

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

9 July 2023

Case No: 37643/22

In the matter between:

MUSA MAKAMU

Applicant

and

**ELECTROMODE/INGROOVES
t/a ELECTROMODE (PTY) LTD**

Respondent

JUDGMENT

SK HASSIM AJ

Introduction

1. The applicant styles himself a musician. He appointed the respondent to exclusively digitally distribute sound recordings¹ (in any digital format only), cinematographic films² (in any digital format only), cover artwork³ and metadata⁴ (constituting 'Client Content' as defined in the Distribution Agreement

¹ As defined in clause 1.1.7.1 of the Distribution Agreement.

² As defined in clause 1.1.7.2 of the Distribution Agreement.

³ As defined in clause 1.1.7.3 of the Distribution Agreement.

⁴ As defined in clause 1.1.7.4 of the Distribution Agreement.

and collectively referred to in this judgment as “the digital content”) on his behalf in terms of a written agreement captioned “Exclusive Digital Distribution Agreement” (“the Distribution Agreement”).

2. The dispute in this application and the counter application, relates to whether the applicant was entitled to cancel the Distribution Agreement.
3. The applicant seeks a declarator that the Distribution Agreement was lawfully cancelled on 23 May 2022 alternatively 3 May 2022, an interdict restraining the respondent from distributing the digital content and a monetary judgment for R463 050.30 for monies due and owing to him flowing from the past distribution of digital content by the respondent.
4. The respondent counter applies for (i) a *declarator* that the notice of cancellation dated 3 May 2022 alternatively 23 May 2022 is invalid and of no force and effect; (ii) a *mandamus* that the applicant complies with the obligations imposed by the Distribution Agreement; and (iii) an interdict restraining the applicant from entering into an agreement with any other person for the digital distribution of the digital content. The interdict and *mandamus* are to endure until the Distribution Agreement is lawfully cancelled, or it expires.

The Distribution Agreement

5. The parties entered into the written Distribution Agreement on 4 April 2021.⁵ The applicant is identified in the Distribution Agreement as the “client”.
6. The preamble records that the respondent was appointed by “the client” to exclusively distribute sound recordings and cinematographic films in digital format *via* the internet, and mobile and telecommunication companies, on his behalf.
7. The term of the Distribution Agreement is governed by clause 2. It reads as follows:

“2. TERM AND TERMINATION

- 2.1 The Initial Term shall begin on the effective date and shall endure for a period of 36 (thirty six) months with a 1 (one) year option. Thereafter the term shall automatically

⁵ The respondent signed the agreement on 1 April 2021 and the applicant on 4 April 2021.

renew for successive periods of 12 (twelve) months each unless and until terminated by either Party giving to the other Party not less than 3 (three) calendar months written notice before each renewal period.

2.1.1 The Client cannot terminate this agreement until such time as all monies due to Electromode/Ingrooves, in terms of this Agreement have been paid in full.

2.2 In the event that this Agreement is terminated for any reason whatsoever, Electromode/Ingrooves shall be afforded 30 (thirty) days to instruct its contracted parties to remove the Client's content from all platforms. Electromode/Ingrooves is not responsible for third-party exploitation after the written removal instruction. The client shall be responsible for any third party take-down fees. The Client's Contents shall only be removed once all monies due to Electromode/Ingrooves in terms of this Agreement have been paid in full."

8. The Distribution Agreement is accordingly a fixed term contract which came into force on 4 April 2021 and endures until its expiration by effluxion of time on 3 April 2024.
9. The fees and consideration payable by the respondent to the applicant is governed by clause 4 which reads as follows:

"4. FEES AND PAYMENT

4.1 In consideration for the services rendered by Electromode/Ingrooves, Electromode/Ingrooves shall pay to the Client the receipts equal to seventy per cent (70%) of Electromode/Ingroove's net receipts arising from the grant of rights hereunder as per clause 3.1 above and in terms of clause 7."

10. Therefore, the revenue generated from the distribution of the digital content by the respondent was to be shared in defined portions between the applicant and the respondent after the deductions contemplated in the Distribution Agreement.
11. Clause 12 governs what would happen in the event of a breach of the Distribution Agreement. It reads as follows:

"12. BREACH

12.1 In the event that a party ("offending party") commit [sic] a material breach of any provision of this agreement and fails to remedy such breach within 21 (twenty-one) business days after delivery by the other party ("aggrieved party") of physical written notice requiring the offending party to do so, the aggrieved party shall be entitled without prejudice to and shall [sic] not constitute a release or waiver of, any other rights or remedies which it may have under this agreement or in law, either to terminate this agreement forthwith or claim immediate performance of all the offending party's obligations, whether or not due for performance.

12.1.1 to cancel this agreement, whether in whole or in part, which cancellation shall be without prejudice to the rights of Electromode/Ingrooves to claim repayment of any advances or amounts constituting advances, or to claim damages and to withhold payment of any amounts due to the artist, pending determination of such damages due to Electromode/ Ingrooves."

12. The parties agreed that the Distribution Agreement “[did] not constitute either of the Parties an agent or legal representative of the other for any purposes whatsoever and neither of the Parties shall be entitled to act on behalf of or to represent the other unless duly authorised thereto in writing, it being agreed that they shall at all times act as independent contractors.”⁶

The authority to oppose the application

13. The answering affidavit is deposed to by the respondent’s Business Affairs Manager. The applicant challenges the authority of the Business Affairs Manager to depose to the answering affidavit and oppose the application.
14. The respondent failed to attach to its answering affidavit the written authorisation given by the respondent’s directors for the respondent to oppose the application and counter apply for relief.
15. While the institution or opposition to legal proceedings must be authorised by its directors, a company does not have to identify the person who will depose to the affidavit, nor does it have to authorise the person to do so. After all, an affidavit is nothing other than the written evidence of a witness. A witness does not have to be authorised to testify *viva voce* at a trial. The same applies to a deponent to an affidavit. The only limitation is that the evidence presented in an affidavit must fall within the deponent’s personal knowledge. The applicant’s objection is bad in law.
16. As far as the authority to oppose the application and the counter application is concerned, an unsigned and undated resolution was attached to the respondent’s replying affidavit in the counter application. The respondent’s Business Affairs Manager explained why the resolution was unsigned and indicated that the signed resolution would be filed prior to the hearing.
17. The written resolution was delivered prior to the hearing. It records (i) a decision by the respondent’s directors at a meeting held on 27 October 2022 that its attorneys oppose the application and launch a counter application; and (ii) that

⁶ Clause 18.5.

the directors ratified the actions taken by the respondent's Business Affairs Manager and its attorneys.

18. The notice of intention to oppose was delivered on 4 August 2022 and the answering affidavit was deposed to on 2 September 2022. The actions taken prior to the decision by the directors on 27 October 2022 have been ratified and the complaint raised by the applicant has been cured.⁷ There is accordingly no merit to the objection raised by the applicant.

The respondent's failure to deliver the answering affidavit timeously

19. The parties had agreed that the respondent's answering affidavit would be delivered on 1 September 2022. It was however delivered on 2 September 2022. The respondent seeks condonation for the late delivery. The delay is slight, and the applicant has suffered no prejudice thereby. The late delivery of the answering affidavit and the counter application are condoned.

The applicant's notice to cancel the Distribution Agreement

20. On 3 May 2022 at 10h43 T – Effect (Pty) Ltd, the applicant's duly authorised representative sent to the respondent's representative an e-mail in the following terms:

“Thanks Tshepo. [The Applicant] has made his decision on terminating the contract with Electromode. As I said on the call – I was just giving you the heads up as e-mails can come through as cold at time [sic], depending on the tone read—which might not be the intended [sic]”.

21. This e-mail shall henceforth be referred to as the “applicant's 3 May 2022 e-mail” or “the e-mail”.
22. The applicant contends that the e-mail constitutes a valid cancellation of the Distribution Agreement. The respondent disputes this and argues that (i) at best for the applicant, it was a notification that the applicant intended in the future to cancel the Distribution Agreement; and (ii) the decision to do so would be communicated by the applicant on a date in the future. It furthermore contends

⁷ Fourways Mall (Pty) Ltd and Another v South African Commercial catering 1999 (3) SA 752 (W).

that the Distribution Agreement could be cancelled only in the event of a breach of its terms and then too, only after the requisites of clause 12.1 were complied with, which it avers did not happen. The papers make no reference to a response to the e-mail. Presumably, there was none.

23. On 23 May 2022, the applicant's attorneys sent to the respondent a letter ("the applicant's attorney's letter"). The substantive and material paragraphs of the letter read as follows:

- “3. Our instructions are that as at 3 May 2022, the T-Effect (Pty) Ltd, (being our Client's management team) advised you of our client's notice of termination of the Distribution Agreement entered into between the Parties on or about 04 April 2021.
4. We advise that our instructions are to confirm that notwithstanding anything to the contrary, the notice of termination of the Distribution Agreement effectively given by the T-Effect (Pty) Ltd in respect of our client as at 03 May 2022 is effective and shall therefore subsist for a period of 30 days up to and including 03 June 2022, whereafter, we request per clause 2.2 of the Distribution Agreement, that you instruct your contracted parties to remove our Client's Content from all platforms from said date.
5. In accordance with section 14(2)(b)(i)(aa) of the Consumer Protection Act. No. 68 of 2008, if a consumer agreement is for a fixed term (i.e., the Distribution Agreement), the consumer (i.e., our client) **may cancel that agreement at any time, by giving the supplier 20 business days' notice in writing** or other recorded manner and form, subject to subsection 3(a) and (b);
6. Section 14 (3) of the Consumer Protection Act No 68 of 2008 further provides that upon cancellation of a consumer agreement as contemplated in subsection (1)(b):
 - ‘(a) the consumer remains liable to the supplier for any amount owed to the supplier in terms of that agreement up to the date of cancellation; and
 - (b) the supplier
 - (i) may impose a reasonable cancellation penalty with respect to any good supplied, services provided, or discounts granted, to the consumer in contemplation of the agreement in during for its intended fixed term, if any; and
 - (ii) Must credit the consumer with any amount that remains the property of the consumer, as of the date of cancellation.’
7. In light of the above, we request that any monies which are due to our client be duly paid to him, that your offices refrain from further distributing any of our Client's Content and you refrain from the use of our Client's name, personality rights and/or likeness on your associated media publications and/or records.
8. Further, taking into consideration the contents of paragraph four above, our client is amenable to his content being removed by yourselves by no later than 30 June 2022.”

[emphasis contained in the quoted text]

The issues in the main application

24. Two primary issues arise:

- 24.1. Was the applicant entitled in law to cancel the Distribution Agreement on 3 May 2022. If not, what is the legal consequence of the applicant's e-mail?
- 24.2. Was the letter of 23 May 2022 a confirmation of the cancellation of the Distribution Agreement communicated in the applicant's e-mail, or was it a new notice of cancellation and if so, was it a valid notice of cancellation.
25. There are three notable statements in the applicant's attorney's letter:
 - 25.1. A confirmation that the applicant's e-mail of 3 May 2022 constituted the notice of cancellation of the Distribution Agreement.
 - 25.2. The 30-day notice period⁸ would lapse on 3 June 2022 and the respondent was therefore required in accordance with clause 2.2 of the Distribution Agreement to remove the "client content" as defined in the Distribution Agreement from all platforms by 3 June 2023.
 - 25.3. The applicant is a "consumer" and has the right in terms of section 14(2)(b)(i)(aa) of the Consumer Protection Act, Act No 68 of 2008 ("the CPA") to cancel the Distribution Agreement on 20 days' written notice to the supplier. The implication being that the respondent is the "supplier" in the context of the Distribution Agreement.
26. The applicant's attorney's letter confirms that (i) the applicant intended to terminate the contractual relationship between him and the respondent within 30 days of 3 May 2022; and (ii) the applicant's e-mail was a communication of that intention.
27. Whether a party is entitled to cancel a contract is governed by the terms of the contract unless there exists a statutory right to cancel or terminate it. The applicant's e-mail does not call on a statutory right to terminate the Distribution Agreement. Therefore, one has to consider whether there was lawful cause in terms of the Distribution Agreement to cancel it before its expiration by

⁸ In terms of clause 2.2 of the Distribution Agreement in the event of the cancellation thereof and regardless of the reason for the cancellation, the respondent had to ensure that the digital content was removed from all platforms within 30 days of the cancellation of the agreement.

effluxion of time. The only circumstance under which the Distribution Agreement permits the lawful cancellation of the fixed term Distribution Agreement is in the event of a breach thereof and, then too, only after the offending party has been given 21 days to remedy the breach.

28. The applicant's e-mail is neither a notice calling upon the respondent to remedy a breach of the Distribution Agreement nor, is it a notice of cancellation in accordance with clause 12.1 following upon a failure to remedy a breach. In the absence of a breach and a notice calling upon the respondent to remedy it, the applicant had no right in law to cancel the Distribution Agreement.
29. The applicant argues that even though the Distribution Agreement is for a fixed term, he is not precluded from cancelling it even if there has been no breach of the terms thereof by the respondent. In this regard the applicant relies on clause 2.2 of the Distribution Agreement. He argues that this clause confers upon him the right to cancel the Distribution Agreement for any reason whatsoever. However, clause 2.2 ⁹ does not confer a right to cancel. It stipulates the consequences of the cancellation of the Distribution Agreement, and the rights and obligations of the parties upon the cancellation, regardless of the reason therefor.
30. The terms of the Distribution Agreement are unambiguous. The applicant was committed to the respondent for a fixed period of 3 years. That period had not expired on 3 May 2022 when the applicant's e-mail was sent to the respondent. In the absence of the respondent having breached the Distribution Agreement, and having failed to remedy the breach within 21 days of being called upon in writing to do so, the applicant had no right to cancel the Distribution Agreement. The applicant's cancellation of the Distribution Agreement on 3 May 2022 was therefore invalid.

⁹ It reads as follows:

"2.2 In the event that this Agreement is terminated for any reason whatsoever, Electromode/Ingrooves shall be afforded 30 (thirty) days to instruct its contracted parties to remove the "Client's content from all platforms....The [applicant] shall be responsible for any third-party take-down fees. The [digital content] shall only be removed once all monies due to [the respondent] in terms of this Agreement have been paid in full".

31. Consequently, the applicant's e-mail of 3 May 2022 constituted a repudiation of the Distribution Agreement. The respondent did not accept the repudiation. The Distribution Agreement consequently remained *extant* notwithstanding the applicant's e-mail. An unaccepted repudiation is "a thing writ in water"¹⁰ and does not affect the parties' legal rights and obligations in any way.
32. Turning to the applicant's attorney's letter of 23 May 2022, it is more than a confirmation that the respondent's management was advised on 3 May 2022 of the applicant's notice of cancellation. It is a notification to the respondent that the applicant seeks to invoke the statutory right in section 14(2)(b) of the CPA to cancel a fixed term contract. There was no reference at all in the applicant's e-mail of 3 May 2022, to the CPA, let alone to section 14 thereof.
33. The *causa* for the notice of cancellation embodied in the applicant's attorney's letter of 23 May 2022 is the statutory right conferred by section 14 of the CPA on a consumer contemplated therein, to extricate himself lawfully from a fixed term consumer agreement which falls under the purview of that statute. The letter was therefore a new notice of cancellation. Whether it was a valid notice depends on whether (i) the Distribution Agreement constitutes a consumer agreement as defined in the CPA; and (ii) whether the applicant is a consumer, and the respondent a supplier, as defined in the CPA.
34. I do not have to determine this vexed question because even if the CPA applies to the Distribution Agreement, and the applicant is a consumer and the respondent a supplier which entitles the applicant to cancel the fixed term Distribution Agreement, the applicant's notice of cancellation in my view does not comply with section 14(3).
35. I have reservations whether the Distribution Agreement falls within the confines of the CPA. The applicant appears to be the consumer of the services supplied by the respondent, but he is also the supplier of the goods. The "service" which is provided under the Distribution Agreement is the distribution of what is defined in the Distribution Agreement as "client content" and includes amongst

¹⁰ Cf. *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 28E

others sound recordings, and cinematographic films. The “client content” (referred to in this judgment as “digital content”) therefore constitutes the “goods” contemplated in the CPA. The applicant would thus be a “consumer” contemplated in the CPA as far as the distribution of the “goods” by the respondent is concerned, and is also the “supplier” of the “goods” which the respondent distributes, thus making the respondent the “consumer” of the “goods” (i.e., recordings and cinematographic films).

36. *Qua* supplier of the goods, the applicant could cancel the fixed term Distribution Agreement only if the consumer (i.e., the respondent) materially failed to comply with its contractual obligations and then too only after the consumer was given 20 business days’ notice to rectify the non-compliance.
37. *Qua* consumer of the distribution services the applicant could only cancel the Distribution Agreement after the respondent as the supplier had been given 20 business days’ written notice of the cancellation.
38. While the applicant’s attorney’s letter of 23 May 2022 states that the applicant is a consumer, it does not state whether the applicant was cancelling the Distribution Agreement *qua* consumer of the digital distribution services performed by the respondent or *qua* supplier of the digital content to the respondent. At best for the applicant, the letter is ambiguous and at worst it indicates that the applicant is not the consumer. One of the difficulties which is presented by defining the relationship between the parties as a consumer – supplier relationship envisaged in the CPA, and labelling the Distribution Agreement as a consumer agreement is that the cancellation of the Distribution Agreement *qua* consumer of the services, is effectively a cancellation *qua* supplier of the digital content.
39. For purposes of this judgment only, I am prepared to accept that the CPA applies to the Distribution Agreement and that it is available to the applicant, but I do so without finding that it does apply or avails the applicant.
40. Section 14 (2)(b)(i)(bb) of the CPA entitles a consumer to cancel a consumer agreement on 20 days’ written notice. Section 14(2)(b)(i) provides as follows:

“14. Expiry and renewal of fixed-term agreements

- (1) ...
- (2) despite any provision of the consumer agreement to the contrary-
 - (i) the consumer may cancel that agreement-
 - (aa) upon the expiry of its fixed term, without penalty or charge, but subject to subsection (3)(a); or
 - (bb) at any other time, by giving the supplier 20 business days’ notice in writing ...subject to subsection (3)(a) and (b); or
 - (ii) ...”

41. The applicant recognises that the Distribution Agreement could be cancelled only after he had given to the respondent 20 business days’ written notice. This is evident from paragraph 5 of the applicant’s attorney’s letter. However, the respondent was not given 20 business days’ notice. This appears from the letter read as a whole.
42. On 23 May 2022, the applicant invoked the right to cancel the Distribution Agreement in terms of section 14 (2) (b) of the CPA. His attorneys communicated the exercise of that right to the respondent in their letter dated 23 May 2022. The first day of the notice would therefore have been 24 May 2022¹¹. The first day of the notice cannot be 3 May 2022 because the applicant had not invoked the statutory right of cancellation on that day, he invoked it 20 days thereafter.
43. It is clear from paragraph 4 of the letter that the last day of the notice period was 3 June 2022. It follows from this that the Distribution Agreement terminated on that day. This is less than the 20 business days’ notice required by section 14(2) (b)(i)(bb) of the CPA.
44. While it is so that the applicant allowed the respondent until 30 June 2022 to remove the “client content” from all platforms, that did not extend the contract. It was simply an opportunity for the respondent to discharge its obligations under clause 2.2 to remove all “client content” from the various platforms. The Distribution Agreement did not endure until 30 June 2022. Paragraph 4 of the

¹¹ Business days are defined in section 2(6). The first day is excluded as well as public holidays, Saturdays and Sundays and the last day included.

letter leaves no room for doubt; the notice period ended on 3 June 2022. This is fortified by paragraph 7 of the letter which demands that the respondent “refrain[s] from further distributing any of [the] Client Content and ... refrain from [using] [the applicant’s] name, personality rights and/or likeness on [the respondent’s] associated media publications and/or records”.

45. The applicant had no intention of complying with his contractual obligations until 30 June 2022 and clearly did not want the respondent to do so.
46. Accordingly, the applicant’s attorney’s letter of 23 May 2022 does not constitute a cancellation contemplated in section 14 (2)(b)(i) and is therefore invalid.
47. There is another reason that the notice may be invalid. The applicant’s attorney’s letter of 23 May 2022 cites section 14(2)(b)(i)(aa) as the source of the right to cancel a fixed term consumer agreement “at any other time”. However, section 14(2)(2)(b)(i)(aa) affords the consumer the right to cancel a consumer agreement upon the expiry of its fixed term without the consumer incurring a penalty or fine. In *casu* the fixed term Distribution Agreement had not expired.
48. It is section 14(2)(b)(i)(bb) of the CPA which affords to the consumer the right to cancel the consumer agreement “at any other time”. The applicant invoked the incorrect section. Having found the notice of cancellation to be invalid because less than twenty days’ notice of the cancellation of the Distribution Agreement was given to the respondent, it is not necessary for me to decide whether the reference in the letter to section 14(2)(2)(b)(i)(aa) as opposed to section 14(2)(b)(i)(bb) renders the notice invalid. Furthermore, the parties have not had the opportunity to address me on the question.
49. The applicant is entitled to neither the *declarator* nor the interdict.
50. The respondent does not dispute that the applicant is entitled to payment of R 463 050.30 but asserts that clause 12.1.1 of the Distribution Agreement entitles it to withhold payment. Clause 12.1.1 is nonsensical in its construction when considered together with clauses 12.1 and 12.2. It is out of place and does not follow on clause 12.1. As constructed, it does not permit the respondent to

withhold payment where the applicant has not breached the Distribution Agreement.

51. During argument Adv Vorster properly conceded that if I find that the Distribution Agreement has not been validly cancelled then the applicant must be paid the amount.

The counter application

52. The counter application is for specific performance of the Distribution Agreement by the applicant. The applicant undertook in clause 7 of the Distribution Agreement to deliver “all client content” to the respondent. In clause 3 he undertook not to enter into any other agreement with regard to the digital distribution of the “client content” under any circumstances. Clause 3 conferred upon the respondent the exclusive right to distribute the digital content.
53. The applicant has not complied with the obligations undertaken by him. The respondent is therefore entitled to an order compelling the applicant to perform in terms of the Distribution Agreement.
54. Turning to whether the respondent has made out a case for interdicting the applicant from entering into an agreement with any other person for the distribution of the digital content, the applicant does not deny the allegation that he or his manager have sought to engage other companies to manage or takeover the digital distribution of the digital content.
55. I am not satisfied that the respondent has made out a case for the interdict sought. Incidentally, the applicant’s case is not that it apprehends injury (loss or prejudice), and that the apprehension is reasonable. Its case is that it will be severely prejudiced. But no facts are averred from which it can be concluded that the applicant will be severely prejudiced. The respondent has assumed a far stricter measure of prejudice or injury than the law requires it to demonstrate. The onus which rests on an applicant for an interdict is to demonstrate on a

balance of probabilities that a reasonable apprehension of injury (or loss) or prejudice exists. This requires it to demonstrate objectively that its apprehension of injury or prejudice is well grounded. In the absence of sufficient facts being disclosed on which the apprehension is based, a court cannot objectively assess whether the apprehension is well grounded and reasonable.

56. The respondent has failed to discharge the onus. It has not identified the injury (loss or prejudice) which may result from the infringement of its right to exclusively distribute the digital contents, nor has it averred facts to enable the court to objectively assess whether the digital distribution of the digital content by another person may result in injury or loss to it, and additionally nor are facts averred to enable the court to objectively assess whether the respondent's apprehension is well grounded and reasonable.
57. The high watermark of the respondent's case is that if the applicant enters into an agreement with another person for the digital distribution of the digital content that agreement "will infringe on [the respondent's] rights on exclusivity, and the return it is entitled to, seeing that [the respondent] has been a large part of the Applicant's success as an artist". [Text underlined for emphasis]
58. The respondent makes the bald averment that the applicant's infringement of its right to exclusively distribute the digital content will be severely prejudicial to it. There is however no factual basis for the assertion of prejudice. While it avers that an agreement concluded between the applicant and another person for the distribution of the digital content "will infringe on the return it is entitled to", the respondent does not identify the nature of that "return". Nor does it aver facts to enable the court to objectively assess whether an infringement on the "return" may result in injury (loss or prejudice).
59. The factual averments are too vague and imprecise for the court to find that the respondent may suffer a loss and that any apprehension of loss or injury is reasonable, let alone for the court to find that the respondent will be prejudiced or will suffer a loss or injury as claimed by the respondent.

60. I am not satisfied that the respondent has discharged the onus of demonstrating a reasonable apprehension of injury or loss resulting from the infringement of its exclusive right to digitally distribute the digital content. The interdict which is sought by the respondent is accordingly refused.

The relief that falls to be granted

61. In the circumstances I find:

61.1. The applicant is entitled to be paid R463 050.30.

61.2. The respondent is entitled to:

61.2.1. A *declarator* that the notices of cancellation dated 3 May 2022 and 23 May 2022 are invalid.

61.2.2. A *mandamus* that the applicant must comply with his obligations under the Distribution Agreement until the lawful cancellation thereof or, its expiry.

62. This brings me to the question of costs.

63. While the applicant has succeeded in his monetary claim, he has been substantially unsuccessful in that both notices of cancellation have been found to be invalid resulting in the *declarators* and interdict being refused. In the circumstances and notwithstanding the monetary judgment in the applicant's favour it will not be fair to make any costs order in the main application.

64. The respondent has succeeded in obtaining a *declarator* that the notices of cancellation are invalid, and it has also succeeded in compelling the applicant to comply with his obligations in terms of the Distribution Agreement. It has however failed in the interdict. Notwithstanding failing in the interdict, the respondent has been substantially successful in its counterapplication.

65. In exercising my discretion as to what a fair costs order would be in the circumstances, I have taken into account that the application and counterapplication are intertwined, and the bulk of the record pertains to the

validity of the two notices of cancellation and, that the oral argument as well as the heads of argument concentrated largely if not entirely on this.

66. In the circumstances it is neither unreasonable nor unfair to order the applicant to pay the costs of the counter application. Nor is it unfair or unreasonable not to make any award as to the costs of the main application. The counter application has succeeded because the main application has been refused and the respondent is being awarded the costs of the counterapplication.

The order

67. In the circumstances it is ordered:

(a) The main application:

- (i) The respondent is to pay to the applicant an amount of R 463 050,30 (four hundred and sixty three thousand and fifty rand and thirty cents) issued under invoice number INV.0000547, within 7 (seven) days from the date of this order.
- (ii) The relief claimed in paragraphs 1 and 2 of the amended notice of motion is refused.

(b) The counter application:

- (i) The applicant's notices of cancellation dated 3 May 2022 and 23 May 2022 (annexure "KE-2" and annexure "KE-3" respectively to the founding affidavit) are invalid.
- (ii) The applicant is directed to comply with his obligations in terms of the Exclusive Distribution Agreement dated 4 April 2021.
- (iii) The applicant must provide to the respondent the collective of the following:
 - (aa) The applicant's Sound Recordings (in any digital format only) whether as a single or whether bundled together as a Digital Album, owned or controlled by the applicant and as are added to during the term of the Distribution

Agreement and as are to be distributed by the respondent on the terms and conditions contained in the Distribution Agreement.

- (bb) The applicant's Cinematographic Films (in any digital format only) whether a single music video or whether bundled together, owned or controlled by the applicant and as are added to during the term of the Distribution Agreement and as are to be distributed by the respondent on the terms and conditions contained in the Distribution Agreement.
 - (cc) The applicant's album cover artwork and any other artwork or images relating to the applicant and/or Sound Recordings and/or Cinematographic Films that the applicant uploads or otherwise provides to the respondent.
 - (dd) Digital information (metadata) conveying information regarding any of the Sound Recordings and/or Cinematographic Films, such as the names of the artists, authors and composers, the artist biography, the title of the album, the name of the song, the name of the record company, the description of the album, the lyrics of the songs, the track and album pricing information, concert information, music genre and such other elements as may be required by the respondent for the digital distribution thereof by the respondent in terms of the Distribution Agreement.
- (c) The applicant is to pay the respondents costs of the counter application.
 - (d) Save as aforesaid, the relief claimed in the main application and the counter application is dismissed.
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S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria
(electronic signature appended)

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 July 2023.

Date of Hearing: 8 May 2023

Applicant's Counsel: Adv KE Radebe

Respondent's Counsel Adv A Vorster