

SOUTH AFRICA / JUDGMENT

CCG Australasia (Pty) Ltd and Another v Cable Gland Company (Pty) Ltd (2014/42807) [2015] ZAGPJHC 249; 2015 BIP 343 (GJ) (6 November 2015) [2015] ZAGPJHC 249

COURT

South Gauteng High Court, Johannesburg

BEFORE

Roland Sutherland

CASE / FILE NUMBER

2014/42807

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REPUBLIC
OF SOUTH AFRICA
HIGH
COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO 2014/42807

DATE: 06 OCTOBER 2015
In

the matter between: CCG
AUSTRALASIA (PTY)
LTD.....First
Applicant
CCG
CABLE TERMINATIONS (PTY)
LTD.....Second
Applicant
And
CABLE GLAND
COMPANY (PTY)
LTD.....Respondent

JUDGMENT

Headnote

Application to interdict a trade rival from using a trademark so similar to that of its own registered trademark as to cause confusion as contemplated by section 34(1)(a) of the Trade Marks Act 194 of 1993 – Both parties manufactured and distributed electrical glands, affixed their marks to the products, published marketing material and had websites – the mark CCG was registered by the applicant- although the marks were visually distinct; ie the applicant's CCG and the respondent's CGCo, the probable aural distinction was almost imperceptible – moreover, the degree of distinction, overall, was not enough to eliminate the risk of imperfect recollection - the risk of confusion existed - application granted

SUTHERLAND J:

Introduction

1. At issue is whether or not the respondent has infringed the applicant's registered trade mark by using a mark so similar as to be likely to cause confusion or deception within the contemplation of. [1](The Trade Marks Act).
3. The registered mark is "CCG" in class 6 and class 17, and has been so registered respectively, since 26 July 1977 (with reference to the cable gland itself) and 21 September 1984 (with reference to a shroud, a rubber like sheath to cover the gland for protection).
4. The respondent has been selling its goods since the beginning of 2014.
5. Three variants of the respondent's mark are alleged to infringe the applicant's mark. They are described thus:

5.1. Within a hexagon , the letters "C, G, C and o" in a staggered pattern; ie, the hexagon rests on a flat base, (ie South) there is above the midline drawn between the west and east points of the hexagon, in capitals, the letters 'C' and "G' and below that line, the letters 'C' and 'o' the 'C' being a capital letter

and the "o", in lower case, being located slightly southward than the "C".

5.2. On its website the mark: " CG-CO"

5.3. As part of its domain name : "cgco.co.za"

The comparison

6. The test to determine the existence of a confusing resemblance has been consistently set out to be an assessment of the marks as a whole, side by side and apart, visually, aurally and conceptually. (see: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (AD) at 640F – 641D) and reiterated more recently in *Addidas International Marketing BV v Pepkor Retail Limited* ZASCA 3 (28/02/2013))
7. Visually, the marks as a whole are patently different, albeit both containing the letters ‘C’ and ‘G’. The applicant does not encapsulate its mark within a border line of any kind. The respondent’s mark has more letters; ie the ‘o’ which is a noticeable difference. Side by side the distinctions are plain.
8. How to ‘read’ the content of the hexagon is said by the applicant to offer two possibilities: as ‘CGCo’ or ‘CCGo’. It is possible, it is argued, to read it as ‘CCG’, rather than the intended ‘CGC’

because of the staggering of the letters, as described above. This reading would be because the eye would travel in a “V”

reading from top left “C” to bottom left “C” and then up to top right “G”. In my view, it is indeed possible to do so, but it cannot be suggested that it is the obvious way to read it. What the applicant’s contention really depends on is that a person, already familiar with the applicant’s mark, “CCG” will, because of that familiarity, at a glance, misread the respondent’s mark. Such a reader would also have to negate the “o” and either not notice or ignore the hexagon. None of these possible readings can be excluded, but it is unlikely that, typically, the two images, seen as a whole, side by side, will be confused. However, the hexagon border could be equally at home with “CCG” as with “CGCo” and seeing the hexagon does not, per se, obviously signal an origin so as to serve to distinguish the one mark from the other.

9. Aurally, the pronunciation possible does not allow a real ‘word’ to be imagined. Some enunciation of the letters is alone possible. ‘see see jee’ and ‘see jee see oh’ seem distinctive. However will the ‘oh’ be enunciated? Suppose it is pronounced simply “see jee see”- how close to ‘see see jee’ is that sound? In short, the sound is indeed close. The hypothetical customers asking for a ‘CCG’ component could be misheard by a hypothetical store assistant. But would an assistant picking up a component bearing the hexagon assume it was a “CCG” product? Again it is possible, although reading the mark to present it to the customer, the distinction would be readily discernible, if the assistant is indeed familiar with both component brands.
10. The respondent seeks to counter this line of the applicant’s argument by suggesting that the pronunciation would be “see jee coe” rather than an abbreviated “see jee see”. Were that to be so, the aural distinction would be profound. The applicant however contends that it is human nature to call the thing by the shorter and more euphonious ‘see jee see’ and the “o” will be ignored, in part, perhaps, because its role as part of the intended “Co” is not an obvious ‘Co’ (ie, perceived as the abbreviation of company) and may be missed at a glance. This possibility, indeed, exists.

11. Conceptually, the letters in these combinations conjure up nothing, other than an anterior consciousness that “C” and “G” together denotes a cable gland. Which brand it is, must be denoted by what else accompanies those core characters.
12. In my view seen side by side the marks are distinctive enough for the difference to be immediately noticed. Seen apart however, the effect of residual and imperfect memory complicates the process of recognition. A quick glance, with an echo of hearing ‘see see jee’ floating in one’s memory, and an image of “CCG” in the recesses of one’s mind’s eye, what will register with a customer looking at the respondent’s mark? It must be taken as a factor that the customer is aware that there is more than one brand, for were it to be otherwise, there would be no effort to choose. It is the customer

who wants a “CCG” component who carries the residual image and wants another one whose predicament and potential confusion

who is to be considered. Such a person may be looking for a prompt for him to recognise the brand he seeks. When he hears “see jee see” or looks at “CGCo” might he be confused? In my view, there is a risk that such a customer is likely to be confused.

13. Neither eye nor ear are precision instruments. They tend not to filter the bombardment of data from daily life too delicately. The exception is when a decision thought to be momentous is made; then the choice is the subject of mulling, reflection and auto-interrogation. These are unlikely to be the attributes of a decision to buy cable glands.

Who are the consumers?

14. It was argued on behalf of the respondent that the class of customers are discerning persons well versed in the electrical contracting industry and appreciative of the distinctions among several brands and their marks. Doubtless there are such persons. It may also be appropriate to infer from the nature of the components that they are not suitable for the mass home market and that it is rare that the proverbial man in the street will be a purchaser, save for the do-it-yourself type who is likely to be technically well informed if he has the confidence to embark on the class of installation for which the cable glands are apparently intended.
15. However, the task of fetching parts is too obviously a delegated chore to the lesser-skilled crewman, who dispatched by his foreman, may not be well versed in these matters, and who is dependent on the potentially equally lesser-skilled store assistant. First impressions, both visually and aurally, may well not alert the hearers and the viewers to the distinctions rather than to their similarities. In the absence of evidence that the sourcing is indeed restricted to a knowledgeable class, a wider circle of potential clientele must be assessed. Despite the respondents assertion that knowledgeable people are the clientele, that assertion alone cannot exclude a wider class of persons undertaking the actual transactions. There is no basis laid to substantiate that only the

truly knowledgeable shall undertake transactions.

The website and domain name

16. The context in which these addresses, CG-C0 and cgco, as a web address and email address respectively, are either used to send messages, or are stumbled upon through internet searches, is quite distinct from the dynamics of shopping. The typical internet user is quickly brought to an acute awareness of the exactitudes that are essential to communicate effectively using online addresses. One cypher out of place means no communication can occur. In my view, there is also an awareness that the addresses of different persons or entities can differ by merely one cypher. The position is not materially distinct from the care needed in dialing a telephone number.
17. In that context, the similarities of the marks in the addresses, which are not 'marks' on products per se, do not in my view, give rise to the sort of material risk of deception or confusion, as may occur in conventional shopping. The risk of confusion, though possible, is materially diminished.

The use of 'C' and 'G' in the Industry

18. Allusions were made to the use of the letters "C" and "G" in formulating part numbers of the similar components of other traders. In my view this is an irrelevance in relation to the perception of the marks denoting origin put out by the parties on the product or in other literature to identify their brand.

Evidence of the occurrence of confusion

19. The absence of a concrete example of confusion is in my view not dispositive of the risk.

Conclusions

20. In my view:

20.1. Visually, side by side, the risk of confusion is slight if at all.

20.2. Viewed separately, owing to the risk of imperfect recollection, the risk of confusion is material,

20.3. Aurally, the risk of confusion is significant because conceptually, the articulation of each of the letter combinations as mere grunts have no meaning and allow for no distinctions to be readily discerned.

20.4. Accordingly, although the risk of confusion varies in the different contexts, the risk of confusion is material.

The Order

- [1] The Respondent is interdicted and restrained from infringing trade mark registrations nos. B1977/03211 CCG in class 6 and 1984/08490 CCG in class 17, by using the marks CGCO, CG-Co and CCGo / CGC Logo (hereinafter collectively referred to as “the infringing marks”), or any other marks so similar thereto as to be likely to cause deception or confusion in terms of section 34(1)(a) of the Trade Marks Act No. 194 of 1993 (hereinafter “the Trade Marks Act”), in relation to the manufacturing, importation and / or sale of cable glands, compression glands and shrouds;
- [2] The Respondent is ordered in terms of section 34(3)(b) of the Trade Marks Act, in the presence of an authorised agent of the First Applicant, to remove the infringing marks from all materials in the possession or under its control, if the infringing marks are inseparable or incapable of being so removed, to destroy all such materials bearing the infringing marks, including all pricelists, labels, signage, packaging materials, advertising and promotional materials, pamphlets, brochures, cable glands, compression glands and shrouds; alternatively, at the option of Respondent, to deliver up for destruction all such materials to the First Applicant’s attorneys, Von Seidels;
- [3] The Respondent shall bear the Applicant’s costs in this application, including the cost of Counsel.

Roland Sutherland

Judge of the High Court,

Gauteng Local Division

Hearing: 11 September 2015.

Judgment:

6 October 2015.

For the applicant:

Adv G Marriott,

Instructed by Von Seidels Attorneys,

Ref: H Prinsloo.

For the Respondent:

Adv PP Ferreira, (Heads of argument prepared by Adv I Joubert)

Instructed by De Kock Attorneys,

Ref E De Kock.

- [1] Section 34 (1) Provides: (1) The rights acquired by registration of a trade mark shall be infringed by- (a) the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion; (b) the unauthorized use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion; (c) the unauthorized use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception: Provided that the provisions of this paragraph shall not apply to a trade mark referred to in section 70 (2).
- [1] Section 34 (1) Provides:
- (1) The rights acquired by registration of a trade mark shall be infringed by-
- (a) the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;
- (b) the unauthorized use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion;
- (c) the unauthorized use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception: Provided that the provisions of this paragraph shall not apply to a trade mark referred to in section 70 (2).

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