

Sneller Verbatim/PJ

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

CASE NO: 14957/03

2004-03-10

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SOURCED BY
BURRELLS

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO

(2) OF INTEREST TO OTHER JUDGES YES/NO

(3) REVISED

DATE 20/4/04 SIGNATURE [Signature]

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In the matter between

SUNSMART PRODUCTS (PTY) LTD



Applicant

and

FLAG AND FLAGPOLE INDUSTRIES

(PTY) LTD t/a NATIONAL FLAG

Respondent

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J U D G M E N T

CLAASSEN J: I have before me two applications. The one regarding a design, infringement of design and the other one infringement of a patent in which matter I have been sitting as a Commissioner of Patents. The two cases run together, they concern the same parties and the same issue.

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In both matters the applicant is seeking an interdict against the respondent against selling and disposing of certain flags of which the applicant says he is a registered designer and in the other case he is

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the registered patent holder.

At the outset Mr Puckrin SC on behalf of the applicant submitted that if one deals with the design application first and it is successful it really takes care of the patent application as well.

In answer thereto Mr Salmon, initially, had some problems with the approach, but eventually a few things happened, amongst other that Mr Puckrin also withdrew certain claims in an action instituted in consequence of the application proceedings and having withdrawn that Mr Salmon was happy that the *lis pendens* issue fell away, but because of that he applied for a postponement of the matter, specifically the design application in order to amplify his papers.

The simple reason for that application is that when the design application was launched somewhere in June last year, the respondent filed answering affidavits in July last year, but in the answering affidavit the deponent says that due to the urgency and the short notice the necessary information about previous knowledge and other designs could not be obtained and the affidavit would have to be amplified. Eventually there was a reply and the matter was enrolled in November last year for hearing on this week's motion court roll.

In the meantime the respondent did not amplify its papers at all and on the merits of the application there is no answer really to the claim for a final interdict against the respondent. The application now for a postponement is to amplify those papers.

It was stated in the answering affidavit also that when the application was launched the applicant's attorney intimated by a letter that no extension of time limits would be granted and therefore the

defendant would have to abide by the rules of court in terms of filing affidavits.

Today in argument Mr Salmon in his heads of argument also raised the issue of *lis pendens* because since then i.e. February this year, the applicant filed summonses and particulars of claim in both the design and patent application because in the application the prayers are for an interdict *pendente lite* which then obviously would mean that they have eventually to file a summons as well. At this stage before me is only the question of postponement and what to do with it and the terms thereof.

On the papers as they stand and despite Mr Salmon's argument to the contrary, I am quite satisfied that the respondent is infringing the design of the applicant's design for this particular type of flag and without papers being amplified I would have been quite happy to grant a final interdict, but I do not think it will do justice to the respondent if I grant such an order, because it is obvious that the respondent needs to amplify its papers. It did not answer fully to the merits of the application.

The question then is whether an interim order is apposite in the circumstances and Mr Salmon has argued strenuously that the grounds for an interdict have not been made out by the applicant. More specifically the questions of irreparable damage and balance of convenience have not been properly aired by the applicant in his founding affidavits.

As Mr Puckrin correctly pointed out that if a case is made out the stronger the case on the one leg the weaker the other leg can be.

Although irreparable harm is not spelt out in all the detail in the founding affidavit, there are certainly allegations of irreparable harm and also of balance of convenience. In fact the applicant goes so far as to tender paying of any damages that might flow from an interim interdict. 5

In any event it would be totally unjust to deny the applicant the right of a temporary interdict on the grounds of a permanent interdict not properly established and in the circumstances it would be to the benefit of all if the interim period can be ruled in terms of an order of some kind. I do believe I have a discretion to grant an interim order under these circumstances. 10

I therefore make the following order:

1. The respondent is interdicted and restrained from infringing design registration A97/1155 pending the determination of this application. That is case no. 14957/03. 15
2. The matter is postponed *sine die*;
3. Costs to be costs in the cause.

As far as the patent application is concerned that is case no. 97/1155, the matter is postponed *sine die*. Costs are reserved.

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ON BEHALF OF THE APPLICANT

ADV PUCKRIN SC

ON BEHALF OF THE RESPONDENT

ADV SALMON