IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No: 54063/2007
Date: 06/02/2008

UNREPORTABLE

In the matter between:

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| BARLOWORLD MOTOR (PTY) LTD<br>t/a AVIS RENT A CAR | APPLICANT |
| and | |
| CLARA BELLE CAR RENTAL CC | 1ST RESPONDENT |
| CLARE ALANA PARMENTER-BRIDGER | 2ND RESPONDENT |
| TELKOM SOUTH AFRICA LIMITED | 3RD RESPONDENT |
| PURE MAGIC TRADING 18 CC | 4TH RESPONDENT |

JUDGMENT

SAPIRE, AJ

The Applicant trades as car hirer, under the name AVIS RENT A CAR (AVIS), leasing motor vehicles, usually for defined, short periods to persons who require the temporary use of a motor vehicle. In this field the business name AVIS is prominent world wide. The right to its use in South Africa vests in the applicant. This right entitles the applicant to dress its employees in distinctive clothing known as livery, associated with and peculiar to the AVIS name and to the use of the distinctive conformation of its logo. There are numerous

locations throughout the country, where the business is conducted from premises decorated in a distinctive AVIS style. The Applicant had, in March 2004, acquired the AVIS business in South Africa from its former proprietor, ZEDA CAR RENTAL (PTY) LTD. (ZEDA). At the time of such acquisition, First Respondent, of which Second Respondent was the sole member, had been an agent of ZEDA and as such conducted AVIS business in Centurion. First Respondent's relationship with ZEDA had been governed by the terms of written agreements, which were successively executed, the second agreement superceding the first.

When Applicant acquired the AVIS business from ZEDA, Applicant replaced ZEDA as First Respondent's principal. There is a strong balance of probabilities favouring the inference that following on the acquisition by Applicant of the AVIS business, the terms of the second written agreement between the First Respondent and ZEDA governed the relationship between the First Respondent and the Applicant.
In about February 2006 the Applicant determined that all its agents, including the First Respondent, then conducting its business on its behalf, should sign new agency agreements. A draft agreement providing for the continued relationship *of* the parties was submitted to the First Respondent for signature.
Attached to the founding affidavit in these proceedings is a copy of what appears to be the new agreement *of* agency between the Applicant and the First Respondent. An authorized signatory duly witnessed subscribed thereto on Applicant's behalf on 20th February *2006.* The Second Respondent by her unwitnessed and undated signature completed execution as the "OPERATOR or DIRECTOR OF THE OPERATOR". The First Respondent was the "OPERATOR". On this agreement the Applicant relies.
The First Respondent however contends some *of* its terms, if not the whole agreement are not binding on it. After execution *of* the agreement the First Respondent returned the completed document to the Applicant Communication *of* acceptance by delivery *of* the signed dcument was made under cover *of* a letter dated 28th February 2006 signed by the Second Respondent expressing her (by which we are to understand the First Respondent's) reservations in these terms "Herewith the Barloworld Agency agreement which I have duly signed, but with the following reservations in terms of:
Clause 4.2

Gives the impression that the company may terminate the agreement merely by giving two months notice without reason is not linked directly to clause 16 which deals which justification for termination.

Clause 7.5.3

(Not relevant)
Clause 8.4
(Not relevant)
Once clarity has been obtained with regards to the amending of the clauses and written confirmation thereof has been received the clauses will either be effective as stated or as amended"

Nothing further took place in connection with the agreement, and there was no communication between the parties dealing with the issues which were raised in the letter.
The Second Respondent had at this time already been functioning as Applicant's agent conducting AVIS business in Centurion for some two years. There is nothing to indicate that the terms governing First Respondent's relationship with the Applicant during that period were anything other than those contained in the Second Agency agreement with Applicant's predecessor ZEDA.
There is dispute as to the legal effect of the signing the contract, the communication of the First Respondent's acceptance with "reservations" and First Respondent's continued functioning thereafter as before. The Respondents contend that only the questioned clauses are not binding. This is a doubtful proposition as if the letter has any effect it could well be a rejection of the whole agreement as the acceptance does not conform to the offer.

In the middle of 2007 the Applicant the Applicant decided that as from 1st January 2008, it would itself conduct, what had hitherto been the Centurion agency, as principal. It envisaged that the First Respondent would be engaged as employee, to manage what would be referred to as a branch rather than an agency. The Applicant also had in mind taking over the lease of the premises and the First Respondent's staff. Although a meeting took place and negotiations ensued no agreement could be reached. The Respondents (first and second) were dissatisfied with the amount of a goodwill payment offered by Applicant as a consideration for Second Respondent giving up the Agency, and the Second Respondent taking up employment with the Applicant, and binding herself to a restraint agreement.
It is pertinent to bear in mind that the Applicant had the right, at its will to terminate the agency relationship on notice *without consideration.* This is so whether 4.2 of the new agreement is binding or not.

The Respondent's contends in regard to the agency agreement have been earlier observed. If this proposition is correct, it could mean that the previous agreement governing their relationship would remain in force. The previous agreement with ZEDA which was taken over by Applicant had a similar if not identical term for termination. In both cases the period of notice was fixed at two months.

If neither agreement was binding, the period of notice for termination would, at common-law, be a reasonable period. Having regard to the history and circumstances of the agency two months could well be the appropriate period. Furthermore a restraint agreement was provided for in the existing contract, meaning that the First and Second Respondents would not be losing anything by taking up employment with the applicant on terms including a restraint.

As First and Second Respondents did not accept the Applicants offer, Applicant, on 28th September 2007 by letter *of* that date, withdrew the offer and on two months notice terminated the agency as of 30th November 2007. Although the Respondents dispute the legality *of* the termination, contending that Applicant's termination on short notice amounted to repudiation, and are contemplating issuing, or have already issued summons claiming a large amount *of* money as damages from the Applicant, at the commencement *of* these proceedings the First Respondent was no longer conducting business as applicant's agent. The issues raised in this application do not require a determination whether the agency was legally terminated or not. The termination is an undisputed fact.

The first issue is whether the fourth respondent is entitled to retain and deal with the telephone numbers which pertained to the business of AVIS RENT A CAR in Centurion.

Fourth Respondent is a rival to Applicant as a car hire company. It has taken over the premises in which the First Respondent formerly occupied when it operated as Applicant's agent. There may be an element of coincidence in this. It can be no coincidence however that the telephone and fax numbers which were since 2001 used by the applicant have now been allocated by the Third Respondent to the Fourth Respondent.

When the First Respondent was agent, first for ZEDA and thereafter for Applicant, it was obliged to obtain and maintain telephone and fax facilities as an essential part of the AVIS business. The subscriber for these facilities was supposed to have been originally ZEDA, but the First respondent contracted with the Third Respondent in First Respondent's own name. This situation was allowed to continue until the final termination of the agency.

The numbers allocated to the AVIS Centurion agency in respect of these facilities were, since 2001, referred to in directories and advertising material which is still current as pertaining to and associated with AVIS in Centurion. There can be no doubt that many of those requiring car rental and wished to contract AVIS would do so using those numbers. Substantial goodwill attaches thereto and is the valuable property of Applicant.

On termination of the First Respondents agency, whether on short notice or not First Respondent clearly had no right to retain the numbers. For the First

Respondent to take advantage of it being the subscriber for the telephone services using the numbers allocated to AVIS and to not only retain them adversely to the Applicant but to ensure that they were allocated to the Fourth Respondent, is a deliberate breach of its obligations as Applicant's agent. The conduct of First and Second Respondents in this regard demonstrates a conspicuous lack of good faith. This is so irrespective of which of the written agreements is applicable and even if no written agreement is found to exist. The conduct of the First and Second Respondents is that of an agent wrongfully retaining the principal's property after termination of the agency, and cannot be justified by contentions of short notice having been given. If such be the case the First Respondent has its remedies.

There is an overwhelming probability that the Fourth Respondent, which is now using those numbers in connection with its business rivaling that of the Applicant, is not an innocent party. The transfer of the numbers to its telephone lines could not have taken place without the cooperation of the First and Second Respondents. These respondents, (excluding the Third Respondent), have clearly connived, designedly and with full knowledge of the circumstances prevailing to take advantage of the situation to filch business from the Applicant. In whatever manner the Fourth Respondent may have its staff answer incoming calls and communications on these lines, the fact remains that persons intending to do business with Applicant find themselves in contact with a rival car hire firm. Some substantial loss to the Applicant is inevitable.

Clearly this state of affairs cannot be allowed to continue and an order will be made providing for the appropriate relief.

The second form of relief sought by the applicant amounts to an enforcement of the restraint provisions of the agency agreement. Appreciating the difficulties as they appear from the affidavits, in obtaining this relief in the present circumstances, Applicant's counsel informed me that should the Applicant be successful in regard to the telephone numbers the Applicant would not press for any further relief. I will accordingly make no order in regard thereto.

For respondents it was argued that if the Applicant was not successful in its claim for relief enforcing the restraint, the order for costs should reflect this. This it was said applied particularly to the Second Respondent, who it was suggested was only interested in the proceedings as far as the restraint was concerned. The proposition cannot be maintained. The Applicant is substantially successful. The issue of the telephone numbers was from the outset been of no less importance than that of the restraint and has remained so and in contention until now. The First, Second and Fourth Respondents have colluded in giving rise to the cause of complaint and made consistent, unremitting common cause in opposing the relief to which I find the Applicant is entitled. They must pay the costs, their liability therefor being joint and several.

The Third Respondent although joined and served, has taken no active part in the proceedings and I am informed will abide the decision of the court.

It is ordered

1. With immediate effect the Fourth Respondent is not to receive any communications on the telephone and fax lines to which the numbers 012 663 1341,012 663 1347, 012 663 1348 have been allocated and shall keep the lines disconnected except for outgoing communications until new and different numbers have been allocated.

2. The Third Respondent shall change the numbers of the telephone or Telefax services allocated to the Fourth Respondent at its premises in Centurion from 012 663 1341,012 663 1347, *012* 663 1348, to any other numbers available and ensure that any persons calling on those lines is answered with a message that the numbers have been changed and that AVIS may be reached by dialing the numbers presently allocated to the Applicant

   Any cost involved in giving effect to this order shall be for the account of the Fourth Respondent

3. The First, Second and Third Respondents shall pay Advocate's costs incurred in this application

S W SAPIRE
ACTING JUDGE OF THE HIGH COURT