

TANZANIA / JUDGMENT

HAVELLS INDIA LTD VS CATHERINE BONIFACE SHIO MISC

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1 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
PAR ES SALAAM MISCLNEOUS COMMERCIAL APPLICATION NO. 5721 OF 2024 (Arising out of
Commercial Case no. 5329 of 2024) BETWEEN HAVELLS INDIA
LIMITED..... APPLICANT VERSUS CATHERINE BONIFACE
SHIO..... RESPONDENT

RULING

Date of Last Order: 25/03/2024 Date of Ruling: 08/05/2024 GONZI, J. The applicant herein herein filed this application before this Honourable Court under certificate of urgency praying for the following orders:

1. That the honourable Court may, pending hearing of the application be pleased to issue an interim injunctive order restraining the respondent or its agents, partners, affiliate, assignees or servants from manufacturing, selling, importing or exporting or commercially dealing in any other manner which counterfeit electrical goods and power distribution equipment's bearing the Havells trademark in the Tanzanian market. 1
2. That the honourable court may, pending Determination of commercial case no.5329 of 2024 be pleased to grant a temporary injunction restraining the respondent or its agents, partners, affiliates, assignee or servants from manufacturing, selling, importing or exporting or commercially dealing in any other manner with counterfeit electrical goods and power distribution equipment's bearing the Havells trademark in the Tanzanian market.
3. An order for the respondent to disclose his manufacturers and suppliers who are supplying him with the counterfeit goods bearing the applicants trademark HAVELLS.
4. Any other or further reliefs that this honourable court may deem it fit to grant.
5. The cost of this application be awarded to the applicant. The application at hand was filed by way of chamber summons supported by Joint affidavit sworn by Mr. Harsh Agarwal and Mr. Roma Arorra principal officers of the applicant narrating all the facts pertaining to the application. There was no counter affidavit filed by the respondent. The respondent was dully served with summons and orders to file counter affidavit but defaulted to file counter

affidavit and appearance. So, the applicant prayed to proceed with the hearing of the matter ex-parte since the matter was filed under certificate of utmost urgency. The Court granted that prayer. The facts obtaining in this application as gathered from the affidavit are that the applicant is a company incorporated and existing under the laws of India, which is engaged, among other things, in the manufacture of unique and distinctly electrical goods and power distribution equipment's under its well-known trademark "HAVELLS". That the Havells products are manufactured, distributed and sold under a distinctly designed get up and /or trade dressing which has served to distinguish the said products as originating from the applicant and its affiliated companies. That the Havells's products consists of distinctively the industrial and Domestic Circuit Protection Switchgear, Cables & Wires, Motors, Fans Power Capacitors, Lamps and Luminaires for Domestic, Commercial & Industrial Applications, Modular Switches, Water Heaters & Domestic Appliances. It was stated that the applicant has been supplying and distributing its Havells products in the Tanzanian market, at least since the year 2008. It was stated further the applicant is responsible for the availability of the genuine Havells products that are found in the Tanzanian markets. That the applicant's Havells products have been supplied into Tanzanian markets for many years and have been promoted and advertised through 3 various media, especially on the internet through the Facebook platform. That the applicant's Havells products have acquired goodwill in the Tanzanian market such that consumers in the markets associate Havells products with the applicant. It was testified in the affidavit that the applicant is the registered proprietor of trade mark "Havells" registered under registration number TZ/T/2010/321 under class 7, TZ/T/2010/322 under class 7, TZ/T/2010/323 under class 9, TZ/T/2010/324 under class 9, TZ/T/2010/325 under class 11 and TZ/T/2010/326 under class 11 in Tanzania mainland. That the Tanzanian registration number TZ/T/2010/321, underclass 7, TZ/T/2010/322 under class 7 TZ/T/2010/323 under class 9 TZ/T/2010/324 under class 9, TZ/T/2010/325 under class 11 and TZ/T/2010/326 under class 11 were initially registered in the name of QRG enterprises limited but the ownership was transferred to the applicant by virtue of an assignment. The dispute arose when the applicant's officers came across counterfeit "Havells" products bearing an identical get up with the genuine Havells products of the applicant. It was further stated that the applicant was able to confirm from the writings on the products and other features that the counterfeit Havells products are being imported and distributed by the respondent and that the level of similarity is such that both products are 4 similar/exactly looking. The products are circuit protection switchgear and distribution boards. Both products bear the word mark "Havells"" and written in the same style and format that the design of the get-up of the respondent's counterfeit products, i.e. the image, colour combination surrounding the image, is identical to the applicant's genuine Havells products. The Applicant testified in the affidavit that the applicant has reasons to believe that the respondent is dealing in importation and distribution of counterfeit Havells products and the same would result in an irreparable damage to its reputation and the value of the genuine Havells products because the applicant's sales of the genuine Havells products are getting / likely to drop due to the unfair competition with the counterfeit products whereby the applicant has no control over them in terms of the quality of the

counterfeit products distributed by the respondent. The Applicant therefore stated that the applicant and the members of the general public in Tanzanian are likely to suffer as the counterfeit product are of inferior quality. Further that that consumers are getting/likely to be deceived into believing that the inferior counterfeit products originate from the applicant and that the applicant's products have lowered in quality, hence the consumers are likely to stop buying 5 the genuine products in the future due to the deception caused by the availability of the inferior but counterfeit, identical products of the respondent. The Applicant concluded that the injury to the applicant's reputation or injury to the goodwill of genuine Havells products would not be capable of being adequately compensated even by an action for damages. That given the impending threat, the applicant prays for a temporary injunction to be issued by the court pending the determination of the main suit in Commercial Case No.5329 of 2024 against the respondent herein. Hence the applicant filed this. When this matter was scheduled for necessary orders on 25th March 2024 the learned counsel for the applicant Mr. Partick Sanga, assisted by Miriam Mosses, learned advocate, told this Court that the application is brought under section 68(c)(e) read together with order XXXVII rule 1(1) of the Civil Procedure Code. Mr. Sanga submitted that the input of these provisions is to vest the court with the discretionary powers to make interlocutory orders as it deems fit. The applicant referred this court to the case of Atilio vs Mbowe (1969) HCD 284 wherein the court pointed out three (3) conditions for the grant of a temporary injunction, namely that there must be a serious question to be tried; there must be overwhelming chances of success and there must be a prima facie case 6 and irrepealable loss likely to be suffered by the applicant rather than the respondent if an injunction is not be granted; and that balance of convenience should tilt in favour of the applicant. On the prima facie case to be established, the applicant's counsel submitted by referring this court to the case of Bata Limited Canada vs Bora Industries Limited Commercial Case No. 76 Of 2005 at Page 9,10 and 11 in which it was held by the court that: "Once the plaintiff has established that he has got a prima facie case in respect of same and similar goods he would be prima facie entitled to ad interim injunction and heavy burden would be upon the defendant to prove that the plaintiff should not be granted an injunction" On irrepealable loss, the applicant's counsel submitted that the applicant inevitably suffers irreparable loss unless the respondent is stopped from the continued infringement of the Applicant's trade mark. Mr. Sanga relied on Nicolous Nere Lekule vs IPTL and another (1997) TLR at page

58. Also he relied on Tanzania Cotton Marketing Board vs Cogecot Cotton SA (1997) TLR page 53. He argued that both cases deal with the determination of an irrepealable loss. That it should be irrepealable by 7 damages. That the applicant can suffer an irrepealable losses unless the respondent is restrained. The Applicant's counsel continued to submit that the irreparability of loss can be determined in applicant's reputation and goodwill created over the 70 years. He argued that, if injunction is not granted, the confusion brought by the respondent's selling counterfeit products that the average consumer may confuse with the genuine ones sold by the applicant, then customers may end up buying the counterfeit goods. He argued that the nature of the goods which are electricity "main switch" can cause harm to the public

as the goods of the respondent are inferior in quality. On the issue of balance of convenience, the applicant's counsel relied on the case of Godrej Consumer Products Ltd vs. Target International (T) Ltd, Miscellaneous Commercial Application No.54 of 2019. On the basis of that case, the applicant submitted that the applicant will suffer more than the respondent as the applicant has established himself well and has acquired goodwill. Hence, the applicant may suffer more financially to restore its goodwill damaged by the respondent. Therefore, he argued that in this case the balance of convenience tilts more in favour of the applicant. 8 It was the applicant submission that the acts of the respondent continuing in distribution of counterfeit goods will destroy the value of Havells products that the sales by the applicant are likely to drop due to counterfeit goods and that the general public may also be deceived to believe that the applicant's products have lowered in quality. Having heard the submissions from the learned counsel of the applicant, I will base my decision on the principles governing the grant of temporary injunctions as set out in *Atilio v. Mbowe* (supra) which was cited by the counsel for the applicant. Starting with the first principle on whether there is a prima facie case with a probability of success, the applicant has managed to show to this court that there is a serious question to be tried in the main case with a probability that the applicant who is the plaintiff in the main case, being entitled to the reliefs claimed in the pending suit. According to the averments made in the affidavit in support of this application, it is not disputed that both parties have their products in the Tanzanian market and that both products bearing the trade mark of Havells which owned by both applicants. This is according to paragraph 11 of the applicant affidavit where the principal officers of the applicant stated that they have come across counterfeit "Havells" products bearing an identical get up like 9 the genuine Havells products of the applicant. The applicant, therefore, has a prima facie case against the respondent. On irrepealable loss, the point for consideration is whether in fact the applicant would suffer irrepealable injury or damage by the refusal to grant the application as compared to the respondent if the application is granted? The learned counsel for the applicant clearly submitted that the applicant has a goodwill of company for more than 70 years in market and that the respondent produces counterfeit products which bear the trade mark "Havells". The customers may not be in a position to distinguish between fake which are produced by the respondent and genuine Havels product which are produced by the applicant. The loss of good will may be difficult to establish in the minds of the same people, once it is lost. I take note that the products are for electricity supply which they are inherently dangerous. There is a need to immediately halt the continued distribution of the fake or sub-standard products in the market as it may harm to the public at large in addition to injuring the reputation of the applicant. On balance of convenience, it is the findings of this court that the applicant as the registered owner of the trademarks and as the beneficiary of the 10 good will ascribed to his products may suffer more than the Respondent whose products are fake and is not the owner of the good will. Without the court's intervention, the applicant's goodwill will be likely to be injured. Once the goodwill of a business has been tainted or products become discredited, the damage in most cases is beyond repair. In the upshot, I find that that the application at hand satisfies the necessary conditions for granting of a temporary injunction as it was held in the case of

Atilio versus Mbowe (supra). I find this application is meritorious and I hereby grant it. I order that:

1. An interim injunctive order is hereby issued restraining the respondent, its agents, partners, affiliates, assignees or servants from manufacturing, selling, importing or exporting or commercially dealing in any other manner with counterfeit electrical goods and power distribution equipment's bearing the "Havells" trademark in the Tanzanian market.
2. The cost of this application shall be borne by the Respondent. It is so ordered, 11 Ruling is delivered in Court this 8th day of May 2024 in the presence of Mr. Partick Sanga, assisted by Miriam Mosses, learned advocates and in the absence of the Respondent who was duly served. 12

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