

JCDECAUX ZIMBABWE (PRIVATE) LIMITED
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 28 March & 28 June 2017

Urgent Chamber Application

Advocate T Mpofu, for the applicant
Mr C Kwaramba, for the respondent

CHAREWA J: On 24 March 2017, the applicant filed an urgent chamber application for, in the interim, an urgent interdict to stop the respondent or anyone acting on its behalf “from removing, defacing or otherwise interfering in any way with the applicant’s advertising signs and artwork installed thereon located at various sites in the Greater Harare area” pending the return date. On the return date the applicant sought a final order for a *declaratur* that the lease agreement between the parties entered into on 28 September 2006 was valid, binding and subsisting until terminated in terms of the provisions of such lease agreement.

I granted the provisional order sought on 28 March 2017, and on 20 April 2017, the respondent noted an appeal to the Supreme Court. On 21 June 2017, I received the Registrar’s request for reasons of judgment for purposes of the appeal, and these are they.

The background and facts

It is common cause that the parties entered into a lease agreement commencing on 2 October 2006 for the lease of advertising sites for purposes of erecting applicant’s billboards in the Greater Harare Area. It is also common cause that the lease was for a ten year period expiring on 30 September 2016. It is also common cause that on 13 May 2015, the applicant exercised its option to renew the lease for a further 10 years terminating on 30 September 2026.

There was no dispute that on 22 March 2017, respondent issued a notice claiming that the lease was not renewable and giving applicant 24 hours to remove its advertising signs, failing which respondent would remove them at applicant’s costs. Applicant then filed this

urgent application on the basis that respondent's threatened action was patently unlawful and applicant would suffer irreparable financial and reputational loss if respondent was not urgently interdicted from its intended action.

Upon reading the record I was of the *prima facie* view that the matter merited to be kept on the urgent roll and I duly set it down for 28 March 2017 for the parties to make submissions on urgency and if necessary, the merits.

Parties' submissions

On urgency, the applicant submitted that the matter merited to be heard on an urgent basis because up until 22 March 2017, when respondent issued its 24 hour notice, there was no court order requiring applicant to remove its billboards or allowing respondent to do so. Therefore, the respondent's threatened action was illegal and the need to act against such action only arose upon applicant being served with the notice on 22 March 2017. Further, the removal of applicant's billboards would cause irreparable harm in terms of lost advertising which could not be easily quantified in damages, quite apart from the loss of applicant's reputation among its international clients in particular should its billboards be summarily removed. In any event, no prejudice would be suffered by the respondent if the interim interdict was granted as it was in receipt of rentals, which, in any case were easily quantifiable in damages.

Mr *Kwaramba* conceded that in so far as the time factor was concerned, the matter was indeed urgent. However, he was of the view that the consequences factor was not satisfied as applicant could always sue for contractual damages and therefore did not stand to suffer irreparable loss. Besides, it was his submission that applicant had not stated the damages it stood to suffer if the relief was not granted.

On the merits, Mr *Mpofu* for the applicant, submitted that there was a binding contract between the parties, which respondent does not refute, and in accordance to which respondent was obliged to act. The by-laws were thus precluded from operation by virtue of the contractual obligation respondent undertook. It therefore was improper for the respondent to try to avoid its contractual obligations by hiding behind the by-laws. In any event, even if the by-laws were applicable, our courts have ruled on numerous occasions that a party must obtain a court order first.

The respondent submitted that the interdict sought was not justified as the law allows that which respondent threatened to do. In particular, Mr *Kwaramba* submitted that the by-laws relied upon to give 24 hours' notice and remove the billboards were valid and the

respondent was entitled to act in accordance therewith until such a time that they were struck down. He therefore prayed for dismissal of the application.

Reasons for judgment

I allowed that the matter was urgent in view of the time factor: that applicant's billboards were liable to be removed by respondent within 24 hours. I was also sympathetic to the applicant's position that it would be difficult to quantify the damage it would suffer in lost advertising should the bill boards be removed. And of, course reputational loss was a distinct possibility: that upon removal of the billboards, the likelihood that a presumption would arise among its international clients that applicant had somehow failed in its obligations to the respondent.

In any event, since the issue of urgency was not seriously challenged by Mr *Kwaramba*, I found that the matter was urgent, in that it could not wait.

With regard to the merits of the application, I was not swayed by respondent's argument which was to the effect that it was acting in terms of by-laws which had not been impugned and were therefore valid. In my view, the consequence of this argument is that respondent is in fact saying that the by-laws give it power to act extra-judicially.

As pointed out by the applicant, respondent did not have the power of a court order allowing it or anyone to remove applicant's billboards. Numerous judgments have been handed down in this court that the respondent can act in terms of its by-laws as long as it follows due process or obtains a court order where there is a dispute¹.

The import of these judgments, in my view, is that the by-laws do not oust the jurisdiction of the court in matters of this nature. Therefore, while the by-laws are on the face of them valid and contemplate and allow that which is threatened, an order of court must first be obtained.

To borrow from the words of BHUNU J in *Farai Mushoriwa (supra)*, the respondent cannot lawfully remove applicant's billboards unless it has been established that the contract between the parties was lawfully terminated. And only a court of law has the power to make such a legal determination. The respondent cannot arrogate to itself the power to determine that its legal and or contractual obligations have terminated without due process or recourse to the courts.

¹ See *Farai Mushoriwa v City of Harare*, HH 195-14

I am in total agreement with BHUNU J when he states that, in acting in the manner it has done, what respondent

“...seeks to do is to oust the jurisdiction of the courts so that it can operate as a loose cannon and a law unto itself. It seeks to extort money from the Applicant without the bother of establishing its claim through recognised judicial process.”²

In this case, respondent seeks to terminate a contractual relationship without the bother of establishing whether it has valid reasons to do so, an issue which can only be competently determined by a court of law. I do not believe that the by-laws excuse the respondent from following due process.

Neither do they preclude the respondent from entering into contracts or excuse it from complying with its contractual obligations. And if respondent can freely enter into contracts despite the existence of the by-laws, then it must adhere to those contracts until they are lawfully cancelled or terminated.

Consequently, a party apprehending injury by any failure to adhere to the contract must have recourse to the protection of the court to ensure that contractual obligations should be honoured. The courts cannot countenance and endorse that a party should elect to flout its contractual agreement on the basis that the injured party can sue for contractual damages as that would destroy the very foundations of the law of contract.

After all, the purpose of contractual damages is to put a party in the position it would have been had a breach not occurred.³ In the instant case, applicant seeks an interdict to stave off any intended breach of contract by preventing respondent from resorting to its by-laws to escape its contractual obligations.

It is trite that silence does not necessarily amount to acquiescence. Each case must be decided upon its own circumstances. However, where the circumstances are such that a party was reasonably and fairly expected to respond and does not do so, then the court may infer acceptance of an offer. This is especially so where the document sent to a party referred to the establishment of a legal relationship.⁴

In the circumstances of this case, that the respondent did not respond to, and decline, applicant’s exercise of its option to renew the lease agreement when it had a duty to do so

² Farai Mushoriwa (supra) at p.4-5 of the cyclostyled judgment

³ Wynina (Pvt) Ltd v MBCA Bank S-27-14

⁴ Sun Radio & Furnishers v Republic Timber & Hardware 1969 (4) SA 378 (TVL)

carries with it a presumption of acquiescence, more so since the respondent did not refute the existence of a contract for more than a year thereafter.⁵

In my view, the applicant has presented *prima facie* evidence that the contract between the parties was still extant as it exercised its option to renew, and for a full year after that exercise, no notice was given that the contract would not be renewed. In fact, after 30 September 2016, the applicant was billed and paid for the billboards. This, I find, amounted to a tacit relocation which continued the landlord and tenant relationship which could only be terminated on reasonable notice⁶. *Ergo*, the applicant was entitled to keep its billboards *in situ* pending the *declaratur* whether the lease agreement is valid, binding and subsisting until properly terminated.

I am of the firm view that the applicant made a *prima facie* case that it had a right to maintain its billboards, had a reasonable apprehension of an injury which could cause irreparable damage, in circumstances where it had no other remedy and the balance of convenience were in its favour. Consequently, the court had to intervene to prevent such injury by granting an interim interdict⁷.

For these reasons, I find that the application is urgent and the applicant ought to be given the protection of the provisional order it sought.

The application is granted with costs.

Dube Manikai & Hwacha, applicant's legal practitioners
Mbidzo Muchadehama & Makoni, respondent's legal practitioners

⁵ *McWilliams v First Consolidated Holding (Pty) Ltd* 1982 (2) SA 1

⁶ *Chibanda v Hewlett* 1991 (2) ZLR 211(HC)

⁷ *Phillips Electrical (Pvt) Ltd v Gwanzura* 188(2) ZLR 117(HC)