IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG)

JOHANNESBURG

NOT REPORTABLE

CASE NO: 39798/08

DATE: 2009-10-12

In the matter between

CITY OF JOHANNESBURG Applicant

and

CLEAR CHANNEL INDEPENDENT (PTY) LTD Respondent

J U D G M E N T

SPILG AJ:

In this matter the Court is required to interpret a contract dated 14 February 2008 which reads as follows:

"Expiry agreement: Freeway Fliers

The freeway flier agreement between the City of Jo'burg Property Company (Pty) Ltd (JPC) and Clear Channel Independent expired on 31 January 2008.

The contract for the above sites has been put out to tender.

We are advised that despite termination of the agreement you continue to display advertisements.

In view of the fact that the new tender will in all probability only be finalised in three months' time a decision has been taken by JPC to allow the current advertising to continue on a month-to-month basis, subject to JPC issuing a ***two-week notice period at any time****, to remove all freeway fliers from the sites and all related costs shall be borne by Clear Channel.*

The notice period to remove all advertising from the sites will be served immediately after the new bridge-sign tender has been awarded.

Payments must continue to be made in terms of the expiry agreement.

Should you have any more enquiries please do not hesitate to contact the writer.

Yours sincerely."

The agreement of 14 February 2008 was signed by a certain Sidlanos the Acting GM Asset Management as the agents for the City of Johannesburg.

The issue in this matter arises because the tender that was awarded was subsequently cancelled, the term used was "withdrawn", and the City has not decided whether to issue a new tender.

The City applied for an order on motion, requiring the respondent to remove its advertising boards on the ground that the

agreement has come to an end since it gave the two-week notice referred to in the agreement after the new tender had been awarded.

The respondent contends that the two-week notice can only be given once a tender has been lawfully awarded.

In this case there is an inherent difficulty in reconciling the contents of the fourth and fifth paragraphs. The fourth uses the term "*at any time"* as if notice may be given unilaterally at any stage, whereas the fifth paragraph appears to only permit notice after the new tender has been awarded and allows the notice to be "*served*" immediately after the new tender has been awarded.

A number of cases have repeated the narrow way in which contracts are to be interpreted. I refer to the golden rule of interpretation mentioned in *Venter v R 1907 TS 910 at 913*. The golden rule of interpretation had regard to the primary meaning of the actual words used and only the recognised exceptions of ambiguity or absurdity or certain other anomalies would entitle a court to go outside those words.

The cases that continue to adopt that position appear to be wrong in view of two fundamental considerations. The first is that the fundamental purpose of interpretation is to ascertain the intention of the parties, and that it is now beyond quarrel that one has regard to the document as a whole when interpreting any document (compare *Venter* supra at p914-915). The effect is that one is not compelled to have regard to other aids to interpretation only when the actual words used in the specific clause become problematic.

In my view the starting point must be to apply what I believe is

the fundamental rule of interpretation, namely to ascertain the intention of a document by having regard to the words in their setting; by having regard to the context in which the words are used; and the purpose for which the words are intended. (See e.g. *Secretary for Inland Revenue v Bray*, 1980 (1) SA 472 (A) 478A-B; *Ferreira v Levine*; *Vryenhoek v Powell*, 1996 (1) SA 984 (CC) para 52, 54, 57, 70 and 170).

In this case the purpose of the words used can be readily gleaned from the undisputed history of the relationship between the parties recorded in the earlier contract and the context in which this agreement was concluded, which in the present case all constitute admissible evidence.

In 1998 the respondent was awarded a five-year tender commencing on 31 January 2000 to erect a number of non-illuminated steel-plated signs some six-by-three metres in size over a number of the City's highway bridges with an option to renew for a further three-year period. Subject to certain changes in the location of the signs the contract was renewed and subsequently expired in terms of the renewed agreement on 30 January 2008.

Prior to the expiry of the contract period and on 13 November 2007 the respondents sought to extend it. The City advised that the contract would go out to public tender. The City had been preparing a public tender process with a closing date for submission of 4 April 2008.

The papers do not indicate whether the actual tender was published before or after the letter in issue of 14 February 2008. The

tender was certainly issued by March of that year.

On 14 February 2008 the letter was written by the applicant's agent, the most obvious change in the existing relationship is that the contract was now monthly. Previously payments were effected on a periodic basis and initially the agreement had in fact provided that payments were to be effected in a particular manner but that the parties could subsequently amend them. Moreover, there were payments that not only were to be made by the respondent to the applicant, but also certain payments by the applicant to the respondent. What is however clear is that in terms of the 14 February 2008 agreement the payments were still to be effected as previously, but that the period was regarded as monthly.

One of the respondent's associated companies with BEE credentials submitted a bid. This would have been known to the applicant's agent and it is also evident that the parties envisaged that the period of the new arrangement would endure until the new tender had been awarded. It was anticipated in terms of the letter itself, that the tender would be awarded within a period of about three months.

Accordingly the need to terminate the contract prior to the envisaged three-month period, and considering that rentals were being paid on the pre-existing basis, the clauses involved appear to take on significance. Moreover, there had been no breach in the past. The City was receiving a regular revenue stream from the billboards and could not give the site to anyone else until the tender process had been concluded.

This is consistent with how the City did act on the assumption that the tender was lawfully concluded. I say this for the following reasons:

1. No notice was given prior to the tender award announcement. The tender process was delayed and the tender committee only announced the three successful bidders on 28 August 2008. These bidders were notified on 17 September 2008. It was on 18 September 2008 that the respondent was advised that the new contract had been awarded. The letter itself commenced with reference to the award of the new tender and then a reference to the two-week notice period in the 14 February 2008 letter.

2. Because the time allowed for the removal was two weeks exactly, in terms of the notification of 18 September 2008 the respondent was required to remove the signs by no later than 3 October 2008. On 2 October 2008 the respondent's attorney requested that the signs be allowed to remain up until the new tenderer could erect its signs. The applicant refused.

The lawfulness of the tender process was challenged on the grounds that the process was fatally flawed and that the tender process should commence afresh. Such notice was done formally some time after 24 October 2008. Unfortunately the letter of complaint in the required form is undated. There was no formal response to the letter. Instead the City advised on 18 March 2009 that the tender award had been "withdrawn" and therefore there was no decision that could be the

subject matter of a review. The City also stated that for the same reason it would not be responding to the complaint. It therefore required this application to be finalised and the respondent to file an Answering Affidavit.

Respondent relies on the unlawfulness of the tender award as a basis for asserting that the entitlement to give notice has not been triggered. The applicant however contends that the award itself triggered the entitlement to give notice and that in terms of the agreement the two-week notice could be given at any stage.

It argues that this was to allow the applicant to terminate at any stage; for instance if it did not wish to carry on putting up signs on the highway. This submission can be safely rejected since the whole purpose of the agreement was precisely because a tender was in the offing. If the applicant no longer wishes to erect any highway signs then it must say so. It confirms that at this stage it is undecided. It would be a travesty if someone else to whom an objection was made regarding the regularity of the tender process were to take over in the meantime. It certainly was not what the parties envisaged.

As I indicated, unless the case is that there are to be no more highway signs, then, and only then, does the question arise of what the parties would have contemplated if that eventuality were to occur. It has not, and I cannot make it an issue where different considerations apply.

The respondent contends that the agreement was impliedly subject to the new tender being lawful and that in any event the respondent contends that the two-week period must be read in the

context, the minimum period for giving notice *"at any time after the tender has been awarded*".

The allegations of the tender being fatally flawed are comprehensively set out and are relied upon by the respondent. The relief sought is final and therefore *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)* applies; the respondent's averments are taken to be accepted in these proceedings since none of the considerations to alter the ordinary acceptance of evidence in motion proceedings for final relief apply.

There are therefore two issues that require consideration and involve interpreting the contract. The first is whether a notice given on the basis of the award of a new tender could only be given if the tender was a lawful tender. In my view it would be stretching the parties' intention to believe that if asked both would have said of course a fatally flawed tender process would suffice.

I say this particularly bearing in mind that the respondent's associated company was a bidder. Moreover it is trite that in respect of the actions of an organ of State any reference to the taking of an action by such a body is confined to the taking of lawful action and all legislation and documentation is interpreted in that way. Accordingly the applicant could not have intended differently.

The respondents have set out a strong case of a flawed tender and in view of the *Plascon Evans* principle, on the papers, as they are before me, the tender would be set aside and declared a nullity as if it never existed had there not been a withdrawal. The withdrawal cannot

affect the nature of the tender award- it either was flawed or not flawed. The respondents have set out a case that it is flawed and for the reasons already given those are the facts with which I am to consider the matter.

The notice of two weeks was clearly given "*any time*" after the award. It was not given on the 1st of the month, nor was it required to, and that brings me to unravelling the second issue; namely whether even if the new tender was not a lawful one whether the two-week period could be given at any stage irrespective of whether or not there had been a lawful tender award.

In this case the two-week period is inserted in a clause referring to a month-by-month agreement. I have had regard to the original agreement. The parties were agreed to let me have sight of it. Clearly the provisions of that agreement despite the professed expiry must have survived. These are provisions relating to the dimensions, relating to indemnities and relating to when the signs could be taken down if they did not comply with certain requirements. There is also a breach provision of 28 days unless there had been more than one breach, in which case the breach provision would be triggered immediately.

The agreement did not however provide for any other relevant period of expiry short of the effluxion of time of the period stipulated in the agreement which I have referred to earlier.

I must also bear in mind that the persons who wrote and received respectively the letter of 14 February 2008 are laymen. In my

view what would have been of concern and was of concern in writing up the document was that the termination period was now effectively described by reference to an event rather than an extended fixed period of five years or three years.

There is also the difficulty of the "*month-to-month*" period which would indicate that payments by the one party to the other required to be effected with that regularity. The problem facing the drafter was therefore a perceived short period until an award was made, which then created the necessity for the month-to-month reference, but that without more the month-to-month reference would mean that if termination was to be effected it would require a full calendar-month notice period, which would defeat the ability of the City to be able to give undisturbed possession of the bridges for the purpose of allowing the successful tenderer to erect its own structures within a short period such as envisaged from the time the new tender would become effective.

In my view this explains, and is the only rational explanation, as to why the two-week period and the reference to "at any time" is juxtaposed with the month-to-month period referred to in the one paragraph, whilst the actual triggering mechanism allowing for a notice to be given is separately set out. It also explains the apparent anomaly of the use of the words "*at any time*" in the fourth paragraph and the words "*served immediately after the new bridge sign tender has been awarded".*

In my view there was a need in the mind of the drafter of the document to cover the situation that inevitably was expected to arise

where a notice period would have to be given "*at any time*" as opposed to at the end of a calendar month, having regard to the identification of the nature of the agreement as being a "*month-to-month* one*".*

That would also explain why the two-week period and the words *"at any time*" after it were placed in the same context and, as indicated from the extract itself, within commas after the words *"on a month-to-month basis".*

In my view this renders the notice period paragraph readily comprehendible. Firstly, the notice period referred to in the fifth paragraph is the notice period of two weeks. It is triggered on the award of the new bridge sign tender. Accordingly the previous paragraph remains consistent in that it did not deal with the triggering event; it only sought to clarify the period of the notice having regard to the fact that it was no longer a five- or a three-year contract, but a contract determined by an event, *ie*, the lawful tender award. It was inserted to avoid any contention that a full calendar month notice was still required, hence the use of the phrase "*two-week notice period at any time*" was emphasised in contradistinction to a full calendar month notice once the triggering event had occurred.

As already stated, that paragraph was only concerned with the period of notice, not with what would trigger it. That the parties did not intend a two-week period at any time prior to the award of a new tender is reinforced by the nature of the advertising. By their nature six-by-three metre large billboards used in advertising drives would mean that the respondent itself would be bound up to contracts with advertisers,

and whilst it would know by when the new tender award would become effective and therefore adjust advertising that may arise at that time, it could not prior to that event, *i.e.* the award of the tender, know how to regulate advertising on its screens.

Mr Both argued that it would be absurd if the respondent were to obtain more rights than a successful tenderer. In my view that is not so. It was in the City's hands to retender. It elected not to.

It is for these reasons that I made the order I did on Friday, namely that the application is dismissed with costs.

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Counsel for Applicant	: Adv Both SC
Counsel for Respondent	: Adv Paul Kennedy SC
Date of Hearing	: 12 October 2009
Date of Judgment	: 12th July 2010