

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 027069/23

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

Judge Dippenaar

In the matter between:

DIAGEO SOUTH AFRICA (PTY) LTD

APPLICANT

AND

**TTG COMMUNICATIONS GROUP (PTY) LTD t/a
TWO TONE GLOBAL**

RESPONDENT

Neutral Citation: *Diageo South Africa (Pty) Ltd v TTG Communications Group (Pty) Ltd t/a Two Tone Global* (Case No: 027069/23) [2023] ZAGPJHC 322 (17 April 2023)

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 17th of APRIL 2023.

DIPPENAAR J:

[1] The applicant, which operates in the alcohol beverage industry, seeks a final interdict against the respondent on an urgent basis for the return of its intellectual property ("the assets"), pursuant to the termination of a written creative services agreement ("the agreement") concluded between the parties on 1 September 2022 in terms whereof the respondent performed certain advertising and related services for the applicant.

[2] The respondent opposes the urgency of the application on the basis that it is self-created. It seeks dismissal of the application with a punitive costs order on the basis that the applicant failed to establish any of the requirements for final interdictory relief. Central to its opposition is its contention that it has a lien over the assets until payment is made by the applicant of all outstanding invoices.

Urgency

[3] In support of the argument that the urgency contended for by the applicant is self-created, the respondent contends that the applicant should have terminated the agreement sooner and on an immediate basis under clause 22.1 of the agreement. According to the respondent, it has a reasonable belief that the applicant acted in *mala fide* manner and contrived a plan for the sole purposes of terminating the agreement,

which would allow it recourse to withhold in full or in part amounts owing to the respondent in terms of its outstanding invoices. It further argued that the applicant should also reasonably have requested return of the assets at the first available opportunity.

[4] These arguments are artificial and are based on speculation rather than on primary facts justifying the inferences sought to be drawn. It also disregards the fact that the applicant was at liberty to exercise whatever contractual remedies were available to it and to elect which to pursue.

[5] I am further not persuaded that the applicant's attempts to persuade the respondent to surrender the assets prior to the launching of the application is fatal to its urgency or renders the urgency of the application self-created.

[6] Considering the facts, I am persuaded that the applicant has set out sufficient facts to establish commercial urgency¹ and that it will not obtain substantial redress at a hearing in due course,² considering the risk of ongoing harm in the face of the respondents' unequivocal stance that it will not deliver the assets to the applicant until it has been paid what respondent contends is owing to it.

[7] I conclude that the applicant has established urgency and that the application must be determined on its merits.

Merits

[8] The background facts are not contentious. The disputes which exist on the papers pertaining to alleged unremedied breaches of the agreement by the respondent are not relevant to the determination of this application. It is not necessary to delve into

¹ Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd 1982 (3) SA 582 (W) at 586E-H

² East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011) paras [6]-[7]

those disputes, given that it is undisputed that the applicant lawfully terminated the agreement in terms of the agreement by giving two months' written notice and did not rely on the alleged breaches in doing so.

[9] It is undisputed that certain accounting issues arose between the parties during November 2022. The agreement and its terms are common cause. It is common cause that the agreement between the parties terminated on 19 February 2023, pursuant to the applicant exercising its discretionary power under the agreement on 19 December 2022 to terminate it on two month's written notice.

[10] It is further common cause that the respondent enjoys no rights to the assets, save as allowed by the agreement and that the applicant exclusively owns the assets. In terms of the agreement, any assets in the custody or control of the respondent are held in trust on behalf of and for the benefit of the applicant. It is further undisputed that the respondent issued various invoices dated 1, 2 and 6 February 2023 and 1 March 2023 respectively.

The parties' respective cases

[11] In sum, the applicant's case is that it has clear contractual, property and constitutional rights under s 25 of the Constitution, which includes intellectual property rights,³ and is entitled to the surrender of the assets by the respondent, pursuant to the termination of the agreement. It contends for a clear contractual right to specific performance and the return of its assets and the right to their return under the *rei vindicatio*.⁴ It is argued that there is no law which permits the respondent to retain possession of the assets and unconstitutionally deprive the applicant of the bundle of rights that make up its ownership of the assets.⁵ It further contends that it has

³ Laugh it Off Promotions KH v SAB International Finance BV 2006 (1) SA 144 (CC) para [17]

⁴ Van Der Merwe v Taylor NO 2008 (1) SA (CC) par [14]; AB and Another v Pridwin Preparatory School 2020 (5) SA 327 (CC) fn 155

⁵ Ngqukumba v Minister of Safety and Security 2014 (5) SA 112 (CC) par 18; Geyser v Msunduzi Municipality 2003 (3) BCLR 235 (N) para 37

established the requirements for a final interdict. The applicant has tendered, both in its affidavits and in the correspondence exchanged between the parties to pay the outstanding invoices within 60 days in accordance with the payment terms agreed between the parties.

[12] The respondent's case on the other hand is that the applicant has not met any of the requirements for final interdictory relief. It contends that it has a debtor and creditor lien over the applicant's assets until such time as its undisputed unpaid invoices have been paid.

[13] According to the respondent, the applicant in terms of clause 24.1.1 of the agreement was obliged to pay the outstanding invoices within 21 business days of termination of the agreement, i.e. before 20 March 2023. It further contends that there is no timeline stipulated whereby the respondent had to arrange the surrender of the assets and that it has arranged for the surrender as it repeatedly informed the applicant that it would surrender the assets on receipt of payment of the outstanding invoices.

[14] The respondent contends that it has to protect its interests as its concerns are of a serious nature, well-grounded and stems from the mistrust created by the applicant's *mala fide* conduct in relation to how it terminated the agreement and its failure to make payment of the outstanding invoices before 20 March 2023.

[15] The respondent in its heads of argument and in oral argument sought to rely on an alleged failure by the applicant to comply with its undertaking to make payment within 60 days of the date of each invoice. That contention was not however addressed in the respondent's affidavits and it is impermissible for evidence on the issue to be advanced informally from the bar at the hearing.

[16] In response to the respondent's reliance on a creditors' lien, the applicant argues that the terms of the agreement do not permit the respondent to have a debtor and

creditor lien as it expressly provides that the respondent has no rights, title or interest in any intellectual property of the applicant except as allowed by the agreement.

[17] It is further argued the agreement is inconsistent with the lien contended for by the respondent as the agreement requires the respondent to deliver the assets to the application on termination of the agreement regardless of any dispute between the parties.

[18] After the hearing, without seeking or obtaining the court's or the applicant's consent, the respondent delivered supplementary written submissions dealing with the applicant's contention that the lien relied on was inconsistent with the agreement, purportedly on the basis that the applicant at the hearing sought and obtained leave to refer to additional authorities.

[19] The applicant's argument pertaining to the inconsistency with the lien with the agreement was however already squarely raised in its heads of argument and the approach adopted by the respondent is inappropriate. Inasmuch as reference was made to a clause of the agreement, the agreement should be considered as a whole.

[20] It is apposite to refer to certain principles before dealing with the merits. As the applicants seek final relief, the so called *Plascon Evans* test must be applied. It requires a consideration of whether the applicants are entitled to relief on the admitted facts in the applicant's affidavit together with the version of the respondents, unless the latter version is so palpably false or untenable that it can be rejected on the papers.⁶

[21] The requirements for final interdictory relief are trite.⁷ They are: (i) a clear right on the part of the applicant; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of any other satisfactory remedy.

⁶ *Plascon Evans Paints (Pty) Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635B; *National Director Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para [26]; *JW Wightman (Pty) Ltd v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para [12]-[13]

⁷ *Setlogelo v Setlogelo* 1914 AD 221

Has the applicant established a clear right?

[22] It is trite that in considering the agreement it is necessary to adopt a linguistic, contextual and purposive approach.⁸ As explained by the Supreme Court of Appeal in *Coral Lagoon*:⁹

“The interpretation of the words used in the agreement must be approached by considering the language used, understood in the context in which it is used and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. The triad of text, context and purpose should not be used in a mechanical fashion, but with consideration of the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement as a whole. The inevitable point of departure is the language of the provision itself.

[23] As further held in *Coral Lagoon*,¹⁰ in considering the meaning of a contested term in a contract, it is also necessary to consider what the design is of the agreement and how its architects chose words and concepts to give effect to that design.

[24] In applying those principles to the agreement, the exercise as to proper interpretation cannot be limited to a narrow interpretation of the text only. A consideration of the words used in clauses 24.1.1 and 30.2, relied on heavily by the respondent, in isolation without considering context, is worthless.¹¹ However, the express wording of an agreement on the other hand also cannot simply be ignored in the interpretation exercise.

[25] In arguing that the applicant has failed to illustrate a clear right, the respondent relies on clause 24.1.1 of the agreement. It argues that the clause does not stipulate a timeline for the surrender and that it was arranged for surrender of the assets against payment of the invoices. It is argued that the applicant does not have the right to have

⁸ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B

⁹ Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA) (“Coral Lagoon”) at para [25]; Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B

¹⁰ Coral Lagoon supra paras [47], [50] and [51]

¹¹ Novartis v Maphil 2016 (1) SA 518 (SCA) para [28]

the assets surrendered without payment and only has the right that arrangements be made to surrender the assets. The respondent further contended that it has provided the assets to the applicant in the form of monthly contact calenders.

[26] In my view, these arguments do not bear scrutiny. Clause 24.1.1 cannot be read in isolation, as the respondent seeks to do. Read in context and taking consideration of clause 15.3.1, the agreement places the obligation on the respondent to surrender the assets to the applicant on request, in any event within 10 business days of termination of the agreement. Under clause 16, the applicant can further request the assets within 5 business days during the currency of the agreement and the respondent is obliged to provide them. The applicant is further entitled to receive its materials in an appropriate format. The provision of monthly contact calenders does not comply with that obligation.

[27] The respondent further contends that under clause 24.1.1 it has the right to receive payment of its outstanding days within 21 days of termination of the agreement. Its case is that that the applicant has reneged, without justification, on its payment obligations to it by failing to make payment before 20 March 2023 and that it has no intention or is unable to make payment of the outstanding invoices. On this basis it is argued that the respondent has a debtor and creditor lien over the assets and is entitled to retain them until payment is received.

[28] Clause 24.1.1 provides:

"Each affected Party to this Agreement shall pay all outstanding and undisputed amounts due to the other affected Party or parties within 21 (twenty one) business days (or when valid invoices would ordinarily be issued and payable (if later) in respect of Third Party Fees or other work started or completed at the date of termination) but Diageo shall not have any obligation to make any further payments to the Agency, save where it has requested the Agency to continue to provide Services pursuant to clause 24.2 in respect thereof;

[29] The respondent's interpretation however focusses only on the first portion of the clause and ignores the remainder thereof which expressly refers to when valid invoices would be ordinarily payable. A plain grammatical reading of the clause thus does not

favour the interpretation proffered by the respondent, neither does a contextual and purposive interpretation thereof, considering the agreement as a whole.

[30] Moreover, the applicant's evidence that the payment terms agreed upon between the parties was 60 days from invoice was not strenuously contested, nor was any countervailing evidence presented by the respondent. The very unpaid invoices relied upon by the respondent all reflect the payment terms as being 60 days. This constitutes documentary support for the applicant's contentions.

[31] The argument further disregards the tender made repeatedly by the applicants to make payment of the invoices within 60 days. It is further inconsistent with the stance adopted by its attorneys of record in their letter of 24 February 2023, wherein the payment terms of 60 days were conceded. In relevant part, the letter provides:

"...our client is not forcing your offices to settle all the outstanding invoices immediately but merely requesting that an undertaking be provided that such invoices will be paid timeously in accordance with the previously agreed time periods of 60 days from receipt of such invoice, whereafter and upon receipt of payment, client shall release the open files. Should you require the open files prior to the date of final payment of our client's invoices, which is currently the end of April 2023, your offices are more than welcome to pay the invoices prematurely in order to secure same."

[32] For these reasons, the respondent's contentions do not pass muster.

[33] The applicant argues that the existence of a debtor and creditor lien is excluded by the agreement and that the respondent has given up any rights to the assets. It further argues that the existence of such lien is inconsistent with the terms of the agreement, which regulates the relationship between the parties. Reliance is *inter alia* placed on clauses 17.1, 17.9, 17.10, 17.11, 18.1, 18.4, 19.5, 24.1.1 and 24.4 of the agreement. To avoid prolixity these clauses are not all reproduced.

[34] In terms of clause 17.11 the respondent agrees that except as allowed by the agreement, it has no right, title or interest in and to any intellectual property of the applicant. Clause 18 deals with ownership of the assets which at all times vests in the

applicant. In terms of clause 18.1 the assets are held in trust by the respondent on behalf of and for the benefit of the applicant. As the assets are held in trust by the respondent, this imposes fiduciary duties on the respondent, including a duty of good faith and a duty to avoid a conflict of interest¹².

[35] In terms of clause 18.4, on termination of the agreement:

“...irrespective of any dispute in respect of the said termination or any other aspect of the Agreement, all Materials and all unused, uncompleted or unpublished Media plans prepared by (the respondent) for (the applicant shall remain or become the (applicant’s) sole and exclusive property to enjoy or make use of as it deems appropriate and shall not thereafter be used by (the respondent).”

[36] Clause 30.2 provides:

“Subject to payment of the Fees, the Agency hereby waives any and all liens (however they may arise) over any materials or documentation connected with the Services over any materials or documents connected with the services and agrees that, where necessary, it shall execute as Diageo may be) (sic) may reasonably require it to execute to ensure that such waiver is effective”.

[37] A debtor and creditor lien affords a creditor personal security rights. It is a contractual remedy and is only enforceable by one party to a contract against the other¹³ because a contractual obligation exists between the parties.¹⁴ The respondent cannot rely on any alleged contractual right not expressly contained in the agreement.¹⁵

[38] Applying the principles enunciated in *Coral Lagoon*, it cannot in my view be concluded that on a linguistic, contextual and purposive interpretation the agreement affords the right of a debtor and creditor lien to the respondent. The agreement does not provide the respondent with an express contractual right to exercise a lien over the assets in the absence of payment of fees. At best for the respondent, the provisions of clause 30.2 does not expressly constitute an unconditional waiver of all liens. It does

¹² Phillips v Fieldstone Africa (Pty) Ltd [204] 1 All SA 150 SCA

¹³ Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (AD) para [21]

¹⁴ Pheiffer v Van Wyk and Others 2015 (5) SA 464 (SCA) paras 11-12

¹⁵ Clause 30.6

not, however conversely expressly provide the respondent with a debtor and creditor lien.

[39] As held in *Coral Lagoon*:¹⁶

“The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text”.

[40] Various clauses of the agreement such as clause 18.4, militate against the respondent’s interpretation. Seen as a whole, the design of the agreement and the words and concepts used, militate against the respondent being afforded the contractual right to a lien. The provisions of the agreement are inconsistent with the right to a lien, such as clause 18.4 which imposes an obligation on the respondent to return the assets irrespective of any disputes between the parties.

[41] In addition, on a factual level, the respondent has not on its papers established that the applicant is in default of its payment obligations, for the reasons already provided.

[42] Contracts freely concluded between parties should be enforced in accordance with the *pacta sunt servanda* principle, as confirmed by the Constitutional Court in *Baedica*.¹⁷

[43] I conclude that the respondent has failed to establish the existence of a debtor and creditor lien or that it is entitled to exercise any such lien in the circumstances. The respondent has not discharged its onus or established any impediment to the applicant exercising its contractual and other rights to the assets.¹⁸

¹⁶ Para[51]

¹⁷ *Baedica* 231 CC and Others v Trustees for the time being of the Oregon Trust and Others 2020 (5) SA 247 (CC)

¹⁸ *Gauteng MEC for Health v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) para [33]; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 442H-443B

[44] I further conclude that the applicant has established a clear right to return of its assets and has illustrated that it has the right to specific performance of its clear contractual right to obtain the assets¹⁹. Its right as owner of the assets is not contested.

Has the applicant illustrated that an injury is being committed or is reasonably apprehended?

[45] The applicant contends that the respondent's refusal to surrender the assets has injured its contractual and constitutional rights with resultant prejudice. In terms of clause 18.1 of the agreement, the respondent has the duty to act in the utmost good faith, to avoid allowing conflicts of interests to arise where it will be confronted with a choice between its private interests and those of applicant in respect of the assets, to act in the applicant's best interests in dealing with the assets and to refrain from deriving personal benefits by virtue of its position of trust without lawful reason.

[46] According to the respondent, it was required to protect its interests and the *mala fide* conduct of the applicant made it reasonably fear that the applicant would not make payment of the outstanding invoices and the applicant approaches the court with unclean hands.

[47] I have already concluded that the allegations of *mala fide* conduct on the part of the applicant are based on speculation and conjecture rather than cogent primary facts.

[48] As explained by the Constitutional Court in *Commercial Stevedoring Agricultural and Allied Workers' Union*:²⁰

"An interdict is intended to protect an applicant from the actual or threatened unlawful conduct of the person sought to be interdicted. Thus, for an interdict to be granted, it must be shown, on a balance of probabilities (taking into account the Plascon-Evans rule, where final relief is sought on motion),

¹⁹ Botha v Rich NO 2014 (4) SA 124 (CC) at para [37]

²⁰ Commercial Stevedoring Agricultural and Allied Workers' Union v Oak Valley Estates (Pty) Ltd 2022 (5) SA 18 (CC) at para 19.

that unless restrained by an interdict, the respondent will continue committing an injury against the applicant or that it is reasonably apprehended that the respondent will cause such an injury.”

[49] It is also apposite to refer to *Hotz*,²¹ wherein the Supreme Court of Appeal held that by granting an interdict, a court enforces “*the principle of legality that obliges courts to give effect to legally recognised rights*”. The purpose of injunctive relief is to “*put an end to conduct in breach of the applicant’s rights*”.

[50] The respondent’s unequivocal stance that it will not release the assets until payment is made in full is in my view dispositive of the issue and it is not necessary to delve into the arguments raised in any detail. Given the particularised facts provided by the applicant pertaining to ongoing harm which it may suffer and the fact that the respondent refuses to release the assets, despite the repeated undertakings provided by the applicant, in my view illustrates a sufficient risk of harm to meet this requirement.

[51] I am not persuaded by the respondent’s arguments that the applicant has addressed this issue in vague terms and is the author of its own misfortune as it did not pay the invoices by 20 March 2023, nor by the argument that the link between the respondent’s retention of the assets pending payment and the injuries that may likely be suffered has not been addressed.

[52] I conclude that the applicant has established this requirement.

Does the applicant have a suitable alternative remedy?

[53] The respondent argues that as the applicant has not raised any disputes pertaining to the outstanding invoices it should accept the respondent’s repeated undertaking to release the assets once payment is received. It is further argued the applicant has failed to show it has exhausted all other remedies as it had the remedy of

²¹ *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) at para 39

paying the outstanding invoices. Payment is however not a legal remedy and I am not persuaded that the respondent has proposed any suitable alternative remedy.

[54] On the facts, I conclude that the applicant has established that it has no alternative remedy. The applicant is not compelled to wait for damages to be incurred and sue afterwards for compensation²² in order to protect its interests.

Conclusion and costs

[55] It follows that the applicant is entitled to the interdictory relief sought.

[56] There is no reason to deviate from the normal principle that costs follow the result. Although the notice of motion did not expressly seek a costs order, the notice of motion and founding affidavit must be read together.²³ The issue of costs was expressly addressed in the founding affidavit. It would be overly formalistic to ignore the founding affidavit as the respondent seeks to do by relying on the absence of a prayer for costs in the notice of motion.

[57] The applicant seeks an order on the scale as between attorney and client. Such costs order is catered for in the agreement, although reliance was not expressly placed thereon in argument.²⁴ The applicant argued that a punitive costs order would be justified in light of the reprehensible behaviour of the respondent in knowingly flouting its clear contractual obligations to the applicant and seeking to unlawfully abuse its possession of the assets, given that the assets are held in trust under clause 18.1 of the agreement, imposing a duty of utmost good faith on the respondent.

²² Buthalezi v Poorter & Others 1974 (4) SA 831 (W)

²³ Betlane v Shelly Court CC [2015] JOL 34003 CC par 29

²⁴ Clause 29.2

[58] Considering all the facts, the respondent's conduct in relation to the matter and the litigation, including a lengthy portion of the answering affidavit being dedicated to irrelevant matter, justifies the granting of such an order.

Order

[59] I grant the following order:

[1] The applicant's non-compliance with the Uniform Rules of Court relating to forms, service and time periods is condoned and this application is dealt with as a matter of urgency under Uniform Rule 6(12).

[2] The respondent is directed to surrender to the applicant within 24 hours of this order:

[2.1] all materials as defined in clause 1.2.18 of the written creative agency services agreement entered into between the applicant and respondent, "FA1" to the founding affidavit;

[2.2] all works as defined in clause 1.2.33 of the Agreement ("Works");

[2.3] all intellectual property, as defined in clause 1.2.15 of the Agreement, in all Works;

[2.4] all unused, uncompleted or unpublished media plans as defined in clause 1.2.20 of the agreement that were prepared by the respondent for the applicant; and

[2.5] without in any way limiting the respondent's obligations in paragraphs 2.1 to 2.4 above, the assets included in the itemised list of assets which is attached hereto as "A";

[3] All the information specified in paragraph 2 above which the respondent is required to surrender to the applicant must be surrendered on a hard drive or other appropriate electronic transfer mechanism.

[4] The respondent is directed to pay the costs of the application on the scale as between attorney and client.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

| | |
|-------------------------------|-----------------------------------|
| DATE OF HEARING | : 05 APRIL 2023 |
| DATE OF JUDGMENT | : 17 APRIL 2023 |
| APPLICANT'S COUNSEL | : Adv. D. Sive |
| APPLICANT'S ATTORNEYS | : Mkhabela Huntley Attorneys Inc. |
| RESPONDENT'S COUNSEL | : Adv. C Denichaud |
| RESPONDENT'S ATTORNEYS | : APA Africa Attorneys |