

SOUTH AFRICA / JUDGMENT

Hollywood Curl (Pty) [1988] ZASCA 132; [1989] 4 All SA 30 (AD) (30 September 1988)

[1988] ZASCA 132

COURT

Supreme Court of Appeal

BEFORE

Corbett, Smalberger, Milne, Kumleben, Nicholas

CASE / FILE NUMBER

281/87

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CASE NO 281/87 /CCC

IN THE SUPREME COURT OF SOUTH (APPELLATE DIVISION)

In the matter between HOLLYWOOD CURL (PTY) LIMITED APPELLANT and

TWINS PRODUCTS (PTY) LIMITED RESPONDENT

CORAM: CORBETT, SMALBERGER, MILNE, KUMLEBEN JJA et, NICHOLAS, AJA

DATE HEARD: 22 AUGUST 1988 DATE DELIVERED: 30 SEPTEMBER 1988

JUDGMENT

NICHOLAS, AJA:

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The facts of this matter are set out in the judgment of CORBETT JA. The question for decision is whether the Registrar of Companies was right in refusing to make an order in terms of s.45(2) of the Companies Act, 1973 ("the Act"), at the instance of Twins Products (Pty) Ltd, ("Twins"), that Hollywood Curl (Pty) Ltd ("the appellant") change its name. The court a quo held that the Registrar was incorrect, and made an order setting aside the refusal and directing that the appellant change its name forthwith. S.52(l) of the Act provides that the memorandum of a company, in addition to stating the purpose for which it is to be formed and incorporated, shall state the name of the company.

S.41 provides that no memorandum containing a name for a company to be incorporated shall be registered if in the opinion of the Registrar the name is undesirable.

S.45 contains provisions empowering the

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Registrar to order a company to change its name. Omitting words

which are not material for present purposes, the section reads:

"45. (1) If within a period of one year after the registration of any memorandum, ... it appears that the name contained in the memorandum ... is in the opinion of the Registrar undesirable, he shall within such period order the company concerned ... to change the name ... concerned.

(2) If within a period of one year after the registration of any memorandum, ... any person lodges an objection in writing with the Registrar against the name contained in the memorandum ... on the grounds that such name ... is calculated to cause damage to the objector, the Registrar may, if he is satisfied that the objection is sound, order the company concerned ... to change the said name ...

(3) If, at any time, the Registrar is of the opinion that the name of a company ... gives so misleading an indication of the nature of its activities as to be calculated to deceive the public, he may order the company concerned to change its name..."

There were provisions corresponding to s.41

and s.45 in s.10 of the Companies Act, 1926 ("the 1926 Act").

Ss.(1), (2) and (4) of s.10 of the 1926 Act (as amended) provided

as follows:

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"10. (1) A company may not be registered by a name identical with that by which a company or a foreign company is already registered, or so nearly resembling that name as to be calculated to deceive, except where the already registered company is in the course of being dissolved and signifies its consent to the registration in such manner as the Registrar requires.

(2) The Registrar may, except upon an order of the Court, refuse to register a company by a name which, in his opinion, is calculated to mislead the public or to cause annoyance or offence to any person or class of person or is suggestive of blasphemy or indecency or a name representing an occupation or profession for which personal qualifications are required.

(3)

(4) (a) If a company through inadvertence or otherwise has been registered in conflict with the provisions of sub-section (1), (2) or (3) the Registrar shall order the company to change its name: Provided that

(b) Wherever a registration in conflict with the provisions of sub-section

(1) or (2) is calculated to cause damage to any company or other person, such company or other person may call upon the Registrar to order a change of name.

(c) "

Under s.41 of the Act, which was taken over from s.17 of the English Companies Act, 1948, the Registrar has a wide discretion: he may refuse to register a memorandum if, in

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his opinion, the name is undesirable. The word "undesirable" in s.41 no doubt comprehends, though it is not limited to, the objectionable names referred to in s.10(1) and (2) of the 1926 Act.

Ss.(4) of s.10 of the 1926 Act corresponded

to s.45(2) of the Act. Under ss.(4) the jurisdiction of the Registrar arose when registration of a company was in conflict with the provisions of ss.(1) or (2), and such registration was calculated to cause damage to any company or person. Under s.45(2) all that is required is an objection

"... on the grounds that such name is calculated to cause damage to the objector."

The decision of this appeal depends largely on the proper

interpretation of these words.

Two problems arise:

(a) Because a name does not in itself have potential to cause

damage, it is plain that there is here an ellipsis which has to be supplied. In my opinion the words are to be understood as if they read: 6/ 6.

"... on the grounds that the registration of the company by such name is calculated to cause damage to the objector ..."

(It is not strictly correct to talk of the registration of a company by a name. What is registered is the memorandum, which contains the name of the company, but the expression is a convenient shorthand one. Compare the opening words of ss.(1) of s.10 of the 1926 Act:

"10(1) A company may not be registered by a name identical with that by which a company or foreign company is already registered ...")

(b) It was said in *Link Estates (Pty) Ltd v Rink Estates (Pty)*

Ltd, 1979(2) S A 276(E) at 278 H that it is clear from ample authority that "calculated" as used in s.45(2) means "likely". The statements in decided cases that "calculated" means "likely", were made with reference to which of two possible meanings of "calculated" (viz. "likely" and "intended") was the proper one in the context. (See, for example, *American Chewing Products Corporation v* 7/

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American Chicle Company, 1948(2) S A 736(A) at 741; Amoils

v Johannesburg City Council 1943 TPD 386 at 389.) The words "calculated" and "likely" are not exactly synonymous. "Calculated" in this context means "inherently likely"; or "of a nature or character proper or likely to" (Oxford English Dictionary; see *Brink v Lichtenburg Liquor Licensing Board*, 1944 TPD 161 at 171). In *Johannesburg Liquor Licensing Board and Another v Short*, 1946 AD 713, TINDALL JA said at 722 in fin to p. 723:

"The expression 'calculated to cause substantial prejudice' means 'likely in the ordinary course of things to cause substantial prejudice'."

In *Ouvah Ceylon Estates Limited v Uva Ceylon Rubber Estates Limited* (1910) 103 L.T.R. 416 (CA), COZENS-HARDY M.R. said at 417 that the phrase "calculated to deceive" means

"... according to the proper use of language, calculated in the ordinary sense of business ... with one's knowledge of affairs how it is to be carried on."

(See also *In re Lyndon's Trade-mark* (1886) 32 Ch.D.

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109(C.A.) at 119 per BOWEN L.J., quoted in *Rex v Lord* 1926 CPD 262 at 264.) The registration of a company by a name cannot, in the nature of things, by itself cause damage to the objector. Actual damage can be caused only if the company carries on activities in the course of which it uses its name. But in the ordinary course of things a trading company is likely to carry on activities, and hence the registration of a company may be calculated to cause damage to the objector. Compare s.4(b) of s.10 of the 1926 Act:

"Wherever a registration in conflict with the provisions of sub-section (1) or

(2) is calculated to cause damage to any company or other person ..."

Registration of a company by a name identical with that by which a company is already registered may serve as an

example. Plainly such a registration is calculated to cause

damage to the latter company. It is calculated to cause

confusion between the businesses conducted by the two

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9. companies; or to affect the latter company in its business by diverting customers to the new company; or to affect the credit or goodwill of the latter company. What s.45(2) contemplates is not a factual but an abstract inquiry - not an inquiry whether damage has occurred or will occur, but an inquiry whether "in the ordinary course of things", "in the ordinary sense of business", and having regard to any relevant circumstances, the registration of the company

by the name concerned is likely to cause damage to the objector. If damage has in fact occurred, that would be relevant only in so far as it may tend to show that it was a likely result,

Twins' contention in this case, as set out in

the heads of argument submitted on its behalf, is this:

"(The) activities which are carried on by the Appellant under its name HOLLYWOOD CURL infringe the Respondent's common law rights and constitute a passing-off. The Appellant's passing-off renders its name HOLLYWOOD CURL undesirable as contemplated by the provisions of Section 45(1) of the Companies Act and the passing-off

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is likely to cause damage to the Respondent as contemplated by the provisions of Section 45(2) of the Companies Act."

The judge a quo appears to have accepted this contention. He said
in his judgment:

"On the basis then that I have found above that the applicant has proved a passing off and that the respondent's name 'HOLLYWOOD CURL' is calculated (in the sense of 'is likely') to cause damage to the objector, it follows that the applicant is entitled to the relief sought in this regard."

A connection between the activities of a company and damage to an objector does not bring a case within s.45(2). What is requisite under s.45(2) is a causal connection between the registration of a company by the name concerned, and likely damage to an objector.

The passing off was the result of the

totality of the appellant's activities, some of which antedated

its incorporation on 14 August 1984 (Vida Kannike, the Vice-

President of Kannike Martins Associates Inc., the parent company

of the appellant, said in her affidavit that Kannike Martins

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started advertising its products in South Africa under the trade-mark Hollywood Curl in February 1981, and acquired premises in Soweto to set up a team of instructors to train aspirant hairdressers in the art of using such products in the treatment of hair.) There is no evidence that the appellant's name was even a contributory cause to the passing off. In none of the affidavits filed by Twins is there any suggestion of a causal connection between the registration of the appellant by the name Hollywood Curl (Pty) Ltd and any damage to Twins by reason of passing off. From these affidavits it appears that the appellant carries on business under the style Hollywood Curl in premises in Soweto, Field Street, Durban, and Hoek Street Johannesburg, and

it has applied in its company name for trading licences in respect of the premises in Durban and Johannesburg. It uses the trademark Hollywood Curl on its goods and on advertising material such as posters, and on T-shirts and plastic carrier bags. If the appellant had been incorporated, by the name Kannike Martins

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(S A) (Pty) Ltd, the position in regard to passing off would have been no different. In my opinion, therefore, Twins did not show that the registration of the appellant company by the name Hollywood Curl (Pty) Ltd was calculated to cause damage to Twins. It follows that the decision of the Registrar of Companies was right, and that the court a quo erred in setting it aside.

I would uphold the appeal with costs,

including the costs of two counsel, and direct that the order of the court a quo be set aside and that there be substituted therefor: "The application is dismissed with costs including the costs of two counsel."

NICHOLAS, AJA

KUMLEBEN, J A - CONCURS

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