

**IN THE COURT OF APPEAL FOR THE REPUBLIC OF
BOTSWANA HELD AT GABORONE**

COURT OF APPEAL CIVIL APPEAL NO. CACLB-062-11
HIGH COURT CIVIL CASE NO. MAHLB-000051-11

In the matter between:

Gaborone City Council

Appellant

and

**Continental Outdoor Media
Botswana (Pty) Ltd**

Respondent

Mr. Attorney A. W. Modimo for the Appellant

Ms. Attorney M. Gaobakwe, with Mr Gabanakemo for the
Respondent

JUDGMENT

**CORAM: FOXCROFT JA
LORD ABERNETHY JA
LEGWAILA JA**

FOXCROFT JA

1. This is an appeal against the judgment of Dingake J in the High Court dated 21 June 2012. The learned Judge *a quo* granted a review application by the present respondent, so setting aside the decision of the appellant (“the Council”) to revoke or cancel the authority earlier given to the

respondent (“Continental”). Dingake J ordered further that the Council’s action in removing/demolishing Continental’s billboard on Nyerere Drive had been unlawful. The Council was ordered to refrain from interfering with Continental’s restoration of billboards “along its previously approved sites on Nyerere Drive”.

2. It is necessary to sketch the factual background to the review application which had been preceded by the granting of an interim interdict to Continental. Continental is a major player in the outdoor billboard advertising industry in Botswana, having commenced such operations in 1991. It is not in dispute that sometime in the early nineties, Continental obtained authority from the Council to erect advertising billboards on three sites situated along Nyerere Drive. A letter of approval containing fees payable for the approved sites was issued and Continental maintained payment of the annual fees from year to year.
3. In a letter dated September 14, 2007, the Town Clerk of the Council wrote to Clear Channel Independent (the name used at that time by Continental) as follows:

*“RE: REMOVAL OF ADVERTISEMENT SIGNBOARDS
ALONG NYERERE DRIVE*

This letter serves to inform you that Nyerere Drive will undergo refurbishment effective January 1st 2008, and the entire road reserve will be needed during the duration of the work. The project takes two years to complete. Therefore, GCC kindly request the removal of your three billboards along this road before end of this year (December 31st 2007).

It has been normal practice in the past that existing signboards may be relocated to other roads of similar type with Council approval. This is one option. Alternatively, you may wait until project completion and restore your billboards to original locations.”

The letter forms annexure “D” to the founding affidavit in the review application.

4. Continental chose the option provided of waiting until project completion. It then began the restoration of its billboards to their original locations, continuing until stopped by the Council’s attempt to demolish the structure which had been erected.

Continental’s case was and is that the road works were completed towards the end of 2010 and that in January 2011, acting in accordance with permission given in annexure “D” (which was annexure “C” in the interdict

application), it commenced restoration of the first billboard. Some days later, when work was under way, the general manager of Continental received a call from the Principal Estates Officer of the Council advising that the Council was going to demolish the work done by Continental.

5. Susannah Steenkamp, the general manager of Continental, attended at the Council offices with a copy of the letter granting permission to restore (annexure “D”) and was immediately told that the letter had been superseded by clause 21 of a lease agreement entered into between the parties in May, 2010. Ms. Steenkamp deposed further that the lease referred to was indeed entered into at a time when Nyerere Drive was still under construction and use of the billboards suspended. She added that, as a natural consequence, rentals were not payable for the period in question. The lease does indeed stipulate in clause 21 that it supersedes all understandings or agreements

“on the subject matter hereof i.e. leased sites. This agreement may be modified only by a further writing that is duly agreed and executed by both parties.”
(emphasis added)

6. There is no denial by the Council that the annexure to the lease agreement which lists the leased sites does not include the land on which the three billboards in issue in this case were erected. All that the Council's Principal Estates Officer had to say about this aspect, at the interdict stage, was that:

"If indeed applicant left out the sites along Nyerere Drive, it has only itself to blame. Applicant has forever lost the sites for a combination of the reasons spelt out at paragraphs 7.2, 7.2.1, and the lease agreement being annexure "D1" to the founding affidavit."

The reasons referred to were that there was no space where the billboards could be relocated on the narrower road reserve resulting from the building of a dual carriage way road. In my view, this attitude on the part of the Principal Estates Officer of the Council was opportunistic and regrettable. To say that it was Continental's fault that they did not feature in the list of "leased sites" was to put the boot on the wrong foot. The Council, controlling public land and the use thereof, was obliged to make clear to prospective users whether they were bound by the lease agreement or not. What is more, the lease was initiated by the Council, as

Mr. K. Busanang, second respondent in the review application admits.

It was not for Continental to make sure that their three billboard sites were included in the lease agreement. Indeed the language of the Principal Estates Officer suggests that he was trying to disguise a slip on the part of the Council in not including in the lease agreement the three sites where Continental wished to restore its billboards.

7. One fact is crystal clear. The permission granted to Continental in the option letter of 14 September 2007 has never been withdrawn. What is also apparent is that in the interdict proceedings, the Council sought to introduce a new reason for the claimed right to revoke Continental's acquired right to restore the billboards, namely the lack of road reserve space.
8. In her founding affidavit in the review proceedings, Ms. Steenkamp makes the point that when she was told by Mr. Busanang on 28 January 2011 that the permission granted to Continental had been superseded by the lease agreement,

this argument of lack of road reserve space was not a reason given to her. In an argumentative and abusive response, the Town Clerk for the Council does not deny this allegation. Instead, she accuses Continental of being motivated by sheer greed and of profiting from unlawful activity. There is no basis for these suggestions. Her further likening of Continental to a “rogue” industry player is totally misplaced, and her allegations of dishonesty on the part of Continental offensive.

9. The Council still labours under the misapprehension that Continental had to get fresh permission to restore their billboards. Its real argument appears at paragraph 14 of the Council’s Answering Affidavit where it is said that –

“14.1 It is admitted that the sites referred to in Annexure “D” were not included in the list of the sites that were leased to the applicant. The simple logic is that those sites were not leased to the applicant.”

That is the basis for the following argument advanced on affidavit suggesting that without a formal lease agreement in respect of those sites, there is no right to put up billboards

on the sites. This is, of course, not evidence. It also ignores the fact of prior permission was never withdrawn.

10. Dingake J found, in his judgment in the review application, that the letter of 14 September 2007 made quite clear that where an election to restore to an original position was made, no further Council approval was required. I agree that the letter made that plain. The learned Judge *a quo* held, again correctly in my view, that the lease made clear that it applied only to the sites enumerated in its annexure, and does not include the site along Nyerere Drive.

I also agree that the letter of 14 September 2007 fulfils all the elements of a legitimate expectation that a hearing would be afforded to Continental before the rights conferred in that letter were summarily revoked. The unlawful action of the Council in attempting to remove the first billboard demonstrated that they had no intention of affording any hearing to Continental.

11. Mr. Modimo conceded that Continental's sites on Nyerere Drive were not included in the lease and was driven to argue

that their occupation by Continental amounted to trespass. The argument requires a finding that the permission granted to Continental to restore without additional approval was somehow revoked. This in turn necessitates a finding that the lease superseded the earlier permission and removed it. Once it is conceded, as it was on affidavit, that the lease did not cover Continental's billboard sites, the argument cannot properly be advanced.

12. Mr. Modimo also attempted to argue that the present position of the billboards falls foul of the applicable municipal bye-laws, and of the common law duty upon the Council to restrain unauthorised occupation of property under its control. He submitted that the Council had proceeded to remove the billboard itself, relying on its bye-laws to do so. This submission finds no support in the affidavit of the Town Clerk. While she does speak of what the Council may not properly allow, she does not say that the unlawful action of starting to attempt to dismantle Continental's first billboard, was pursuant to a bye-law requirement. Even if it had been, notice of a hearing would have been required. Whether or not a bye-law might be

relevant to this matter was not part of the reason why the Council acted as it did in damaging Continental's property. Much of Mr. Modimo's written argument deals more with the spoliation and possible counter-spoliation relating to the interdict proceedings. That is not relevant to the review which is concerned with the decision of the Council that Continental's right to restore billboards on Nyerere Drive had been superseded by the provisions of a lease agreement. The review sought an order reviewing that decision.

13. On 9 July 2012, I ruled that the costs of the abandoned application for leave to appeal the interdict judgment of 26 May 2011 would be determined at this later stage. I consider that the costs of that abandoned application for leave to appeal should follow the result in this review appeal.
14. Accordingly the appeal is dismissed with costs, such costs to include the costs incurred by the respondent (Continental) in relation to the leave to appeal application

made by the appellant (the Council) and abandoned by the appellant, as recorded in my ruling of 9 July, 2012.

DELIVERED IN OPEN COURT AT GABORONE THIS 1st DAY OF FEBRUARY 2013.

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J. G. FOXCROFT
JUSTICE OF APPEAL

I agree

.....
LORD ABERNETHY
JUSTICE OF APPEAL

I agree

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E. W. M. J. LEGWAILA
JUSTICE OF APPEAL