

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 10295/2008

DATE: 8 AUGUST 2008

5 In the matter between:

ADMIRAL YACHT MANUFACTURERS

(PTY) LIMITED APPLICANT

and

ISLAND SPIRIT YACHTS (PTY) LIMITED 1ST RESPONDENT

10 CATAMARAN MARQUEE S.A. CC 2ND RESPONDENT

ANDRIES CARL VAN ROOYEN 3RD RESPONDENT

GOLDEN FALLS TRADING 438 (PTY) LTD 4TH RESPONDENT

PHILLIP SOUTHWELL t/a

SOUTHWELL YACHT DESIGNS 5TH RESPONDENT

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JUDGMENT

LOUW, J:

20 The applicant carries on business as a builder of catamaran yachts. The first to fourth respondents are likewise involved in the manufacture and sale of catamaran yachts. The fifth respondent, Southwell, is the designer of the Island Spirit catamaran.

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During the course of 2007, a company Fortuna Catamarans (Pty) Limited (Fortuna), the holder at the time of the exclusive licence granted to it by Southwell to manufacture, market and sell the Island Spirit catamaran, was liquidated. The third respondent, who is, it seems, the first respondent under another name, purchased the moulds used to cast the Island Spirit hulls from Fortuna in liquidation on 14 January 1008. The sale was voetstoots and without warranties as to intellectual property. Earlier during the course of the liquidation of Fortuna, the applicant negotiated with Southwell and on 27 March 2007 concluded a written contract (the Admiral contract) granting the applicant, so it contends, the exclusive right to manufacture, market and sell the Island Spirit catamaran.

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A dispute has arisen between the applicant and Southwell about the validity and status of the Admiral contract. This dispute has been referred to arbitration (the arbitration proceedings). Southwell has consented to an order prohibiting him, pending the resolution of the arbitration proceedings from granting any other party the right to manufacture, market or sell the Island Spirit catamaran.

The applicant now also seeks orders against the first four respondents, whom I shall refer collectively as the

respondents, interdicting them from manufacturing, marketing or selling the Island Spirit catamaran pending the resolution of the arbitration proceedings.

5 In addition, the applicant seeks orders restraining the respondents from passing off any catamaran design as the Island Spirit catamaran, and restraining the respondents from bringing about any changes to the design of the Island Spirit catamaran which are not sufficient to constitute an entirely
10 new design, and of manufacturing, marketing or selling, redesigned vessels.

Finally, it also seeks an order restraining the respondents from using the Island Spirit catamaran brand name pending the
15 outcome of the arbitration proceedings.

All the relief sought is, as I have said, pending the outcome of the arbitration between the applicant and Southwell.

20 Mr Louw, who appeared on behalf of the applicant, has conceded that the relief sought against the respondents is final in nature, although it is to endure for a limited time, namely until the resolution of the arbitration proceedings to which the respondents are not party.

The application was launched as a matter of urgency, and the respondents right to challenge the application on the basis of lack of urgency was reserved when the matter was initially postponed when it was first heard on 8 July 2008. The matter was finally set down before me in the fast lane of the motion court on Friday, 1 August 2008, when Mr Tyler, on behalf of the respondents, without conceding, did not at this stage press the argument based on a lack of real urgency.

10 At the commencement of the hearing, Mr Tyler raised two issues, first the striking out as new material of the report of a marine engineer, Dr Brian Gowans, which was annexed to the applicant's replying affidavit, and further the striking out of certain plans for catamarans annexed to a further affidavit the
15 applicant was given leave to file.

One of the disputes between the applicant and the respondents is whether the vessel the respondents claim they are entitled to manufacture, which is described in the papers as the 080 model catamaran, is in fact the same as the 063
20 model the applicant contends is the model which it is entitled to manufacture exclusively under the Admiral contract with Southwell.

Dr Gowans filed an affidavit as part of the launching papers, wherein he states the following with reference to the moulds which the respondents purchased from Fortuna in liquidation:-

5 "In this respect I state the following with certainty:-

6.1 Moulds are simply put on catamarans like many other yachts are made in and extracted from.

10 6.2 Moulds, however, frequently have a finite life, that means that only a certain number of catamarans ought to be produced from a mould. Thereafter the mould deteriorates to a point that it should be replaced. Even if slight modifications are made to the mould at such time of replacement, it still remains a mould based on the original design.

15 6.3 In other words, for a specific catamaran design there may be different moulds, but these would all be variations of the original design.

20 6.4 Changes can be made to a design and/or the moulds to improve performance or aesthetics, but this does not change the design *per se*.

25 6.5 Therefore, if a designer or manufacturer refers to a version of a design, it means that

such version is based on the original brand and/or original design.

6.6 It may be that a number on a drawing can be changed to denote that a change has been made, but this does not mean that the fundamentals of the design has been changed. In this regard the terms "configuration control" in accordance with the ISO 9000 is employed, which refers to model numbers to identify different variations of the same design.

In my opinion for there to be a change in a design, basic naval architectural aspect must change, i.e. principal dimension, stability, etcetera. I know from my experience in surveying boats for the European Recreational Craft Directive (for CE certification a legally required European certification requirement) that a significant change requires that the drawings/calculations have to be re-submitted. If the same CE certification is applied to a new vessel, that indicates that fundamental changes have not been made and not taken place from the old to the new vessels.

In addition to the above, and more specifically at

the time of the liquidation of Fortuna Catamaran (Pty) Limited (Fortuna), the previous holder of the design rights of the Island Spirit catamaran design, I was asked by the liquidator to do a survey on the Island Spirit moulds which formed part of the estate of Fortuna, because Fortuna made certain modifications to these moulds. My finding, as presented to the liquidator, was that even with these modifications, the moulds still constituted the Island Spirit design.

Furthermore, the moulds in the liquidated estate of Fortuna matched significantly and substantially the set of drawings available on the Island Spirit design, namely the so-called 063 design, bearing in mind that drawing numbers on a design may change all the time with every modification of the original design, say for instance if a double room is changed into two single rooms, that will result in a new drawing with a new drawing number, but it will still constitute the original yacht design. The drawings referred to as 063 were given to me by Mr Phillip Southwell."

It is therefore clear that from the outset the applicant's case,

as it is set out in the launching papers, was that the catamarans the respondents intended manufacturing with the moulds purchased from Fortuna were the same as the vessels the applicant claims to have the exclusive right for.

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Dr Gowans's opinion was not challenged directly in the answering papers on behalf of the respondents. In its reply filed on 10 July 2008, the applicant returned to the dispute regarding the 080 and 063 models and referred back to Dr Gowans's opinion expressed in the launching papers and annexed Dr Gowans's expert report given to the liquidators of Fortuna on 1 August 2007. It is clear that the report cannot, in the circumstances, be considered new matter which must be struck out.

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In his report to the liquidators, Dr Gowan referred to a "representative set of drawings" furnished to him by Southwell and on the basis of which he expressed his opinion. In a letter dated 11 July 2008, the respondents' attorney requested copies of the drawings. These drawings were provided as an annexure to a fourth set of affidavits by the applicant dated 21 July 2008. Dr Gowans also in his original affidavit referred to these drawings.

25 In the context, the drawings and report of Dr Gowans do not, in

my view, constitute new matter which should be struck out.

I turn to the merits of the application. The argument based on copyright and lack of originality which was canvassed in the heads of argument on behalf of the respondents was not persisted with by Mr Tyler during oral argument.

The applicant's case is in broad outline that it has acquired through the Admiral contract, the exclusive rights to manufacture, market and sell the Island Spirit catamaran from the designer Southwell. The respondents do not dispute the existence of the admiral contract. The respondents are in the process of manufacturing a catamaran with moulds purchased from Fortuna. These vessels, even if they are termed the 080 model, are in fact, on the evidence in these proceedings, of the same design as the 063 model which the applicant contends it has exclusive rights to.

The evidence of Gowan, in my view, on the balance of probabilities establishes that this is the case. The issue is whether the applicant has shown that it has a clear right to exclusively manufacture, market and sell the 063 model.

The first issue raised in this regard is that the Admiral contract did not afford any rights to the applicant because it purports to

confer rights which Southwell did not at the time have to dispose of. This is so because these rights belong to Fortuna in liquidation. There is no evidence that the liquidator consented to the termination of Fortuna's rights and consequently these rights rested in the company in liquidation, it was contended. Whether Fortuna's rights remained in existence after its liquidation and whether such rights precluded Southwell from concluding the Admiral contract with the applicant, may or may not be, in dispute between the liquidator and Southwell. In my view, on the papers in this case, the doubt created in this regard is not of such a nature as to dislodge the balance of probabilities in the respondents' favour.

15 The next point raised by the respondents is that the applicant has not demonstrated that it did in fact acquire any rights from Southwell. This is so because, it is contended, the very existence of the Admiral contract is in dispute between the applicant and Southwell. In my view, the applicant has on these papers established, on a balance of probabilities, that it has a clear right based on the Admiral contract, the existence of which is not in dispute on these papers. Without seeking to prejudge the outcome of the arbitration proceedings, the applicant has, in my view, on the papers in the application, 25 established such a right.

It is clear that unless the respondents are interdicted, the applicant will be prejudiced if the respondents should be allowed to continue to manufacture, market and sell the catamarans it claims it is entitled to make and sell. I do not repeat the facts in this regard that are fully canvassed in the papers.

Finally, given the fact that the relief sought must be given without delay if it is to be effective, the applicant does not, in my view, have an adequate alternative remedy. I intend to follow the alternative relief sought by the applicant in terms of which both it and the respondents are interdicted.

In the result, the following order is made:-

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1. Pending the outcome of the arbitration proceedings currently pending between the applicant and the fifth respondent:
 - 1.1 The respondents and the applicant are restrained from manufacturing, marketing and selling the catamaran yacht known as Island Spirit catamaran and/or any variation thereof.
 - 1.2 The respondents and the applicant are restrained from passing off any catamaran design as the Island Spirit

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catamaran design and/or any variation thereof.

1.3 The respondents and the applicant are restrained from bringing about in any manner whatsoever any changes to the Island Spirit catamaran design and/or any variation thereof which changes are not sufficient to constitute an entirely new catamaran design and then manufacture, market and sell such changed design.

1.4 The respondents and the applicant are restrained from using, in any manner whatsoever or for any purpose whatsoever, the Island Spirit catamaran brand name.

1.5 The fifth respondent is restrained from entering into any agreement granting any party other than the applicant the right to manufacture, market and sell the Island Spirit catamaran.

2. Finally, the first to fourth respondents are ordered to pay the costs of this application.



LOUW, J