IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT
(HELD AT JOHANNESBURG)

CASE NO: 2005/10365
DATE: 25/11/2010

Reportable
(In the Electronic Law Reports Only)

In the matter between:

HONDA GIKEN KOGYO KABUSHIKI KAISHA
First Plaintiff/First Respondent

HONDA SOUTH AFRICA (PTY) LTD
Second Plaintiff/Second Respondent

and

HOFFMANN INTERNATIONAL (PTY) LTD
First Defendant/First Excipient

ALL DIESEL POWER PRODUCTS (PTY) LTD
Second Defendant/Second Excipient

HOFFMANN, ALAN LADWILL
Third Defendant/Third Excipient

JUDGMENT

WILLIS J:

[1] The defendants have taken exception to the plaintiff's replication on the basis that paragraphs 1 to 3 thereof "do not disclose a reply to the defendants' plea." In the action, the plaintiffs seek an interdict and claim damages arising from for the first and second defendants' alleged importation and sale in South Africa of cylinder heads and cylinder barrels, whether separately or as part of general purpose petrol engines. The plaintiffs have alleged that these parts, if manufactured in this country, would have constituted an infringement of a copyright in four manufacturing drawings. The defendants have denied that their parts are reproductions or adaptations of the drawings. In addition, the defendants have pleaded the statutory defence contemplated by section 15 (3A) of the Copyright Act, No. 98 of 1978, as amended ("the Copyright Act").

[2] This is the plaintiffs' replication:

The Plaintiffs replicate to the Defendants plea as follows:

Ad paragraph 21

1. The defendants plead that the First Plaintiff's copyright in its drawings has not been infringed, by virtue of section 15 (3A) of the Copyright Act, because the Defendants' parts (the cylinder head and the cylinder barrel) are three-dimensional reproductions of authorized reproductions of original drawings of the first plaintiff, i.e. whether such original drawings are the drawings in issue or other drawings.

2. The Plaintiffs plead that the defence of section 15 (3A) if the Copyright Act can only competently be raised in respect of the drawings in issue. Reproductions of drawings which are not in issue does not avail a defence in terms of Section 15(3A) of the Copyright Act.

3. In the circumstances, the plaintiffs plead that the defendants' reliance on the reproduction of drawings other than the drawings in issue does not disclose a defence to their allegations sustaining the claim of infringement.

4. The Plaintiffs plead further that section 15 (3A) of the Copyright Act amounts to an arbitrary deprivation of property which is in conflict with section 25 of the Constitution of the Republic of South Africa Act 108/1996 ('the Constitution").

5. The Plaintiffs plead that, in the circumstances, Section 15 (3A) of the Copyright Act is invalid as being inconsistent with the Constitution.

6. In the circumstances, Section 15 (3A) of the Copyright Act does not give rise to a defence to the Plaintiffs' claims.

Wherefore the plaintiff prays for:-

1. A declaration that Section 15 (3A) of the Copyright Act is inconsistent with Section 25 of the Constitution and is therefore invalid;

2. An order, referring to the Constitutional Court for confirmation, the declaration on prayer 1;

3. Such further relief as the Court deems fit;

4. The relief sought in the Particulars of Claim.

[3] In addition to their submissions that the exception is without merit, the plaintiffs complain that the exception has been taken out of time without any explanation or application for condonation. Rule 23(1) of the Uniform Rules of Court provides that exceptions shall be delivered within the period for filing any subsequent pleading. Rule 25(5) provides that further pleadings, after the replication, may be delivered within ten days after the previous pleading delivered by the opposite party. The replication was delivered on 6 April 2010. Any exception (or further pleading) thereto was therefore due on or before 20 April 2010. The exception was served on the plaintiffs on 24 June 2010. In terms of Rule 26, any party who fails to deliver a replication or subsequent pleading within the time stated in Rule 25 is *ipso facto* barred. No further pleading may be delivered unless the bar is

removed. In the absence of an agreement between the parties this may occur upon good cause shown to the court. The plaintiffs contend that neither situation obtains in the case of the exception. Furthermore, they argue that, in terms of Rule 29(b), the pleadings closed on 21 April 2010. Relying on *Stockdale Motors Ltd v Mostert*,[1] the plaintiffs submit that as exceptions are pleadings, they cannot be brought after the close of pleadings. Accordingly, the plaintiffs argue that the exception stands to be dismissed on the basis that the defendant have been out of time.

[4] Section 15 (3A) of the Copyright Act provides as follows:-

> The copyright in an artistic work of which three-dimensional reproductions were made available, whether inside or outside the Republic, to the public by or with the consent of the copyright owner (hereinafter referred to as authorized reproductions), shall not be infringed if any person without the consent of the owner makes or makes available to the public three-dimensional reproductions or adaptations of the authorized reproductions, provided the authorized reproductions primarily have a utilitarian purpose and are made by an industrial process.

[5] During the course of argument, a fair amount of time was spent in consideration of the case of *Dexion Europe Ltd v Universal Storage Systems (Pty) Ltd*[2] in attempts to persuade me of its implications in the present case. In do not think I need venture into this territory.

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[1] 1958 (1) SA 270 (O) at 270 H.
[2] 2003 (1) SA 31 (SCA), esp. at paragraphs [4] and [5]

[6] It would be inappropriate for me, in this case, to express an opinion on the constitutionality or otherwise of section 15 (3A) of the Copyright Act. For the purposes of deciding this exception, I think it would be fair, however, to observe that if the matter does eventually fall to be determined by the Constitutional Court, it is not "obvious" that the plaintiffs would fail. The question raises issues of considerable technical and legal complexity. It also touches upon important issues of policy. The matter would need to be carefully considered. It would be wrong for this court to "excise" the substratum upon which the plaintiffs intend to rely in the event that they may seek to challenge the constitutionality of the section.

[7] It is well settled law that exceptions should not be taken to particular sections of a pleading unless those sections are self contained.[3] Furthermore, it is plain enough that the whole purpose of an exception to a plaintiff's pleading is to avoid the leading of unnecessary evidence at the trial.[4] It is also clear that it is only in exceptional circumstances such as where a defendant admits the plaintiff's allegations but contends that, as a matter of law, the plaintiff would, in any event, fail.[5]

[8] In my view:

(i) Paragraphs 1 to 3 of the Plaintiff's replication are not self-contained – rather the replication must be read and understood as a whole;

[3] See, for example, *Salzmann v Holmes* 1914 AD 152 at 156; *Stephens v De Wet* 1920 AD 279 at 282; *Barrett v Rewi Bulawayo development Syndicate Ltd`* 1922 AD 457 at 459; *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553G.
[4] See, for example, *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706 and *Barclays National Bank Ltd v Thompson* (*supra*) at 553H.
[5] See, for example, *Welmoed en Andere v Sauer* 1974 (4) SA 1 (A) esp. at 6B-H and 20G; *Barclays National Bank Ltd v Thompson* (*supra*) at 553H.

(ii) The exception will not avoid the leading of unnecessary evidence at the trial and, if successful, may well result in the leading of more evidence precisely because the plaintiff would need to cover a wider field than being able to contend, in effect, that "even on the defendants own version of what they say they have done, they have infringed the Copyright Act and, if it is indeed permitted in terms of section 15 (3A), then that section is unconstitutional";

(iii) The defendants do not in their exception admit the plaintiff's allegations but contend that, as a matter of law, the plaintiff would, in any event, fail – the basis of their objection is that paragraphs 1 to 3 thereof "do not disclose a reply to the defendants' plea".

[9] Quite apart from other considerations such as the fact that the exception has been taken late and that no application for condonation has been made and the contention that the exception does not comply with Rule 23 (1) of the Uniform Rules of Court, it therefore is clear to me to me that the exception must fail.

[10] The following is the order of the court:

The defendants' exception to the plaintiffs' replication is dismissed with costs, which costs are to include the costs of two counsel.

DATED AT JOHANNESBURG THIS 25th DAY OF NOVEMBER, 2010.

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Plaintiffs/Respondents: *C.E. Puckrin* SC (with him, *O. Salmon* and *F. Southwood*)
Counsel for the Defendants (Excipients): *A.P. Rubens* SC (with him, *I. Miltz* S.C.)

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Date of hearing: 18th November, 2010.
Date of judgment: 25th November, 2010