

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1100/2004

In the matter between:

KING CONCOLIDATED FOOD
SERVICES (PTY) LTD

APPLICANT

and

OLYMPIC FLAME (PTY) LTD

RESPONDENT

CORAM:

VAN COPPENHAGEN J

HEARD ON:

10 FEBRUARY 2005

JUDGMENT:

VAN COPPENHAGEN J

DELIVERED ON:

17 FEBRUARY 2005

[1] In his founding affidavit the applicant alleges:

“38. As at the date of issue of this application, the Respondents continue to use and commercially exploit the Applicant’s trademarks and intellectual

property, in the following manner:

- 38.1 The Respondent continues to display the
‘Keg’ signage outside the premises atop a
‘pole signboard’.
- 38.2 The Respondent continues to display the ‘Keg Pub & Restaurant’
signage within the premises.
- 38.3 The Respondent continues to display the ‘Keg’ pillar boards within the
premises.
- 38.4 The Respondent continues to display the sand blasted ‘Keg’ signage
on glass panels within the premises.
- 38.5 The Respondent continues to display the ‘Keg’ wall mounted specials
chalk boards within the premises.
- 38.6 The Respondent continues to make use of
the ‘Keg’ menu’s and cocktail menu’s.
- 38.7 The Respondent continues to make use of
the ‘Keg’ operational manuals, training
manuals, menu manuals, maintenance
manuals and recipe manuals.
- 38.8 The Respondent continues to display the words ‘Keg’ on the waitrons
name badges.
- 38.9 The Respondent continues to display the
words ‘Keg’ on till slips and computer
generated printed documents.

38.10 The Respondent continues to display 'Drink your way around the world' signage and logo's, 'Cocktail Cruise' signage and logo's."

Applicant applies for an injunction against the respondents to desist in acting as set out above.

[2] Respondents deny the allegations that as at date of the issue of the application that they were in any way and in any manner conducting itself as set out in the founding affidavit and give a full explanation in reply to applicant's founding affidavit.

[3] I need say no more but that on the allegations contained in the founding affidavit read with the allegation contained in the opposing affidavit, various actual disputes present themselves negating any order in favour of the applicant.

(ADMINISTRATOR, TRANSVAAL, AND OTHERS v THELETSANE AND OTHERS 1991 (2) SA 192 (A) at 197)

Appreciating the difficulties confronted with, applicant's counsel suggested in the alternative that the matter be

referred to evidence or alternatively for trial.

- [4] The main argument, however, on behalf of applicant, suggests that respondent on his own version acknowledges, that the trademark registered in the name of the applicant, is being exploited by the respondents in that signage used by respondents except for the inscriptions thereon, so closely resembles the signage by or registered in the name of the applicant, that the actions by respondent can be described as “passing off”.

The main argument on behalf of the applicant is not substantiated by the application and respondent was not required to react or reply to allegations or averments relating to a passing off. Applicant cannot in argument rely or suggest conduct infringing on a trademark or registered trademarks if in its application or founding affidavit the respondent was not alerted to the fact that such an argument should or could be expected. See **THELETSANE’S** case *supra*.

[5] In a so-called supplementary affidavit one Nitsche explains that he on the 28th November 2004 visited the premises of the applicant and that he found with regards to applicant's trademark a mark "Drink your way around the world" to be displayed on a board inside the restaurant and a sign outside the restaurant about 50 meters away which reflects the "Keg" logo and the name "Keg and Mustang".

Respondent fully explains the presence of the mark "Drink your way around the world" displayed inside the restaurant and the sign outside the restaurant displaying the name "Keg and Mustang".

What is of importance, however, is that Nitsche although he inspected the business could find no evidence of any infringements of the trademark other than the alleged above by the respondents at the date of the inspection on 28 November 2004.

An order on the terms as applied for by the applicant will therefore be a futile exercise.

- [6] In approaching the court applicant was aware or should have been aware that the allegations contained in its founding affidavit would be hotly disputed, but nevertheless, elected to use applications for proceedings, in stead of proceeding by way of action. It must suffer the consequences of its indiscretion.

No reason suggests itself why the successful party should not be entitled to its costs.

The following order must follow:

1. The application is dismissed with costs including the costs of 18 October 2004.

G. VAN COPPENHAGEN, J

On behalf of applicant:

Adv. Nigel Redman
Instructed by:
Naudes Attorneys
BLOEMFONTEIN

On behalf of respondent:

Adv. N. Snellenburg
Instructed by:
Goodrick & Franklin
BLOEMFONTEIN

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