

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. 2247/2011

In the matter between:

YUNG SHEN PLASTICS

(Registration No 2007/025470/23)

Applicant

and

YU TA BAGS CC

(Registration No. 1999/007317/23)

1st Respondent

TOPAZ DISTRIBUTION SERVICES

(Registration No. 2008/065163/23)

2nd Respondent

JUDGMENT BY: NAIDOO, AJ

HEARD ON: 1 DECEMBER 2011

DELIVERED ON: 15 DECEMBER 2011

NAIDOO AJ

- [1] The relief that the applicant seeks is the enforcement of its copyright in certain works, as well as an interdict restraining the respondents from passing off products in the applicant's get-up or which could be regarded as confusingly similar to those of the applicant. Mr B Knoetze represented the applicant and Mr HJ Benade represented the second

respondent. It is evident from the papers that the applicant pursued a number of different legal remedies in order to obtain relief, namely a Mareva Injunction, an Anton Pillar order, institution of action by way of summons and the present application (which preceded the action). The relief sought in the action was exactly the same as in this application. Apart from the respondents in this application, there was one other party sued in the action. It appears that this application did not proceed as the parties entered into settlement negotiations, with the result that the 2nd respondent filed a notice opposing this application but did not file an opposing affidavit.

- [2] From the papers it would appear that the applicant and the first respondent initially concluded a settlement agreement on 2 August 2011, one of the terms of which is that, upon compliance with certain agreed terms, the applicant was prepared to waive its right to proceed with any claim against all defendants and to withdraw pending lawsuits against such defendants. The second respondent was included in the list of defendants so mentioned, but was not a party to such an agreement. On 25 August 2011, it seems another settlement

agreement was entered into between the applicant and first respondent, as well as the third defendant in the action, Chin Hua Weng. The second respondent (the second defendant in the action) was again, not a party to this second agreement, which superceded the earlier agreement and did not contain an undertaking by the applicant not to proceed against the other defendants or to withdraw pending lawsuits against them.

- [3] This application was served on the second respondent on 14 June 2011 and its notice of opposition was filed on 5 July 2011. Settlement negotiations presumably took place thereafter, but no indication is given in the papers whether these negotiations included the second respondent, who appears to have had two firms of attorneys (one in Bloemfontein and one in Pretoria) representing it. Default judgment was taken against the second respondent on 15 September 2011, but it seems that one of the attorneys representing it filed a notice of intention to defend after judgment was taken, which notice was subsequently withdrawn. The default judgment against the second

respondent appears to have been brought to the attention of its attorney on 26 September 2011.

[4] In October 2011, the second respondent made an offer to settle, which was not accepted by the applicant. Thereafter, on 10 November 2011, the second respondent declined to increase its offer and attempts to settle the matter finally failed. The second respondent, however, did not file its opposing affidavit and on 22 November 2011, the applicant served a notice of set down of this application on the second respondent. The applicant's Heads of Argument was filed on 29 November 2011 and on 30 November 2011 the second respondent filed an application for postponement of the matter and for an order allowing it to file its opposing affidavit by 12 December 2011.

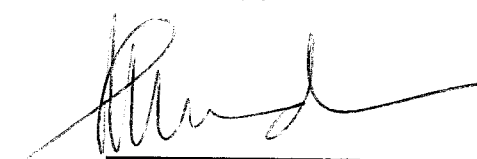
[5] In its Heads of Argument, the applicant indicated that it seeks only an order for costs of this application as the other relief was already obtained by way of the default judgment. Mr Benade argued that the applicant should not be granted costs in this matter as it had already obtained judgment and an order for costs in the action. He further argued that the

application for postponement should be granted in order for the issue of costs to be properly ventilated. No explanation was forthcoming as to why the second respondent took no action between 10 November 2011 (when settlement negotiations broke down) and 22 November 2011 (when the notice of set down was received), either to file an opposing affidavit in this application or to launch an application for rescission of the default judgment.

[6] In my view no purpose will be served in allowing a postponement of this matter simply to argue the question of costs. The applicant is entitled to costs of this application, which are separate from the costs of the action. In the absence of more convincing reasons for the delay, on the part of the second respondent, in filing an opposing affidavit or in taking steps to rescind the default judgment, the court cannot come to its rescue.

[7] I, accordingly, make the following order:

The Second Respondent is ordered to pay the costs of this application.



S. NAIDOO, AJ

Counsel for Applicant:

Adv B Knoetze SC
Instructed by:
Matsepes Incorporated
26/28 Aliwal Street
Bloemfontein

Counsel for the Respondent:

Adv HJ Benade
Instructed by:
Botha Hefer Incorporated
Property Park
60 Kellner Street- Suite B
Westdene
Bloemfontein