

SOUTH AFRICA / JUDGMENT

AR Controls (Pty) Ltd v Bray Controls Africa (Pty) Ltd (40571/2018) [2019] ZAGPJHC 414 (8 October 2019) [2019] ZAGPJHC 414

COURT

South Gauteng High Court, Johannesburg

BEFORE

M A Makume

CASE / FILE NUMBER

40571/2018

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE NO: 40571/2018
In the

matter between: AR
 CONTROLS (PTY) LTD
 Applicant
 and
 BRAY
 CONTROLS AFRICA (PTY)
 LTD Respondent

JUDGMENT

MAKUME, J:

- [1] During or about July 2018 the Applicant Bray Controls Africa (Pty) Ltd addressed letters to certain companies in which letter Bray said the following about the Respondent AR Controls (Pty) Ltd (AR):

“On the 11th June 2017 Analytical Response t/a AR Controls has been notified of their termination of agreement as sole agents and distributors for all Bray products both local and Internationally. Further to this Bray International has uncovered that AR Controls had subsequently endeavoured to engineer their own product named “Incolok” valves and controls. We have discovered

that these valves have been manufactured based in part in reverse engineering of Bray valves”.

We have further discovered that AR Controls has supplied original Bray valves bearing the Incolok mark suggesting that the valves are Incolok valves. We are in the process of taking legal action against AR controls for this.”

- [2] The letter was distributed and sent to a number of clients of both Bray and AR. It is common cause that Bray and AR are competitors in the business of industrial valves.
- [3] Infuriated by the contents of the letter AR controls as applicant launched an application during October 2018 against Bray in which application AR controls seeks protection from unlawful competition on the part of Bray.
- [4] In its founding affidavit AR controls made reference to a number of documents in support of its grievances against Bray.
- [5] On the 3rd December 2018 Bray delivered a notice in terms of Rule 35(12) of the Uniform Rules of Court. By the 20th December 2018 AR had not responded to the Rule 35 (12) notice as a result Bray served a notice in terms of Rule 30A calling on AR to within 10 days of service respond to the Rule 35 (12) notice.
- [6] The 10 days expired and still there was no response from AR. This prompted Bray to launch this application on the 25th July 2019 in which application Bray the applicant seeks the following orders:

6.1 Directing and compelling AR Controls (Pty) Ltd (the Applicant) within 5 days of granting of the order to provide for inspection and allow the Respondent to make copies of the documents referred to in the Applicant’s founding affidavit in the main application which have been requested in paragraphs 1 to 9 of the Respondents notice in terms of Rule 35(12) dated 30 November 2018.

6.2 Alternatively striking out the Applicant’s founding affidavit in the main application in terms of Rule 30(A) 2.

- [7] The documents required are those that the Applicant (AR) has made reference to in paragraphs 77 of its founding affidavit.
- [8] I shall in keeping with the choice of the parties retain their description and nomenclature as in the main application.
- [9] It is common cause that between 1998 and 2017 the Applicant was the sole distributor of Brays range of products in Africa. Bray Africa the Respondent is a subsidiary of Brays International Inc. It is a leading manufacturer and supplier of a wide range of valves

including butterfly valves, balls valves and pressure independent valves to the industry and mining. These valves are used mainly to meet the demanding flow of application of chiller/boiler isolations, air handles and terminal units for new construction, retrofit and/or heed certification applications in buildings such as hospitals, schools and universities, data centres, airports, hotels and commercial offices.

[10] The Applicant in its founding affidavit in the main application says that as soon as it was becoming clear that its sole distributorship agreement with Bray was coming to an end it took steps to establish its own product range in order to continue trading in the business sector of Industrial and Commercial Valve. To achieve this it amongst others embarked on a “cumbersome and detailed process amongst which were to:

10.1 Sign OEM agreements granting it the intellectual property and manufacturing drawing to the product.

10.2 Registered trademarks in respect of Incovalve and Controls, Incovalve and Incolok.

10.3 Compiled Trim charts containing all of the specifications and composition of Incovalve and Incolok.

10.4 Concluded agreements with Chinese and Korean Manufactures on the manufacture of the Incovalve and Incolok products.

10.5 Compiled brochures for both the Incovalve and Incolok products.

10.6 Compiled actuator sizing sheets.

10.7 Compiling of repair that price lists.

10.8 compiled gearbox price list

10.9 Compiling of cost pricing on Inco accessories.

[11] In this application the Respondent Bray maintains that the documents stated in 10.1 to 10.9 above should be produced to it prior to them filing their answering affidavit to the Applicant’s main complaint of unlawful competition. The Respondent says that the said documents are necessary and relevant as same will prove that:

11.1 The Applicant was dishonest whilst acting as Bray’s sole distributor in that it used Brays’s confidential information, trade secrets and intellectual property to conclude the OEM contracts with the Chinese and Korean Manufacturers.

11.2 In compiling the trim charts the Applicant copied Brays confidential information.

11.3 When the Applicant registered trademark for both Incovalve and Controls and Incovalve and Incolok it will illustrate that the Applicant commenced to do so whilst still contracted to Bray as sole distributor.

11.4 The brochures that the Applicant compiled were essentially a duplication of brochures of Brays products which the Applicant produced using Brays confidential information, trade secrets and intellectual property.

11.5 That the actuator sizing sheets were also compiled by using Bray's confidential information, trade secrets and intellectual props.

[12] The Respondent maintains that it is necessary to have access to the documentation referred to above to enable it to deal with the allegation against it as set out in the Applicant's founding affidavit.

THE APPLICANT'S RESPONSE

[13] In opposing the application the Applicant maintains amongst others that the starting point is that the Respondents right to access to the document is not an absolute right and that the court has a discretion.

[14] Secondly it is the Applicant's stand point that the documents being requested are either privileged or irrelevant. The Applicant mentions that the Respondent is a direct competitor and that making available the documents will defeat the very purpose of the main application in that the Respondent will then have free access to the Applicant's trade secrets.

[15] The above stance is made stronger by the fact that after the Respondent had not succeeded in purchasing AR it then successfully poached Mr Jan Hatting who held a key position of sales manager at AR. In the view of the Applicant the Respondent is bent on getting rid of the applicant in order for it to create a monopoly.

[16] The Respondent has conceded in its replying affidavit that the following documents have been made available namely:

16.1 One OEM Agreement in a redacted form.

16.2 One redacted agreement named "Independent Design and Intellectual Property Generation Agreement.

16.3 Copies of the registered trademark document in respect of Incovalve and controls, "Incovalve" and "Incolok".

16.4 Copies of the brochures for each of the Incovalve and controls Incovalve and Incolok products.

[17] According to the Respondent the following documents which have been requested are still outstanding and it is these that the Respondent request the court to order that they be produced:

17.1 One other OEM agreement.

17.2 The agreement between AR and Korean Manufacturer.

17.3 Copies of the trim chart.

17.4 Copies of the actuator sizing sheets.

17.5 Copies of the repair kit prices lists.

17.6 Copies of the gearbox price lists.

17.7 Copies of the cost pricing on INCO accessories.

[18] This court must now decide if the outstanding documents are necessary to enable the Respondent to file its answering affidavit. The starting point is to deal with the issue of relevance. *Vermotern J in Mangum Aviation Operations vs Chairman, National Transport Commission 1984*

(2) SA 398 (W) held that rule 35(12) is not qualified by the requirements of relevance and that once a document has been referred to it must be produced. On the other hand *Friedman J in Gorfinkel vs Gross Hendler & Frank 1987 (3) SA 766 (C)* held that prima facie there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection unless the document is not in his or her possession and it cannot be produced or the document is privileged.

[19] In the words of *Schultz AJ in Crown Cork & Seal Co Inc and Another vs Rheem South Africa (Pty) Ltd & Others 1980 (3) SA 1093 (W)* which position was quoted with approval by *Moseneke DCJ in the matter Independent Newspapers (Pty) Ltd vs Minister of Intelligence Services In re: Masetlha vs President of the Republic of South Africa and Another 2008 (5) SA 31 (CC)* it was held as follows: “A conflict arise between the need to protect a man’s property from misuse by others, in this case the property being confidential information and the need to ensure that a litigant is entitled to present his case without unfair halts. And although the approach of a court will ordinarily be that there is a full right of inspection and copying, I am of the view that our courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant’s right to a fair trial, of which the discovery procedure often forms an important part.”

[20] I wish to align myself with the sentiments expressed by *Schultz AJ* in deciding on the issues in this matter.

REQUEST FOR COPIES AD PARAGRAPHS 77.7.14 AND 77.11

- [21] The Respondent's complaint is that the Applicant made reference to more than one agreement and only produced one in a redacted form. It also says that reference was made to one Chinese and Korean Manufacturer agreement also that they are in a redacted form.

I can find nothing improper with the response by the Applicant in my view the Applicant has furnished sufficient information about the type of contracts it concluded and it is those two contracts that the Applicant will use at the hearing of this matter. It is clear that there is no Korean agreement. The Applicant says agreement "A" is with a Chinese company responsible for manufacturing of various products of the applicant relating to Incolok and Incovalves whilst agreement B is in essence also an agreement with a Chinese company responsible for the design and generation of intellectual property of the Applicant relating to Incolok and Incovalve.

REQUEST 77.9 (TRIM CHARTS) 77.16 ACTUATOR SIZING SHEETS

- [22] The Applicant maintains that both these documents should remain confidential as in the case of Trim sheets should any competitor intercept the product or code it will create confusion between Applicant and its clients.
- [23] Applicant further says that as far as the actuator sizing sheets are concerned these are documents that provide specifications as to different actuators that can be used to operate various valves received from various manufacturing parties. The actuator sizing sheet is compiled as a direct result of various tests performed on combination of valves and actual. This information is accordingly confidential.
- [24] In response all that the Respondent says is that the actuator sizing sheets are relevant and should be produced because the Applicant used information it gained whilst a sole distributor of Bray products.
- [25] I am not persuaded by this argument. The Respondent does not say how the absence of this document will prejudice it from meeting the case against it and file its answering affidavit. It must be remembered that Mr Jan Hatting who was a sales person employed by the Applicant should be in a position to relate how these two documents the Trim chart and the Actuator sizing sheets have been used to reverse engineer Brays products. I accordingly find that the Respondent has not made out a case why these two documents should be produced.

REQUEST FOR REPAIR KIT PRICE LISTS (77.17) GEARBOX PRICE LISTS

(77.22) COPIES OF THE COST PRICING ON INCO ACCESSORIES (77.23)

- [26] The Applicant says that all these price lists are confidential and if same are divulged then it will reveal the identities of supplies and or clients and will lead to a competitor to approach clients and poach them away by undercutting the competitor. The Respondent's argument on this crucial aspect is unconvincing and stands to be rejected.

[27] In conclusion it is my view that fairness dictates that the intellectual property and trade secrets of both litigants must be protected. In the same manner that the Respondent speculates and suspect that the Applicant is reverse engineering on Bray's products because of knowledge that the Applicant gained as Brays sole distributor the same can be said that Mr Jan Hatting who held a senior position at AR Controls is or could possibly be divulging the trade secrets of AR to Bray.

ORDER

[28] In the result the application in terms of Rule 30A(2) to compel the Applicant to comply with the Rule 35(12) notice Is hereby dismissed with costs.

DATED at JOHANNESBURG on this the 08TH day of OCTOBER 2019.

M A MAKUME

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING

: 10 SEPTEMBER 2019

DATE OF DELIVERIN

: 08 OCTOBER 2019

FOR APPLICANT

: Adv

INSTRUCTING

: Karin Coetzee Attorneys

FOR RESPONDENT

: Adv

INSTRUCTING

: Fluxmans Incorporated

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