

SOUTH AFRICA / JUDGMENT

Zascotime (Pty) Ltd v Abrina 3765 (Pty) Ltd t/a BMW Sandton (A5014 / 2022 ; 35714 / 2020) [2023] ZAGPJHC 677 (9 June 2023) [2023] ZAGPJHC 677

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mia, Windell, Wilson

CASE / FILE NUMBER

A5014 / 2022

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Appeal

Case No: A5014 / 2022

Case

No Court a quo:

35714 / 2020

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

09.06.23

In

the matter between:

ZASCOTIME
(PTY) LTD
Appellant
(Respondent)
and
ABRINA
3765 (PTY) LTD t/a BMW SANDTON
Respondent
(Applicant)
Neutral
Citation: Zascotime
(PTY) LTD vs Abrina 3765 (PTY) LTD t/a BMW Sandton
(Case No: A5014/2022) [2023] ZAGPJHC 677 (09 June 2023)

JUDGMENT

Mia, J

Introduction

- [1] This is an appeal against the order and judgment of this court (Friedman, AJ) sitting as a court of first instance. The appellant appeals the whole of the judgment and order handed down on 2 December 2021 in terms of which the appellant was ordered to repay the respondent the sum of R 552 000.00 (inclusive of VAT) for advertising services, together with interest thereon on at a rate of 9.25 % (per centum) to run from 10 June 2022; together with costs of the application. On 23 February 2022, the court granted the appellant leave to appeal.
- [2] The appellant (Zascotime) is a registered company in terms of the laws of SA. Abrina 3765 (Pty) Ltd t/a BMW Sandton (Abrina) is also a duly registered South African company. The appellant was the respondent before the court a quo. The respondent, the applicant.

Factual background

- [3] The appellant and the respondent entered into a written agreement in March 2020 in regard to an advertising sign situated outside of the respondent's business premises in Sandton. The respondent leased the premises and renovated its showroom specifically to maximise the space. It required the sign in front of the showroom removed and requested the lessor Smarthgrowth Investments (Pty) Ltd (Smarthgrowth) to ensure the sign would be removed.
- [4] Smarthgrowth indicated they could not guarantee the removal of the sign as it required approval from the City of Johannesburg (CoJ), but made the undertaking and requested the removal of the sign from the CoJ. The respondent being uncertain that the sign would be removed, enquired about the sign and advertising on it. It was informed by the appellant, that there were competitors willing to advertise on the sign. This prompted the respondent to enter into an agreement with the appellant to advertise its own product on the sign. After

signing the agreement, the appellant discovered that the sign did not comply with the CoJ Municipality ByLaws and was illegal. The respondent enquired from the appellant why the legality and litigation pending between it and the CoJ regarding the sign had not been disclosed. The response received a denial that the sign was illegal and an indication that the litigation was opposed as there was a moratorium in place granting an indulgence for a period of 36 –months which the appellant benefitted from and covered the sign.

- [5] The respondent wrote to the appellant and resiled from the agreement citing the illegality and non-disclosure, indicating that it would not have entered into the agreement had it been informed about the illegality of the sign and pending litigation. The respondent demanded repayment of the money paid. The appellant refused. The respondent applied to the court a quo for the return of the money paid. The court a quo found in favour of the respondent whilst considering that clause 8 in the agreement allowed the appellant to retain the money paid in the event that the sign was to be removed by order of court.
- [6] The court held that the appellant had exclusive knowledge regarding the litigation and details thereof, as well as the information relating to the moratorium. Thus it could and should have disclosed the applicability of the moratorium over the period of 36 months. This would have enabled the respondent to consider the facts and decide on the agreement. The court a quo found that there was a duty to disclose the litigation between the appellant and the CoJ and granted respondent the relief sought.

Issues on appeal

- [7] The issue to be determined on appeal is whether the appellant was obliged to disclose to the respondent the existence of the litigation instituted by the CoJ which was pending at the time the agreement was concluded.
- [8] The appellant contended that the court erred in failing to apply the Plascon Evans test and should not have found the appellant's version improbable and unrealistic and in doing so rejecting it.

Before the Court a Quo

- [9] Counsel for the appellant conceded that the agreement was concluded on 19 March 2020. This is evident from the appeal record where the representative of BMW, Ms Groenewald, indicated per email "Please see POP... Our team is happy with the contract" reflecting their satisfaction with the contract. The appellant requested the signed agreement indicating "Thank you very much for the POP...receipt by us of a duly signed and initialled copy for counter signature by us would enable our accounts Department to allocate the income to the correct month for VAT purposes with absolute confidence. Please appreciate that in the absence of such a contract, receipt of these proceeds will be considered a liability in our books until such time as the contract is concluded...".

[10] The court a quo in its judgment, recognised the respondent's reluctance to admit the signed agreement but found that the agreement had been concluded as is evident in the extract of the communication above. The court referred to two separate applications lodged, one by an adjoining neighbour affected by the sign and the other by the CoJ, where different parties challenged the legality of the sign and called for its removal. Where there were these challenges, there could have been no doubt on the part of the appellant that there was a challenge to the legality of the sign and a request for its removal. Neither of the applications were finalised

and judgment had not been handed down in either of the applications when the matter was heard before Friedman AJ. The disputes remained alive.

[11] The court a quo considered that it was not reasonable for the appellant to rely on the moratorium. It reasoned that the appellant's interpretation of the clauses in the agreement did not assist it as the material non-disclosure was tied to whether the agreement was valid in the first place. The respondent's knowledge of the CoJ's stance that the sign was illegal would have influenced the respondent's decision to enter the agreement. The appellant's reliance on the moratorium, it was agreed, was an objective consideration. On this basis, the court considered that another court may come to a different conclusion and on this basis granted leave to appeal.

[12] According to the CoJ's public notice which the appellant relied upon[1]:

" 23.3 The 'transitional period' must be understood to be a principle that regulates the period that starts before the amendment or an enact of law comes into force,...This was done in an effort to ensure that the sector is not disadvantaged while the new By-laws are suspended due to Litigation.

23.4 Council decided to provide for some form of indulgence through a well structured and interim to allow for the phasing out illegal signs over the 36 month transitional period. During this period the City has undertaken to the sector that it will not take any punitive action against any advertising assets declared to the City provided an agreement is reached on a timeframe to remove such sign if found to be non-compliant with the Bylaws within the 36- month period. This period will be contracted upon so that the City has legal recourse in the case of non-compliance to the terms agreed upon.

Before this court

[13] Counsel for the appellant submitted before us that the respondent was not required to disclose the pending litigation relating to the illegality of the sign as it was covered by the exemption afforded by the CoJ. Having conceded that the date the agreement was concluded was 19 March 2020, counsel relied heavily on this agreement with the respondent and the moratorium being effective over this period and applicable to the appellant at the time the agreement was entered into.

[14] In neither of the two pending matters had a decision been made regarding the legality of the signs. The point taken by the appellant and which is evident on the correspondence was that the sign forms part of the “Council approved initiative”. But, whilst the appellant had requested that its signs be considered in its application during the period that the moratorium was applicable, the terms applicable to the moratorium do not appear in any of the papers and counsel was unable to indicate that the appellant had satisfied the requirement. The CoJ required, as appears in the answering affidavit, not only that an applicant declare the signs it had, but that it indicate the gross income it derived from the signs and enter into an agreement with the CoJ to become

compliant if the sign was found to be non-compliant with the CoJ Municipality Bylaws. Counsel for the appellant conceded that this

agreement had not been reached.

[15] In light of what is established above, even if the moratorium period was considered to be relevant, it is not clear that the appellant benefitted from it. There is no record on the papers that it entered into an agreement with the CoJ during this period. Whilst the appellant declared its signs to the CoJ, an agreement regarding the outstanding rentals was never concluded. In the absence of this agreement during the moratorium, the requirement by the CoJ to qualify for the “indulgence” during the moratorium was not met and the appellant was not covered by the exemption during the moratorium. Thus the signs declared by the appellant were not legal merely by virtue of the public announcement. It required action on the part of the appellant, namely the declaration as well as the conclusion of the agreement with the CoJ to pay the outstanding monies due over the 36-month period. Given that there was litigation pending at the time the agreement was concluded, the nature of the moratorium, and the prospects of the sign being included in it, were clearly important facts that would have been material to the respondent’s pre-contractual deliberations.

[16] The court a quo was correct in not accepting that the appellant could rely on the moratorium. When regard is had to the appellant’s answering

affidavit which refers to the CoJ terms relating to the moratorium, it is evident that the appellant, failed to comply with the most crucial of all the requirements, the entering into an agreement to regularise the non-compliant sign. This is especially where the appellant disclosed to the CoJ that the contract in relation to Rivonia and South Road earned monthly revenue of R26 000 per month for 6 months[2] whilst the contract had been signed for 12 months at a fee of R46 000 per month and it failed to enter into an agreement to regularise the non-compliant sign. The court a quo was thus correct in rejecting the appellant’s version which sought to rely on the moratorium and the legality of the signs based on the aforesaid moratorium.

[17] There was no debate about the repayment in the event that the sign was to be removed. Counsel for the appellant conceded that the respondent would be entitled to a repayment in the event that the sign was ordered to be removed for the period that it was not available. Counsel referred to clause 8, which provided protection to the respondent. The court found

that the protection envisaged in clause 8 applied where the content of the sign was unsuitable. The appellant could possibly retain the fee paid if the sign became unavailable. It follows that the respondent was contractually protected should the appellant have been forced to remove the content on the sign or vacate or because it was not compliant with the CoJ Bylaws.

- [18] On a simple reading of the CoJ's notice and counsel's concession that no agreement was entered into, the appellant did not meet the CoJ's requirements to qualify for indulgence during the moratorium. Factually, there was a failure to comply with the CoJ's requirements, and the appellant did not qualify for the indulgence during the moratorium and was not exempt during the 36-month period. It is not objectively possible to reach a different conclusion.
- [19] The issue is whether the appellant had a duty to disclose the CoJ litigation. Counsel for the appellant argued before the court a quo and on appeal that the moratorium was effective from 6 March 2019 for a period of 36-months and the sign was exempt during this period. As this is an objective determination and there was no agreement entered into with the CoJ as conceded by counsel, this 36-month period could not have assisted the appellant. The appellant informed the respondent that it had clients ready to sign up for the space in front of the respondent's dealership. These, the appellant informed the respondent, were competitors of the respondent. In circumstances where the sign contravened the CoJ's Bylaws and clause 8 contained a provision that the appellant could retain the funds even if the sign became unavailable. The absence of an agreement between the CoJ and the appellant would be exclusively within the knowledge of the appellant. The disclosure of the aforesaid litigation would no doubt have influenced the respondent's decision to enter into the agreement or not. This was especially where Smartgrowth had undertaken to have the sign removed.
- [20] The appellant's non-disclosure would no doubt have had an effect on the respondent's decision to enter into the agreement and the effectiveness of the agreement.
- [21] Counsel for the appellant conceded that the facts were within the exclusive knowledge of the appellant. The application of the principle in *Absa Bank Limited v Fouche*[3] cannot be faulted. This is especially where as the Court stated in *Absa*:
- "A party is expected to speak when information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information moreover, is such that the right to have it communicated to him "would be mutually recognised by honest men in the circumstances"*
- [22] It is irrefutable that the details of the litigation were exclusively within the knowledge of the appellant. The non-disclosure of the information in circumstances where the respondent entered the agreement only to ensure no other competitor used the space is a relevant consideration. Had the existence of the litigation been disclosed, even in the slight possibility that the sign might ultimately have benefitted from the moratorium, the

respondent would probably not have entered into the agreement on the terms that it did or at all. The appellant failed to disclose the litigation pending in circumstances when it would be expected from an honest person to do so.

[23] On a proper construction of the record, there was no dispute of fact. The facts were common cause. Thus, the decision in Plascon Evans did not come into play at all. The test is not applied on the mere say so of one party. A dispute of fact must be evident from the papers. In this case, there was none on any reading.

[24] For the reasons, above the appeal ought not to succeed. There is no reason why the usual cost order should not follow.

[25] I propose the following order:

Order

The appeal be dismissed with costs

S C MIA

JUDGE OF THE HIGH COURT

I agree, and it is so ordered

L WINDELL

I agree..

S WILSON

For the Appellant: Adv B.D Stevens Instructed by Jurgens Bekker Attorneys For the Respondent:
Adv. L. Hollander Instructed by Hirschowitz Flionis Attorneys

Heard: 24 May 2023

Delivered: 09 June 2023

[1] Caseline Record 003-78-003-79 Appellants Answering Affidavit deposed to by Paul Ristic dated 20 January 2021

[2] Caselines Record 00-15, Annexure "A16-AA12" Letter to from Sunrise to CoJ regarding billboards.

[3] 2003(1) SA 176 (SCA)

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