

SOUTH AFRICA / JUDGMENT

Calypso Dealers CC v Registrar of Designs and Another (39406/2008) [2011] ZAGPPHC 124; 2011 BIP 326 (GNP) (26 July 2011)

[2011] ZAGPPHC 124

COURT

North Gauteng High Court, Pretoria

BEFORE

Webster

CASE / FILE NUMBER

39406/2008

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IN

THE NORTH GAUTENG HIGH COURT

(REPUBLIC

OF SOUTH AFRICA)

CASE

NO.: 39406/2008

DATE:26/07/2011

In

the matter between:

CALYPSO

DEALERS

CC.....APPLICANT

AND

REGISTRAR

OF

DESIGNS.....FIRST

RESPONDENT

DAVID

BOWEN.....SECOND

RESPONDENT

JUDGMENT**WEBSTER J**

1. The applicant seeks an order in the following terms:

1.1 Revoking the registration of design with serial number F2004/0048 registered in the name of the second respondent, in accordance with the provisions of Section 31(l)(a) of the Designs Act, No. 195 of 1993, as amended;

1.2 Re-registration of the said design in the name of the applicant in accordance with Section 33 of the Designs Act, No. 195 of 1993, as amended.

1.3 Directing:

1.3.1 the second respondent to pay the costs of this application;

1.3.2 the first respondent to pay the costs of this application, jointly and severally, with the second respondent (the one paying the other to be absolved), but only in the event of the first respondent opposing the relief sought by the applicant herein. The application is opposed by the second respondent.

2. The applicant's case is that the second respondent was, at all material times hereto (i) in the employ of the applicant as its

general manager; (ii) prepared a design of an "optical disc container" which is a functional design as defined in section 1 of the Designs Act, during 2004 in the course and scope of his employment. It is averred that the applicant is therefore the owner of the said design.

3. The applicant further avers that the second respondent registered the said design wrongfully in his name and that the applicant is accordingly entitled to the relief sought.

4. In support of its case the applicant avers that (i) the second respondent was paid a salary during his employment with the applicant; (ii) the graphic drawing necessary for purposes of registration of the design was paid for by the applicant; (iii) the fees of the attorneys that registered the patent were paid by the applicant; (iv) the applicant is accordingly entitled to the relief sought.

5. The respondent raised various defences in limine for the purposes of this judgment, however it is not necessary to traverse all the issues raised in the papers. Shortly stated, the second respondent avers that (i) in June, 2003 he started a business of repairing CD's and DVD's; (ii) at that time he was "blacklisted" with the National Credit Bureau; (iii) with the consent of his wife, the sole member of the applicant, he conducted his business through the applicant; (iv) at that particular time the applicant was dormant;

- (v) he ran this business under the name of "Disc Doctor S.A."; (vi) no letter of appointment was furnished to him, no salary was paid to him, no salary slips were issued to him. He used the applicant as a corporate vehicle to conduct his business. He admits that the fees paid to the patent attorneys for the registration of the device were paid by his wife and not the applicant. He denies that the device was designed in the course of his employment as a servant of the applicant.
6. It is convenient, in a matter such as this to re-state the principle applied in motion proceedings and that is that "...where a litigant chooses motion proceedings the case will, where there is a conflict in the versions, be decided on the facts admitted by the respondent: *Brisley v Drotsky* 2002(4) SA 1 at p. 9 [Par 2].
7. About five days before the matter was heard the applicant sought to file an additional "...supplementary replying affidavit".

The respondent opposed the late filing of this affidavit, the purpose of which was to substantiate "an internet payment" to the second respondent as well as "...a Return for Remittance for PAYE and UIF for January 2006" to SARS and a bank statement. This was strenuously opposed.

8. It is convenient to deal with the attempted late-filing of the supplementary affidavit. There are three sets of affidavits filed in motion court proceedings in accordance with the provisions of rule 6(5) of the Uniform Rules of Court, viz., the "supporting

affidavits", the answering affidavits and the replying affidavits. It is only with the leave of the court that any further

affidavit may be filed (*James Brown and Hamer (PTY) LTD v Simmons* N.O. 1963(4) SA 656 at 660 D-H). The court will exercise its

discretion to admit further affidavits only if there are special circumstances which warrant it or if the court considers such course advisable (*Rieseberg v Rieseberg* 1926 WLD 59; *Joseph and Jeans v Spits & Others* 1931 WLD 38) and only if the court is satisfied that no prejudice will be caused to the opposite party that cannot be remedied by an appropriate costs order (*Transvaal Racing Club v Jockey Club of South Africa* 1958(3) SA 599 (W); *Cohen N.O. v Nel and Another* 1975(3) SA 396). The applicant has not set out any reasons why it did not obtain any bank statements it may not have had in its possession or why the returns it made to SARS were not perused before the application was launched for whilst it conveniently attempts to incorporate the information sought to be placed on record in its replying affidavit the averments therein contained ought to have been set out in the founding affidavit. Secondly allowing the further affidavit would have necessitated an adjournment to enable the respondents to answer. That in all likelihood would, again in all probability, would have required a reply from the applicant. That eventuality is clearly most inappropriate and to be avoided. Lastly, and perhaps most importantly, the applicant made no formal application for the filing of the supplementary affidavit: it was simply handed up, sans explanation, sans formality. Leave for the handing in of the said application is refused.

9. I turn to consider the merits of the application. The following are common cause and admitted by the respondent: (i) the second

respondent and the sole member of the applicant are husband and wife having married out of community of property on 1 November, 1997; (ii) they were divorced on 30 November, 2006; (iii) their settlement agreement expressly provides that it "...constitutes the entire agreement between the parties...".

10. The first and significant point is that nowhere in its papers does the applicant allege that the duties of the second respondent

encompassed research or the devising or manufacture of any product or any device. Further, nowhere has it been alleged that the device forming the subject matter of this application was conceived or devised by the second respondent in the course and scope of his employment - he was merely a "general manager". Even if this court were to accept that his version that he merely used the applicant's name for his own business is not true, the applicant has not made out any case that it is entitled to the intellectual property conceived and designed by the second respondent totally on his own initiative and for his own benefit and gain.

11. Secondly, section 27(1) of the Patents Act, No 57 of 1978 provides as follows:

"27 Who may apply for a patent

- (1) An application for a patent in respect of an invention may be made by the inventor or by any other person acquiring from him the right to apply or by both such inventor and such other person."
12. Nowhere in the applicant's papers is there any reference to the applicant having "acquired" from the second respondent the right to apply for the registration of the patent. It appears from the papers that the device conceived and patented by the second respondent may be of financial value. Whilst this aspect is not canvassed in the papers, it appears quite strange why the sole member of the CC could have overlooked it when the parties divorced more so in the light of the fact that she personally paid for the registration of the patent and the patent attorneys' fees.
13. Be that as it may: the crucial consideration is that the issues have to be decided on the respondent's version. I can find nothing that can be criticised in it, much less any reason not to accept it. The applicant's version contains unexplained inconsistencies and improbabilities which detract from the allegations that the device was conceived and designed for the benefit of the applicant without any provision being made for the compensation of the second respondent. The applicant has failed to satisfy this court that it is entitled to the relief it seeks.
14. The application is accordingly dismissed with costs.

G. WEBSTER

JUDGE IN THE HIGH COURT

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