may result in an unnecessary waste of costs. The prejudice the respondents will suffer in having to deal

with inadmissible matter, or a different or new cause of action, which has not been made out in the founding papers, is apparent. The rules and practice relating to motion proceedings are well-established: it for the applicant to establish its cause of action and the material allegations relied on, in the founding papers. The applicant cannot be allowed to introduce unrelated new matter or found a new cause of action (*Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en andere* 1984 (2) SA 261 (W) 270A; *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T) 92F) in the replying affidavit in the hope of or expecting the respondents to deal with those either

by provisionally responding thereto, or to seek leave to file a further affidavit. Such a procedure would defeat the whole purpose of, and rationale for, motion proceedings.

- [8] It remains to deal with a further contention advanced by counsel for Primedia. The new matter, counsel submitted, merely expands on the existing cause of action and should for that reason be allowed to remain. In support of the contention reliance was placed on the judgment of Miller J in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) 704E, where the learned Judge recognised that there may be occasions when the court will allow the introduction of additional facts or grounds for relief in the replying affidavit, even though this might necessitate the admission of further affidavits. The learned Judge then proceeded to set out the considerations that may apply in deciding this issue. I have already given my reasons for holding that the impugned allegations should not be allowed to remain in the replying affidavit. It is merely necessary to add thereto that the new matter cannot be regarded as “enlarging upon what has been revealed” by the respondents in their answering affidavit (*Shakot* 705B-C). On the contrary, the respondents, in the answering affidavit, repeatedly reminded Primedia that it will be held to the allegations made in the founding affidavit. The urgency of the application when launched, which might have been a consideration for allowing some latitude, does not avail Primedia: once armed with the first respondent’s undertakings the matter proceeded in the ordinary course and nothing prevented Primedia from amplifying the founding affidavit.
- [9] Having considered all the circumstance and in the exercise of my discretion (*Kleynhans v Van der Westhuizen* NO 1970 (1) SA 565 (O) 568E); *Pat Hinde & Sons Motors (Brakpan) (Pty) Ltd v Carrim* 1976 (4) SA 58 (T) 63E-65B) I have come to the conclusion that this paragraph, excluding the first three sentences thereof, ought to be struck out.

PARAGRAPH 18.9 TO 18.9.7 AND 20.2 AND 20.3 OF THE REPLYING AFFIDAVIT

- [10] These allegations concern the second respondent’s tender documents which were submitted to the first respondent in the tender process. The deponent to the replying affidavit contends that it appears from a “cursory analysis” of those documents that the second respondent’s tender ought to have been rejected as a “non-responsive tender”. He then proceeds to deal, in sub-paragraphs 18.9.1 to 18.9.7, with that analysis and further advances reasons in support of the contention. I do not consider it necessary, for present purposes, to traverse those reasons.
- [11] The objection raised against allowing these allegations and documents annexed in support thereof, to remain is that they could

and therefore should have formed part of the founding papers. I agree. No explanation for the belated introduction of the new matter

has been tendered. Their discovery, moreover, apparently required nothing more than a cursory analysis. Primedia has been in possession

of the documents since early December 2011, and thus long before the launching of the main application. The obvious question arising why this was not attended to earlier remains unanswered. But it goes further: the relevance of the contentions in view of the cause of action relied on, on the one hand, and the single ground of review relied on in the review application on the other, escapes me. Although an intention to supplement the grounds for review is stated, no further action was taken nor has the proposed additional grounds for review been disclosed to this court. Had it been the intention of Primedia to “vigorously” pursue the review, as it is stated in the replying affidavit, I would have expected the Primedia to get its house in order. It follows that these paragraphs, similarly, ought to be struck out.

PARAGRAPHS 18.11 TO 18.13

[12] Score cards for the purpose of technical evaluation of the tenderers by evaluators were used in the tender process. A copy of the score card in respect of the Primedia’s Outdoor division (the second applicant), is annexed to the papers. With reference

thereto, the deponent to the replying affidavit, in these paragraphs, “merely mentions some issues” which, he further states, “will be fully canvassed when the applicants supplement the review application”. Those “issues” are the impugned allegations that are now being attacked, on the basis of irrelevancy and further, that they should have been included in the founding affidavit.

[13] Similar considerations to those dealt with in respect of the previous paragraph, apply here. Until the review application has been supplemented these allegations are irrelevant and therefore ought to be struck out.

PARAGRAPHS 19.1 TO 19.14

[14] These paragraphs contain a number of contentions, again based on an examination of the tender documents, forming part of the review application. The main contention advanced, in essence, is that the second and third respondents are technically incapable to carry out all the tender requirements. It is for that reason, so it is suggested, that Strawberry Worx was given the opportunity to perform the outdoor function that had originally been awarded to the second respondent.

[15] This, once again, constitutes a further attack on the tender process which has not been dealt with in the review application.

Nothing but speculation would allow those allegations to remain in the replying affidavit. They accordingly suffer the same fate than the others I have already dealt with.

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

Paragraphs 11 (excluding the first three sentences thereof); 18.9 to 18.9.7; 18.11 to 18.13; 19.1 to 19.14; 20.2 and 20.3 are struck out from the applicants’ replying affidavit.

The applicants are ordered to pay the costs of this application, including the costs consequent upon the employment of two counsel by the first respondent, as well as the costs consequent upon the employment of two counsel by the second and third respondents.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT : ADV JP McNALLY SC

ADV JJ ROESTORF

APPLICANT'S ATTORNEYS: DE WET VAN DER WATT & JORDAAN

COUNSEL FOR FIRST RESPONDENT: ADV H VAN EEDEN SC

ADV MA DEWRANCE

FIRST RESPONDENT'S ATTORNEYS: EVERSLED

COUNSEL FOR SECOND AND

THIRD RESPONDENTS: ADV PF LOUW SC

ADV HJ FISCHER

SECOND AND THIRD RESPONDENTS'

ATTORNEYS: DMS ATTORNEYS

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