

COMMON LAW PRINCIPLES: VERBAL MANDATE TERMINATED AT SHORT NOTICE

Liberty Group Limited and Others v Mall Space Management CC t/a Mall Space Management (644/18) [2019] ZASCA 142 (1 October 2019)

Under common law, a mandate is generally terminable at the will of the principal and unless specifically provided for, a notice of intention to terminate is unnecessary. Could the agent, whose oral mandate was terminated given 5 days' notice, call on principles of Ubuntu to demand a 6 month notice period?

The Judgment can be viewed [here](#).

FACTS

Liberty Group Ltd owns Eastgate Shopping Mall, Liberty Midlands Mall, Liberty Promenade Mall and is co-owner of the Sandton City Mall. Mall Space Management CC (Mall Space) had for a number of years acted as Liberty Group's agent to facilitate the conclusion of rental agreements with exhibitors and tenants at these shopping malls.

The parties never concluded a written agreement to regulate this mandate. Mall Space advised that its responsibilities under the agreement included invoicing the exhibitor and upon receipt of payment from the exhibitor, paying it over to Liberty Group. This was the position up until May 2015 when the invoicing function was taken over by Excellerate Brand Management (Pty) Ltd (Excellerate). (Later they also were awarded the mandate that Mall Space had.)

During 2017, as a result of a dispute between Mall Space and Liberty Group regarding Mall Space's alleged failure to pay over moneys collected on Liberty Group's behalf, the latter gave five days' written notice to Mall Space to terminate its mandate. Shortly before this termination, some of Mall Spaces' employees left its employ to join Excellerate after they were offered better employment prospects. (Mall Space contended that these developments and changes were not effected for operational reasons, but were made in order to facilitate an unlawful competition between it and Excellerate.)

Aggrieved by the termination of its services, Mall Space launched an application against Liberty Group and Excellerate in the High Court, seeking interdictory relief, essentially: (i) preventing Liberty Group from terminating its mandate; (ii) directing Liberty Group to allow it access to the four malls concerned for the purposes of performing its work; and (iii) preventing Excellerate from unlawfully competing with it in relation to facilitating the conclusion and rental agreement for exhibition space at the relevant malls.

The High Court, applying the constitutional values of Ubuntu and fairness, granted an order in favour of Mall Space.

Liberty Group appealed against the decision to the Supreme Court of Appeal. The questions before the Court were:

- i) Whether Liberty group, as principal under a mandate agreement, were obliged in terms of the contract of mandate they concluded with Mall Space to give the latter six months' notice before terminating the mandate; and
- (ii) Whether Excellerate's assumption of Mall Space's mandate in relation to the shopping centres concerned constituted unlawful competition.

HELD

Cancellation notice and Ubuntu

- Under common law, Mall Space's mandate was terminable at the will of Liberty Group, as principal. This was not unreasonable as it was clear to Liberty Group that Mall Space could not deliver on their mandate in that they failed to account properly to them. Liberty Group could not be expected to wait for the worst to happen before taking action to protect their own financial interests, which had been placed in jeopardy by Mall Space's mismanagement of the contract. There was no obligation on Liberty Group to give Mall Space six months' notice before terminating the mandate.
- The High Court thus erred in directly applying the principle of Ubuntu to the common law rules of agency (contract) as a basis to grant the relief and find that a six month notice period would be reasonable in the circumstances. This was because the principles of Ubuntu are not stand-alone mechanisms on which to base a claim for relief. It had to be appreciated that the fact that a term in a contract or common law is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. In the absence of evidence that a party's constitutional rights were infringed, it is impermissible for a court to develop common law by infusing the spirit of Ubuntu and good faith so as to invalidate a term or clause in question.
- As such, the question on length of notice did not arise in this matter. The mandate did not impose an obligation on Liberty Group to give Mall Space six months' notice if they wanted to terminate it. Mall Space has not shown that it had the right to be given six months' notice before its contract could be terminated. In these circumstances, it was not competent for the High Court to grant an order interdicting Liberty Group from cancelling the contract.

Unfair competition

- Mall Space's cause of action against Excellerate based on unlawful competition should also have failed because there was no case made out for it. Excellerate did not act wrongfully in assuming some of the roles and responsibilities which were hitherto performed by Mall Space in terms of the mandate. Mall Space's mandate was lawfully terminated and there was no obligation upon the principals to have given Mall Space six months' notice period before terminating their mandate.
- In order to succeed with a final interdict against Excellerate, Mall Space had to show that the contractual right it obtained from Liberty Group protects an interest that is also enforceable against Excellerate with which it has no contractual relationship; that Excellerate unlawfully infringed or threatened to infringe that right and that there was no adequate alternative remedy. Mall Space failed to establish the three requisite elements for the grant of a final interdict.

CONCLUSION

The appeal was accordingly upheld.