THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

1.1 Case : 06/2007
REPORTABLE

In the appeal between:

STREET POLE ADS DURBAN (PTY) LTD	First appellant
UNIVERSITY OF KWAZULU-NATAL	Second appellant

and

ETHEKWINI MUNICIPALITY	Respondent

Before:	Howie P, Cameron JA, Mthiyane JA, Ponnan JA and Mhlantla AJA
Heard:	Tuesday 4 March 2008
Judgment:	Friday 28 March 2008

Mandament van spolie – despoiled party seeking relief going wider than despoiled property – respondent entitled to challenge title in counter-application – Contract law – contract not permitting party to 'subcontract any of its obligations' – meaning of 'subcontract'

Neutral citation: Street Pole Ads Durban v Ethekwini Municipality (06/07) [2008] ZASCA 33 (28 March 2008)

JUDGMENT

CAMERON JA:

[1] This is an appeal against an order Nicholson J granted in the High Court in Durban in October 2006, confirming a spoliation order the first appellant (SPA) earlier obtained against the respondent (the municipality), but at the same time granting the municipality relief it sought in a counter-application (which challenged the basis on which SPA brought its application), and granting none of the parties their costs. The municipality joined the University of KwaZulu-Natal (the university) as the second respondent to its counter-application, and it is now the second appellant; both it and SPA appeal with leave granted by Nicholson J. For its part the municipality does not challenge the confirmation of the spoliation order granted against it, nor Nicholson J's refusal to grant any costs.

Background

[2] The proceedings have their origin in a contract the university concluded with the municipality[1] in May 1999 ('the main agreement'), which

[1] The predecessors of the current parties were then the Durban Transitional Metropolitan Council and the University of Natal; but their changes in form and title have no bearing on the proceedings.

launched the university's 'adopt a light/adopt a pole' fundraising project. The agreement secured the municipality's consent and cooperation for public sponsors to 'adopt' electricity poles and street lights for advertising on them. The university undertook to obtain sponsors, and to pay the municipality a quarterly royalty of 90% of the gross income received by the project. Of this royalty, the municipality was to spend no more than 40% on maintenance, repairs and cost of power supply, 2% to clear graffiti, and 58% on community development projects (mainly street lighting and electrification).

[3] The main agreement was to last for five years, plus automatic renewal for three further five-year periods, subject to written notice otherwise. The agreement envisaged that the university would conclude 'adoption agreements'. Should notice of termination be given, the main agreement would continue in force for purposes of these sub-agreements.

[4] When the main agreement was concluded in 1999, the university's Centre for Innovation and Business Germination was steering the 'adopt a light' project, together with one Willem Vermaak (who was named in the agreement as the university's representative). But the university parted ways with Vermaak, and from early 2002, to the

knowledge of at least some municipal officials, SPA became involved in the operation; and from 1 September 2002, SPA took over the management of the project.

[5] In November 2002, municipal officials dealing with the project expressed concern about resultant changes in the apportionment of gross income. But on 4 February 2003 the university formalised its new arrangement with SPA in an agreement (the adoption agreement). Under this agreement, SPA hired exclusively from the university the use of all poles and street lamps which were the subject of the main agreement. In return, SPA agreed to pay the university 20% of 'gross monthly turnover'. This the agreement defined as the total amount received by SPA from the display of advertisements, temporary event posters, community or charitable messages on the municipality's poles. The agreement stipulated that the amounts '(if any)' which SPA charged for the display of advertisements would 'always be in the sole discretion' of SPA. The agreement was effective from 1 September 2002 to 30 August 2005, with a three-year renewal option (which SPA later exercised).

[6] The university became aware soon afterwards that the municipality was 'apparently annoyed' that it had 'sub-contracted' the administration of

the project to SPA without the municipality's consent, but for the next eighteen months SPA continued to conclude 'sub-adoption' agreements for its clients to use the advertising space the municipality's poles provided. It paid the university 20% of its gross turnover; the university in turn retained 10% of what it received, paying the remaining 90% to the municipality.

[7] In March 2004, the municipality gave the university notice of termination of the main agreement, but the university and SPA maintained that the adoption agreement, as renewed by SPA, continued in force until August 2008. The dispute escalated into this litigation.

This litigation: judgment of Nicholson J

[8] In November 2004, the municipality started removing SPA advertising from its poles. In response, SPA obtained interim orders in the High Court in Durban prohibiting this, and requiring the restoration of advertisements already removed. The orders SPA sought and obtained sourced its entitlement to place the advertisements in the main agreement and the adoption agreement. The interim interdicts namely directed the municipality (emphasis added) –

> 1.1 'to immediately desist from removing or causing to be removed street pole advertisements owned by [SPA] and placed on various street poles in the Ethekwini

metropolitan area *pursuant to the agreements forming annexures A and B to these papers* [ie, the main agreement and the adoption agreement]', and
1.2 'to forthwith restore to the street poles upon which they were [formerly] placed, those advertisements erected by [SPA] *pursuant to the aforementioned agreements* and which were removed by the [municipality] or a third party under its direction on or about 12th, 13th and 14th November 2004', and
1.3 'not to remove or otherwise interfere with the aforesaid advertisements erected by [SPA] *pursuant to the aforesaid agreements[s]* pending the final determination of an action to be instituted by [SPA] within 20 days of the grant hereof for an order declaring the aforesaid agreements to be in full force and effect and that the [municipality] is bound by the terms thereof'.

[9] When the municipality joined issue, it retaliated with a counter-application for an order against SPA and the university that the adoption agreement was unenforceable against it (or, if enforceable, that SPA was not entitled to conclude 'sub-adoption agreements' direct with advertisers, but, if so, had to apply to the municipality each time, and was then obliged to pay the municipality 90% of the gross income received).

[10] In an extensive judgment Nicholson J ruled essentially in the municipality's favour. Though he concluded that SPA had established its entitlement to a spoliation order (para 1.2 of its prayers set out above), the rest of its application for relief (paras 1.1 and 1.3, which related to future conduct, and covered all posters on municipal poles – not only those the municipality had already taken down) required him to consider the merits of its underlying possessory claim to the poles.

[11] This took Nicholson J directly to the validity of the adoption agreement, and thence to the main agreement. This he interpreted with the aid of specimen adoption agreements which the municipality attached to its affidavits. These he regarded as part of the background circumstances that explained the genesis and purpose of the main agreement. Those agreements reflected individual sponsors adopting particular poles for specified time periods, at specified amounts. In the light of this, he concluded that the adoption agreement fell foul of the prohibition on cession in the main agreement.

[12] Nicholson J held that a 'fair reading' of the main agreement showed that the poles were to be hired out to sponsors with 90% of revenue accruing to the municipality and 10% to the university – whereas the effect of the university's agreement with SPA was that 80% of revenue went to SPA, while the municipality and the university split the remaining 20%. This was 'totally incongruous' when the whole project and its objectives were considered. It was never contemplated that a sponsor would receive any money from the project – only publicity (which would generate income). The main agreement further did not contemplate that an entity like SPA would manage the contract on behalf of the university.

[13] Nicholson J rejected the defences of waiver and estoppel. While no one had claimed that SPA could enforce the adoption agreement directly against the municipality, these parties' lack of contractual nexus did not prevent the court from granting the municipality relief against SPA, which was in the position of an illegally occupying sub-tenant against whom a landlord was entitled to obtain direct relief.

Form of proceedings – the municipality's challenge to the adoption agreement

[14] On appeal SPA urged that the high court should not have engaged with the municipality's counter-application. SPA had gone to court solely to seek spoliatory relief: the orders sought in paragraphs 1.1 and 1.3 of its notice of motion constituted merely adjunct relief necessary to restore SPA's position. It did not go further and seek an order declaring it had a right of possession. The references to the main agreement and the adoption agreement in its prayers merely alluded to facts from which the relief it claimed stemmed. It was therefore not open to the municipality to challenge the adoption agreement in these proceedings.

[15] This argument invokes the principle that an offending respondent in a spoliation application is generally not allowed to contest the spoliated

applicant's title to the property. That is because good title is irrelevant: the claim to spoliatory relief arises solely from an unprocedural deprivation of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case,

> 'the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims.'[2]

This is because such an applicant –

> '… in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered …'[3]

[16] The qualification applies here. SPA's application sought classically spoliatory relief in demanding the restoration of the posters the municipality had despoiled (para 1.2). But, as Nicholson J pointed out, its claim went further. It pressed for an interdict, not directed only to the despoiled property, but in wide terms embracing all the 'various street poles in the Ethekwini metropolitan area' covered by the disputed agreements.[4] That claim spoiled for a fight about its title to those poles,

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[2] *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services* 1996 (4) SA 231 (C) 244C-E, per Rose Innes J.

[3] *Minister of Agriculture and Agricultural Development v Segopolo* 1992 (3) SA 967 (T) 971B, per Goldstein J.

[4] Contrast a case like *Engler Earthworks (Pty) Ltd v Marais* 1998 (2) SA 450 (SE) 457-458, where the fact that the despoiled party sought for expressly limited purposes to assert title to the despoiled property itself, in conjunction with the claim for spoliatory relief, was held insufficient to allow the respondent to challenge the title by counter-application.

and it was this fight in which the municipality was entitled to and did engage.

[17] What is more, four days after SPA obtained the interim interdicts, the municipality agreed to a consent order, in terms of which the order in paragraph 1.2 (requiring restoration of the despoiled advertisements to the poles) was substituted with an order that the municipality simply return direct to SPA the advertising material in question. This the municipality did. There was thereafter no threat by the municipality to despoil SPA's posters, nor any suggestion that it would resume doing so. It subjected its wish to remove further posters from its poles to establishing its right to do so in this litigation. The fight thereafter was thus in substance about SPA's claim to derive title from the adoption agreement. It would be both unrealistic and unfair to hold otherwise.

[18] It is true that SPA proposed to establish its title not overtly in the motion proceedings, but in a trial action which order 1.3 envisaged would be instituted 'within twenty days' of the grant of the interdicts. It would in my view be obstructively formalistic to hold that, rather than waiting for trial, the municipality could not join issue immediately on that dispute – as it did – nor join the university in the proceedings for that purpose, as it did. The high court, which had all the relevant information

and contentions before it, chose instead to decide the issue immediately: a just and sensible approach.

The proper interpretation of the main agreement

[19] The pivotal issue is thus whether the conclusion of the adoption agreement violated the main agreement, entitling the municipality to the relief it sought in its counter-application. I agree with the appellants (and respectfully differ here from Nicholson J) that in answering this question it is unnecessary (and indeed impermissible in the circumstances of this case) to look beyond the plain meaning of the agreement itself, in its background setting, since it contains no ambiguities or uncertainties. (The appellants justly objected that the specimen adoption agreements to which the Judge had regard as background circumstances were sent out only some years after the main agreement was concluded; they could not therefore have formed part of the background against which the contract's meaning is to be ascertained.)

[20] The university and SPA vigorously argued that the adoption agreement did not fall foul of the main agreement. They pointed out the main agreement specified only that 90% of income *received by the*

university – not generated by the project – was due to the municipality. Nowhere did the main agreement specify that there could not be only a single sponsor who hires all the municipality's street poles. Nor did it specify that resultant advertising had to be that of the sponsor in question.

[21] It was therefore wrong to assume (they argued) that the main agreement obliged the university to contract only with sponsors who were themselves 'end users' of advertising (and not sponsors on behalf of other business advertisers). All the adoption agreement did was to commit the university to receiving a single hire charge from a single sponsor, calculated at the rate of 20% of what SPA earned from letting the street poles to its advertisers. The municipality's complaints about income were misconceived, since the main agreement never promised it any minimum income. The municipality's actual income from the project was therefore contractually irrelevant.

[22] This argument is beguiling. But it cannot prevail. It runs aground on the provisions of the agreement which envisaged that the university would itself continue to be an active partner in its execution. Those provisions make plain that the university would have a continuing role in

the execution and furtherance of the project, and in securing sponsors and relaying income derived from them to the municipality.

[23] The agreement locates the university's power 'to undertake' the project in its private Act[5] (clause 1.5) and expressly envisages that it 'has developed and will from time to time continue developing' 'know-how' to implement the programme (clause 1.6.1). In its main operative provision, clause 2.1, the parties agree that the university 'will undertake the project' on the terms and conditions set out. It is true, as the appellants emphasised, that the agreement does not expressly require the sponsors to number more than one (though plurals are used throughout in referring to 'sponsors' and 'adoption agreements'); but the agreement incontestably provides for, and requires, the continuing participation of the university itself.

[24] To this end, clause 5, 'Duties of [the university]', records that the university 'agrees and undertakes' at its cost 'to carry out the project', 'to operate the project from its premises', 'to provide the manpower, infrastructure, resources and other facilities necessary to fulfil its obligations', 'to endeavour to obtain sponsors to adopt poles' and 'to use its best endeavours to collect all project income'.

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[5]University of Natal (Private) Act 7 of 1960, s 2 of which provides subject to the Act's provisions that the university is capable 'of entering into all other contracts, and of doing or performing such other acts and things as bodies corporate may by law do or perform'.

[25] Clause 10, ‘General Duties of [the university]’, continues in this vein. This provision requires the university to ensure that its ‘representative and senior management devote sufficient time and attention to the project’, that ‘the advertising content of sponsors is legal and conforms to the specifications from time to time’, and that ‘the conduct of the programme [is] to the greatest benefit of the project’.

[26] None of this is compatible with the adoption agreement, which grants SPA exclusive use of the poles (clause 2.2) for it to hire out and to use, and vests in it the power ‘to do anything in relation to the advertisements and their display’ that is lawful (clause 5.2), and permits SPA to enforce, in the university’s name but at SPA’s expense, ‘all or any of the rights’ accruing to the university under the main agreement (clause 8.1.3). Conversely, the agreement disbars the university from enforcing ‘any of the terms’ of the main agreement without SPA’s prior written consent (clause 8.1.4). The university is required to permit SPA to represent the university ‘in all negotiations and discussions’ with the municipality (clause 8.1.6), and is prohibited from itself negotiating – or even discussing – the main agreement with the municipality ‘unless requested to do so in writing’ by SPA (clause 8.1.7). The university could not agree to any amendment of the main agreement, unless

negotiated by SPA, nor waive 'any of its rights' under that agreement, without SPA's prior written consent (clause 8.1.9 and 8.1.10).

[27] It is plain from these provisions that the adoption agreement entailed the university's wholesale abdication from the role the main agreement envisaged for it. In its stead, SPA obtained the rights, and undertook the duties, which previously fell to it. The university retained certain limited rights and duties. It was still obliged to pay the municipality 90% of what it received from SPA. And the agreement does not divest it of title to sue the municipality to perform its obligations (ie, to make the poles available for hire to sponsors). For this reason, the adoption agreement did not in my view amount to a cession, since if the effect of a transaction is not to divest the right-transferring party of its power to sue for what is owed to it, the transaction is not a cession.[6] On this, I respectfully differ from the approach of Nicholson J, but not from his conclusion that the adoption agreement violated the critical no-transfer provision of the main agreement, clause 23.5:

> 'No party may cede any of its rights or delegate or assign or subcontract any of its obligations in terms of this agreement without the prior written consent of the other parties. Provided that the [municipality] may subcontract any of its maintenance obligations in terms of clause 4.1.3 [to keep the poles in good order and condition] without the consent of [the university].'

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[6] See RH Christie, *The Law of Contract in South Africa* (5 ed, 2006), p 464, citing *Purchase v De Huizemark Alberton (Pty) Ltd* 1994 (1) SA 281 (W) 285-286, per Mahomed J.

[28] While there was no cession, the main agreement also prohibited the university from subcontracting 'any of its obligations' without prior written consent. The adoption agreement plainly farmed out the great bulk of the university's obligations to SPA, and with them its rights under the main agreement. That was a subcontracting. A subcontractor is one who agrees with the contractor to perform any part of the work that the contractor previously agreed to perform for another; it is one who takes a portion of a contract from the principal contractor (or from another subcontractor).[7] The object of clause 23.5 was plainly to give the municipality a say in determining to whom the university could pass on any of these rights and obligations. Yet the adoption agreement summarily subcontracted the greatest share of these.

[29] In the absence of written consent, and there was none, the conclusion of the adoption agreement violated the main agreement. For similar absence of writing, the defences of waiver and estoppel (sourced in the two years during which the municipality continued to implement the project despite SPA's overt involvement) were rightly not pressed much in argument before us. The representation the appellants rely on to found the estoppel – the municipality's conduct in representing that it consented to the conclusion of the adoption

[7] See William Statsky, *West's Legal Thesaurus/Dictionary* (1985).

agreement – runs aground on clause 23.5 itself, which to SPA's knowledge required just such consent to be in writing. In addition, the main agreement contains the usual only-in-writing waiver provision (clause 23.4), which puts paid to waiver.

[30] The municipality was thus entitled to relief. Even though we were informed from the bar that it has not cancelled the main agreement in reliance on the breach, none of the parties disputed that on the conclusion reached it was entitled to the declarator Nicholson J granted, namely that the adoption agreement was not enforceable against it. Counsel for the municipality recorded that the municipality regarded itself as bound, in removing illegal advertising, by a decision of the Full Court that requires it first to approach a court in all situations save where the public interest requires immediate removal.[8]

[31] For these reasons, I conclude that Nicholson J was correct in his approach to the relief the respective parties sought. His costs award was not vitiated by any demonstrable misdirection, and must also stand.

[32] The appeal is dismissed with costs, including the costs of two counsel.

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[8] *African Billboard Advertising (Pty) Ltd v North and South Central Local Councils, Durban* 2004 (3) SA 223 (N) 229C-D per Levinsohn J (Skweyiya and Swain JJ concurring).

E CAMERON
JUDGE OF APPEAL

CONCUR:
HOWIE P
MTHIYANE JA
PONNAN JA
MHLANTLA AJA