

SOUTH AFRICA / JUDGMENT

Jack Maserow Manufacturers CC v AXZS Industries (Pty) Ltd t/a Don Elly Enterprises (2014/60485) [2015] ZAGPPHC 647; 2015 BIP 450 (GP) (8 September 2015) [2015] ZAGPPHC 647

COURT

North Gauteng High Court, Pretoria

BEFORE

E Bertelsmann

CASE / FILE NUMBER

2014/60485

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

NORTH DIVISION, PRETORIA

CASE

NO: 2014/60485

DATE:

8/9/2015

In

the matter between:

JACK

MASEROW MANUFACTURERS CC

Applicant

and

AXZS

INDUSTRIES (PTY) LTD t/a DON ELLY ENTERPRISES

Respondent

JUDGMENT

1. The applicant is Jack Maserow Furniture Manufacturers CC, a close corporation duly incorporated in terms of the applicable legislation,

with registered address at 565 Nupen Crescent, Midrand, Gauteng. The applicant is the registered holder of the design registered as A2011/01049. The design is registered in class 6 for furniture. It is registered a set of furniture, a bedroom suite.

2. The respondent is Axzs Industries (Pty) Ltd, a company with limited liability duly registered and incorporated in terms of the applicable

legislation, with registered office at 207 Lakeside Two, 3 Ernest Oppenheimer Avenue, Bruma, Gauteng.

3. The applicant alleges that the respondent markets and sells a bedroom suite known as the 'Seville' suite which embodies its 2011 design or a design not substantially different from that design. This, applicant argues, is an infringement of its design, which it claims is deliberate. It therefore seeks an order in the following terms:

- a) That respondent is interdicted from infringing South African design registration A2011/01049 ('the 2011 design') by selling the 'Seville' bedroom suite or any other set of furniture which embodies the 2011 design or is not substantially different to it;
- b) The respondent is ordered to deliver up to the applicant for destruction all furniture in the respondent's possession or under its control which embodies the 2011 design or is not substantially different to it;
- c) There shall be an enquiry held into the damages suffered by the applicant as a result of the respondent's infringement of the 2011 design;
- d) The respondent shall make payment to the applicant of the damages found to have been suffered by the applicant pursuant to such enquiry;
- e) In the event that the parties are unable to reach agreement as to the future pleadings to be filed and as to discovery, inspection

and/or other matters of procedure in relation to such enquiry, either party is authorised to make application to this court for directions in regard thereto;

- f) An order for costs of the proceedings against the respondent.

4. The applicant has manufactured furniture, in particular bedroom furniture, for some decades and has manufactured these from polyurethane since about 2002. Its principal member and deponent to its affidavits claims that it has produced more than 113 000 polyurethane bedroom suites worth more than R 500 million since 2002. Its products are sold in some of the most well-known furniture retail chains.

5. In 2011 the applicant developed the design – called the ‘Aztec’ bedroom suite; with a cheaper version known as ‘Bolero’ - that is the subject of the dispute in the present proceedings. Its deponent claims that it represents a radical departure from designs that were common in the bedroom furniture market at that stage in South Africa, from so-called ‘classical’ designs with soft flowing features to a masculine design without ornate decoration, a substantially square headboard and square shape of all items in the set; the overall relationship of the component parts of the suite – headboard, nightstands and dressing table - to each other including their relative size and spatial relationship; a ‘shield’ described as curved on the doors of the nightstands, the side cupboards of the dressing table and on the left, right and centre of the headboard and dressing table and their relative positions on the various parts of the suite; clean lines creating the image of a padded headboard and the presence of a thick base and top on each of the nightstands and the dressing table. It is, of course, an aesthetic design as defined in the Designs Act 195 of 1993.
6. The applicant’s design registered in 2011 describes its principal features in the definitive statement as ‘The features for which protection is claimed reside in the shape and/or configuration of a set of furniture, and/or the ornamentation applied to the set of furniture, substantially as shown in the accompanying representations, irrespective of the appearance of parts shown in broken lines.’
7. In the explanatory statement of the design the following is set out: ‘The design is applied to a set of furniture comprising a headboard and nightstands for a bed, as well as a dressing table, which all share the same common features, and which are intended to be on sale and used together.’
8. The applicant’s deponent alleges that the respondent wilfully and intentionally set out to copy its successful new design by creating the ‘Seville’ suite as a copy of the ‘Aztec’. It furthermore offered its design at a lower price than that of the ‘Aztec’. Applicant claims to have experienced reduced sales of its products since the ‘Seville’ has arrived in the market place. It also claims that the design of the latter was prepared by a former employee of the applicant who was specifically instructed to design a bedroom suite that closely resembled the applicant’s product. Although such an instruction and indeed, the intention to copy or imitate the existing design is denied, it is not in dispute that it was in fact a former employee of the applicant that designed the bedroom suite that is said to infringe the ‘Aztec’ design. The former employee, now back in the applicant’s fold, confirms the instruction allegedly given to him by the respondent’s deponent to its answering affidavit..
9. The respondent, in opposing the applicant’s claims, attacks the applicant’s right to have registered the design sought to be protected on the basis that it lacks originality, was not new when it was registered and is not an aesthetic design as contemplated in the Designs Act 195 of 1993. In addition the claim that the design is infringed is denied upon the basis that the ‘Seville’ suite is significantly different from the ‘Aztec’ and that the registered design is not

original because bedroom suites in similar style existed for years before the applicant produced its two suites.

10. In order to illustrate the point that the two suites are different the respondent prepared scale drawings of both and superimposed the one above the other. While a few differences in the measurements of the headboards and nightstands are apparent from the comparison, the superimposition of the drawings does strikingly demonstrate a strong similarity in the two designs' general shape and aesthetic impression. It is important to remember in this context that the applicant's design is an omnibus design which does not, as the above-quoted definition statement shows, claim novelty or originality in respect of any particular feature, but for the configuration of the entire bedroom suite.
11. As Harms, ADP (as he then was) said in *Clipsal Australia (Pty) Ltd and Another v Trust Electrical Wholesalers and Another* 2009
- (3) SA 292 (SCA) at par [7] and [8] that the configuration of the article in respect of which the design was registered has to be considered as a whole to determine whether an infringement has occurred. Design features must for that purpose be judged solely by the eye, which, although it is the court's eye, must adopt the perspective of the likely customer. Applying that test to the superimposed drawings there can be no doubt that the likely purchaser could easily confuse the 'Seville' with the 'Aztec'.
12. The respondent contended further that the design was in no way novel as it could be found in bedroom suites that existed prior to the registration of the design. To illustrate the point numerous examples of bedroom suites as published in sales catalogues distributed by furniture dealers were annexed to the answering affidavit. Similarities between some of these and isolated component parts of

applicant's design were pointed out in a generalized fashion. What is remarkable, however, is that not one of these bedroom suites bore any significant likeness to the Aztec when all the component parts of the 'Aztec' were considered as a whole – other than the 'Seville'. These examples therefore establish that the 'Aztec' design was indeed novel in its shape and configuration and was validly registered as a design.

13. As the superimposed drawings prove the 'Seville' is substantially identical to the 'Aztec' both in shape,

appearance and configuration. It falls within the 'Aztec' design. The infringement of applicant's design has thus been established and the applicant is entitled to the relief it seeks.

An order is made in terms of the prayers contained in the notice of motion.

Signed at Pretoria on this day of September 2015.

E BERTELSMANN

Judge of the High Court

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