

SOUTH AFRICA / JUDGMENT

Evrigard (Pty) Ltd v ENB Import And Export (Pty) Ltd and Another (57565/2021) [2023] ZAGPJHC 1014 (11 September 2023)

[2023] ZAGPJHC 1014

COURT

South Gauteng High Court, Johannesburg

BEFORE

Wepener

CASE / FILE NUMBER

57565/2021

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

Case Number:

57565/2021
NOT REPORTABLE
NOT OF INTEREST TO OTHER
JUDGES

In the matter between:

EVRIKARD
(PTY) LIMITED
Applicant
and
ENB
IMPORT AND EXPORT (PTY) LIMITED
First
Respondent
SELECT
PPE (PTY) LIMITED
Second
Respondent

JUDGMENT

This judgment has been delivered by being uploaded to the CaseLines profile on and communicated to the parties by email.

Wepener J

- [1] The applicant is Evrigard (Pty) Limited (“Evrigard”), a supplier of personal protective equipment including a respirator branded as the R402P Phuza Moya Get-up mask and sold in distinctive packaging (“the Phuza Moya Get-Up”).
- [2] Evrigard seeks declaratory and interdictory relief as well as ancillary relief, but the decision on the declaratory and
- interdictory relief is a prerequisite for any further litigation.
- [3] The first respondent is ENB Import and Export (Pty) Ltd (“ENB”), an entity that manufactures and sells a competing respirator brand as the AZ110 ASZORB in its packaging which Evrigard alleges is both similar and a substantial reproduction or adaptation of the Phuza Moya Get-up. It is claimed that ENB’s conduct amounts to passing off under the common law and copyright infringement in terms of section 23(2) of the Copyright Act.[1]
- [4] The second respondent is Select PPE (Pty) Ltd (“Select”) an entity that it sold and distributed Aszorb masks and it is alleged that its conduct amounts to passing off both under the common law and which is an infringement in terms of section 23(2) of the Copyright Act.
- [5] Disputes developed regarding the admissibility of evidence and the value of certain paragraphs in the heads of argument. At the outset Select objected to the evidence contained in an email from one Jacques Malan (“Malan”), who attached a spreadsheet of information regarding alleged sales of masks. Initially, I was uncertain whether the deponent had personal knowledge of the facts and did not rule the evidence inadmissible.
- [6] However, as argument proceeded, it became clear that the witness had no personal knowledge of the facts stated in the email and annexure and based his evidence on that unproven hearsay evidence. As indicated to the parties, the first ruling was provisional and after the argument by the parties, I concluded that the email emanating from Malan and its annexure, are inadmissible due to the fact that it is unproven hearsay evidence and it falls to be struck out.
- [7] A further issue regarding the affidavits of a certain Mr Williams, which affidavits were filed by Evrigard and ENB and which contradicted each other, was not pursued as all the parties accepted not to rely on the Williams affidavits, after it was conceded that the Williams affidavit filed by the ENB, could be admitted into evidence.

[8] During argument, ENB applied that an email emanating from a person in China be admitted as evidence under section 3(1)(c) of the Law of Evidence Amendment Act (“Evidence Act”) which provides:[2]

“Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) . . .

(b) . . .

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admissions of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

Is of the opinion that such evidence should be admitted in the interest of justice.”

[9] The reason why the writer of the email did not furnish an affidavit is said to be that ENB would attempt to source a confirmatory affidavit from the writer and that it was doubtful whether the writer would provide an affidavit due to a breakdown of relations between ENB and the supplier of masks.

[10] There is no evidence of any attempts that were made to procure such an affidavit and ENB failed to satisfy, at the very least, the provisions of section 3(1)(c)(v) of the Evidence Act. I am not satisfied that ENB placed sufficient evidence before me to place me in a position to receive the hearsay evidence. It is disallowed.

[11] An application to strike out paragraphs in Evrigard’s heads of argument as being evidence with no basis in the papers, was abandoned due to Evrigard not persisting with any submissions contained in these portions of its heads of argument. Evrigard also conceded that the contents of para 19 of its replying affidavit may be struck out.

[12] It may be prudent to deal with the Select’s arguments first. It was submitted that Evrigard had no locus standi to institute litigation of this nature against the Select.

[13] It is common cause that the Select is a distributor of the Aszorb masks to certain mines. The allegations concerning Select are that, since 2 November 2021, Evrigard was assigned the copyright in the works identified in attachments to the deed of assignment. The deed of assignment assigns the subject matter in specific words referring to all future copyright authored by the assignees. There is no reference to historical infringements nor any accrued rights. On the contrary, the parties specifically contracted for future rights. At the date of the assignment on 2 November 2021, Evrigard received no accrued rights prior to that date. The affidavits make it clear that the Evrigard's complaint does not refer to conduct by Select on dates preceding the

date of assignment. The application based on copyright resting in the assignment cannot succeed as no accrued rights, should they exist, were assigned by November 2021. Evrigard relied on section 24 of the Copyright Act.[3] In my view, section 24 states the obvious but does not refer to or include rights which were accrued prior to an owner receiving rights in terms of that section. It does not clothe Evrigard with a cause of action for past infractions of copyright.

[14] A second leg of Select's submission was that the assignment of goodwill in trademarks does not result in a case against it. No case has been made out that Select misappropriated the Phuza Moya mask, which was assigned to Evrigard. That argument is correct.

[15] It is also so that Evrigard failed to make a case against Select for an interdict. The absence of a reasonable apprehension of harm becomes fatal to Evrigard's case against Select. The examples relied on by Evrigard are based on historical facts going back to 2018. The evidence of Select is that, upon receipt of a cease and desist letter from Evrigard in November 2019, it, admittedly, returned all the alleged offending products to ENB. In instances where it could not return masks, it secured the removal of all outer cardboard casing from the masks, leaving them without any packaging, whilst it tendered the delivery of the packaging to the Evrigard. Subsequent thereto, there is no evidence to suggest that Select continued to utilise any of the offending packaging. Indeed, it placed no further orders for Aszorb masks with ENB. This conduct controverts any suggestion that there can be an apprehension of further harm which can justify interdictory relief. This is also borne out by the letters written on behalf of Evrigard to ENB. The principles to apply is that, unless the version of a respondent can be found to be palpably untrue, a court is constrained to decide a matter on motion, with reference to the version of a respondent where disputes arise. Select set out evidence that miners do not choose masks on the basis of packaging but based on their sense of comfort and protection. This version is met by Evrigard with a photograph taken in 2018 of boxes of masks. The problem is that the photograph does not depict competing goods. On the face of it, it looks like one set of products. In the absence of competing goods, there is no substantive case of passing off. Evrigard's deponents simply do not have evidence to implicate Select in any passing off conduct. Evrigard has, consequently, failed to make any case against Select, also prior to the assignment of rights.

[16] I now turn to the case against ENB. Evrigard submitted that ENB remains guilty of passing off Evrigard's Phuza Moya mask which it has been marketing since 2001 with the current Get-up, having been introduced in 2009. Again, ENB was unaware of the Get-up claimed by Evrigard to be its property and it too undertook to wind down the acquisition and stock with the comparable Get-up. To get past this, Evrigard relied on the hearsay evidence regarding purchases of admitted stock by ENB, which evidence I have struck out and which can take the matter no further. Much of the argument by Evrigard turned on the hearsay evidence which is to be disregarded. ENB attacked the rights of Evrigard based on section 2(1) of the Copyright Act.[4] The requirement, before a claimant can establish a contravention, is that its own product must be original. ENB showed that another

international manufacturer (Port West) uses similar, if not the exact same packaging, as Evrigard. ENB has, consequently, produced evidence to the contrary of the allegations by Evrigard. The patent similarity between the Port West packaging and that of Evrigard is on record and shows that it is strikingly similar. There is no explanation from Evrigard why the Get-up of Evrigard and Port West is so similar. This must impact on the originality of Evrigard's product. Evrigard failed to show that its product is original as required in section 2 of the Copyright Act. The question is whether the allegations regarding the Port West Get-up raised a dispute of fact, and if so, what the consequences are. In my view, ENB indeed raised the dispute of fact regarding the originality of the Get-up of Evrigard. There is nothing to show that Mr Berger (the creator of the Get-up) has historical prototypes or any of the evidence which predates the Port West packaging. All that he says is that it did not copy Port West. That, in my view, does not overcome the disputes raised by ENB.

[17] In addition, ENB submitted that Evrigard failed to establish a sufficient reputation amongst a substantial number of persons to prove the distinctiveness of its goods as explained in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another*.^[5] The evidence regarding the supply of the masks to mines shows a very limited market, and I am of the view that Evrigard also failed to establish a sufficient reputation in the Get-up in order to succeed in this matter. Having regard to the aforesaid, Evrigard cannot succeed in its application.

[18] The submissions regarding the striking out of matter contained in the affidavits did not materially lengthen the application. I am of the view that it does not warrant a special order for costs.

Order

1. The affidavit of Mr Williams filed by the first respondent, is allowed.
2. The evidence of Mr Malan, and the annexure to his email, are struck out.
3. Paragraph 19 of the replying affidavit is struck out.
4. The application against the respondents is dismissed with costs.

Wepener J

Heard: 28 August 2023

Delivered: 11 September 2023

For the Evrigard:

Adv G. Marriot

Instructed by

Kantor Myers Paslovsky Attorneys

For the ENB:

Adv F.J. Labuschagne

With him Adv R. Orr

Vos Viljoen Bekker Attorneys

For the Select:

Adv. C. Bester

Mc Naughton and Company Incorporated

[1] Act 98 of 1978.

[2] Act 45 of 1988.

[3]“(1) Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright, and in any action for such an infringement all such relief by way of damages, interdict, accounts, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights.”

[4] “(1) Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright. . . .”

[5]

[1998] ZASCA 44; 1998 (3) SA 938 (SCA) para 20-21.

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