



CASE NO.: I 706/2010

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PRIMEDIA OUTDOOR NAMIBIA (PTY) LTD

PLAINTIFF

VS

**ROADS CONTRACTOR COMPANY LTD
ROADS AUTHORITY**

**1ST DEFENDANT
2ND DEFENDANT**

CORAM: MILLER, AJ

Heard on: 11 July 2011

Delivered on: 23 November 2011

JUDGMENT:

MILLER, AJ: [1] On the 8th of March 2010 the respondent, as plaintiff issued summons against both applicants as defendants. I will refer to the parties as they are cited in the summons.

[2] In essence the plaintiff alleged that that it was the lessee of certain street light poles in Oshakati in terms of a written lease agreement entered into between it and the lessor, Oshakati Premier Electric (Pty) Ltd. Although the plaintiff alleged that the agreement was annexed as Annexure "POC1", it was in fact not so annexed and consequently not served on the defendants. The plaintiff furthermore alleged that in terms of the agreement it was entitled to install advertising signs on the street light poles it had leased.

[3] The plaintiff went on to allege that it had in pursuance of the agreement erected 200 advertising frames on the leased poles.

[4] The plaintiff then alleges that during December 2009, the first defendant, alternatively the first or second defendant acting jointly unlawfully removed 100 of the advertising frames.

[5] Consequently the plaintiff alleges that it became entitled to the following relief:

“ **CLAIM 1**

1. Delivery by the first defendant, alternatively the first and second defendants of the plaintiff's property in an undamaged condition, consisting of 100 advertising frames;
2. Alternatively, payment by the first defendant of N\$253 000-00;
3. In the further alternative, payment by the first and second defendants, jointly and severally the one paying the other being absolved of N\$253 000-00;
4. Interest on the aforesaid amount *a tempore morae* to date of payment;

5. Costs of suit
6. Further or alternative relief

AD CLAIM 2

7. Payment by the first defendant of the amount of N\$1,430,000-00;
8. Alternatively, payment by the first and second defendants, jointly and severally, the one paying the other being absolved, of the amount of N\$1,430,000-00;
9. Interest on the aforesaid amount *a tempore more* to date of payment;
10. Costs of suit
11. Further or alternative relief.”

[6] I pause to mention that the sum of N\$235,000-00 was alleged by the plaintiff to be the monetary value of the 100 advertising frames. Likewise the sum of N\$1,430,000-00 was alleged to be the loss of advertising revenue suffered by the plaintiff subsequent upon the removal of the 100 advertising frames.

[7] Neither of the defendants entered an appearance to defend, whereupon the plaintiff moved an application for judgment by default before Ndauendapo, J on 30 July 2010. That application was granted.

[8] The first and second defendants now apply for an order rescinding the judgment. The application is premised in the first place on Rule 44 of the Rules of this Court. In essence the applicants allege that the judgment was granted in error.

[9] It is convenient at this juncture to consider the judgment in the form in which it was granted. The order made reads as follows:

“AD CLAIM ONE

1. Payment by the first and second respondents/defendants to pay the plaintiff, jointly and severally, the one paying the other being absolved, of the amount of N\$253 000.00.
2. Interest on the aforesaid amount *a tempore morae* at a rate of 20% per annum, from date of judgment to date of payment.
3. Costs of suit.
4. Further or alternative relief.

AD CLAIM TWO

5. Payment to the plaintiff by the first and second respondents/defendants jointly and severally, the one paying the other to be absolved, of the amount of N\$220 000.00.
6. Thereafter, from the date of this judgment, payment to the plaintiff of the monthly amount of N\$27 500.00 by the first and second respondents/defendants, jointly and severally, the one paying the other being absolved, for each and every month and until plaintiff is able to secure an undertaking from both the respondents/defendants that the plaintiff's advertising boards, once erected in Oshakati again, will not be removed again by either of the defendants.
7. Interest *a tempore morae* on the amounts mentioned in paragraphs a) and b) at a rate of 20% per annum, from date of judgment to date of payment.
8. Costs of suit.

and the Respondents/defendants being in default, the Court grants default judgment for the applicant/plaintiff as claimed, with costs of suit.”

[10] It is immediately apparent that the judgment handed down differs in material respects from the relief claimed in the Particulars of Claim. Paragraph 6 of the judgment was introduced as part and parcel of the relief claimed for the first time when the application for default judgment was moved. At no stage did the plaintiff seek an appropriate amendment to the particulars of claim.

[11] It is not permissible for the plaintiff to go about matters that way. That much was virtually conceded by Mr. Barnard, who appeared for the plaintiff before Court. The plaintiff faces other difficulties over and above that.

[12] In an affidavit which accompanied its application for default judgment, the deponent thereto, a Mr. Mouton states that in relation to Claim 2, the plaintiff relies on a written agreement concluded between itself and Patch Communications in terms whereof the plaintiff become entitled to revenue in the sum of an average of N\$27, 500.00 and which revenue no longer accrues to it. Mr. Mouton alleges that the agreement is attached to his affidavit as Annexure “D”. The difficulty is that Annexure “D” is an agreement concluded between the plaintiff and Oshakati Premier Electric. I suspect that to be the agreement which the plaintiff failed to attach to its particulars of claim. That strikes me as a fatal defect.

[13] I am satisfied that in the circumstances the defendants have established that the order granted by Ndauendapo, J was erroneously sought and granted.

[14] In these circumstances there is no need for the applicants to establish good cause as a requirement.

[15] I accordingly set aside the default judgment granted by Ndauendapo, J on 30 July 2010.

[16] The respondent is ordered to pay the costs of the application.

MILLER AJ

ON BEHALF OF THE PLAINTIFF: Mr. Barnard
Instructed by: Francois Erasmus & Partners

ON BEHALF OF 1ST DEFENDANT: Mr. Obbes
Instructed by: MB de Klerk & Associates

ON BEHALF OF 2ND DEFENDANT: Mr. Strydom
Instructed by: Conradie & Damaseb