**BEECHAM GROUP LTD**

**V.**

**ESDEE FOOD PRODUCTS NIGERIA LTD.**

COURT OF APPEAL (LAGOS JUDICIAL DIVISION)

JUNE 12, 1985

SUIT NO. CA/L/12/84

**LEX (1985) - CA/L/12/84**

OTHER CITATION:

3PLR/1985/76 (CA)

28 NIPJD [CA.1985] 12/1984

(1980) F.H.C.L 177

(1977-1989) 2 I.P.L.R. 369

**BEFORE THEIR LORDSHIPS**

IDRIS LEGBO KUTIGI, J.C.A.

PHILIP NNAEMEKA-AGU, J.C.A.

UTHMAN MOHAMMED, J.C.A. *(Delivering the Lead Judgement)*

**BETWEEN**

BEECHAM GROUP LTD – Appellant

AND

ESDEE FOOD PRODUCTS NIGERIA LTD. - Respondent

**REPRESENTATION**

B. OMOTAYO (WITH HIM, R. N. AGU) - FOR THE APPELLANTS

O. KAYODE (WITH HIM, O. J. IDIGBE). BRIEF PREPARED BY DAVID GARRICK - FOR THE RESPONDENTS

**ISSUES FROM THE CAUSE(S) OF ACTION**

INTELLECTUAL PROPERTY – TRADEMARK:- *Trademark Infringement* – What constitutes – When sound of mark complained against will suffice even if the text appear dissimilar - *Remedies for Trademark Infringement* - Successful litigant in a trademark infringement case – Whether is entitled to damages – Relevant considerations

ANTITRUST AND TRADE REGULATION:- Statutory requirements for registration of contracts - the National Office of Industrial Property Decree No. 70 of 1979 – Failure thereto – Where not pleaded and evidence given at the lower court in proof of - Whether can defeat a claim arising from the contract

AGRICULTURE AND FOOD LAW – PROCESSED FOOD PRODUCT:- Merchandising of – Protection of rights relating thereto through trademark – Relevant considerations

PRACTICE AND PROCEDURE – APPEAL – FRESH ISSUE:- An issue that has not been raised in the lower court – Whether can be entertained on appeal – Proper treatment of

INTERPRETATION OF STATUTE:- Section 4(d) and 7 of Decree 70 of 1979 – Interpretation of - Penalty for non-registration of contemplated agreements

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIM(S)

Following the introduction and sale of a non-alcoholic beverage under the trademark “Glucos-Aid” by the Defendants (Esdee Food Products), the Plaintiffs/Respondents (Beecham Group) who were the owners of the registered trademarks “Lucozade” with trademark Nos. 5452 and 5456, filed an injunction restraining the Defendants from infringing upon their registered trademarks. The Plaintiffs/Respondents also sought the delivery for destruction, all goods, cartons, wrappers, blocks, discs or stamps bearing any mark or set up that would be in breach of the injunction prayed for.

DECISION APPEALED AGAINST

At the trial court, it was held that “Glucos-Aid” is confusingly similar in sound to the registered trademark “Lucozade”, and as such it offends the provision of Section 5(1) of the Trade Marks Act of 1965. The court awarded N5,000 as damages to the plaintiffs/respondents.

ISSUE FOR DETERMINATION

1. That the judgement of the learned trial judge was given per incuriam as neither parties in the court below adverted his mind to the provisions of Decree No. 70 of 1979 – National Office of Industrial Property Decree.

2. That there were more than one Plaintiff in the court below and,

3. That on the evidence the Respondent did not make out a case for infringement in the court below.

DECISION OF CURRENT COURT (SUPREME COURT)

On appeal to the Supreme Court, counsel for the plaintiffs/respondents cited the case of Bell Sons and Co. v. Godwin Alco & Others to buttress the point that both the ears and the eyes must be together involved in the exercise of comparison. Applying the test in that case, the Supreme Court dismissed the appeal and held that “Glucos-Aid”, in sound, is confusing to ‘Lucozade’ and it will undoubtedly mislead the public.

**MAIN JUDGMENT**

UTHMAN MOHAMMED, J.C.A. *(Delivering the Lead Judgement)*

Following the introduction and sale of a non-alcoholic beverage under the trademark “Glucos-Aid” by the Defendants (Esdee Food Products), the Plaintiffs/Respondents (Beecham Group) who were the owners of the registered trademarks “Lucozade” with trademark Nos. 5452 and 5456, filed an injunction restraining the Defendants from infringing upon their registered trademarks. The Plaintiffs/Respondents also sought the delivery for destruction, all goods, cartons, wrappers, blocks, discs or stamps bearing any mark or set up that would be in breach of the injunction prayed for.

At the trial court, it was held that “Glucos-Aid” is confusingly similar in sound to the registered trademark “Lucozade”, and as such it offends the provision of Section 5(1) of the Trade Marks Act of 1965. The court therefore awarded N5,000 as damages to the plaintiffs/respondents.

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Applying the test in that case, the Supreme Court dismissed the appeal and held that “Glucos-Aid”, in sound, is confusing to ‘Lucozade’ and it will undoubtedly mislead the public.

*“…we do not think that the mere substitution* *of the letter ‘A’ in red for the letter ‘B’ in black* *(but clearly retaining the size and lettering in* *both designs) is sufficient to dispel the* *confusion which may likely arise in the mind* *of a customer who has almost always to go by* *his recollection…I also see no reason why I* *should interfere with the damages awarded by* *the learned trial Chief Judge. I regard the* *award as reasonable in the circumstances of* *the case. In the end this appeal has failed and* *it is dismissed. The judgment of the Chief* *Judge of the Federal High Court in Suit FHC/L/86/80 is affirmed. I award N300 costs in favour of the respondent.”*

In a claim concerning infringement of a trademark, the learned Chief Judge of the Federal High Court entered judgement in favour of Beecham Group Limited, against Esdee Food Products Nigeria Limited, the Appellants, in this appeal.

The Respondents are the registered proprietors of a trademark “Lucozade” No. 5452, schedule (3), of Trademarks Act, 1965, which are chemical substances used for medicine and pharmacy. They are also the proprietors of the same in

respect of the substance used also as food or as ingredients in food. Evidence was given before the trial court that the Appellants had put in the market and offered for sale and sold a non-alcoholic beverage under a trademark called “Glucos-Aid”. The Respondents testified before the learned Chief Judge and asserted that the Appellants have committed an infringement of their registered trademark “Lucozade” by the use of a trademark “Glucos-Aid”. Their claim before the trial court against the appellants was as follows:

1. An injunction restraining the Defendants, their servants and agents from infringing the Plaintiffs registered Trademarks No. 5452 and 5456.

2. Delivery up on Oath for destruction of all goods, cartons, wrappers, blocks, discs or stamps bearing any mark or set up that would be in breach of the injunction prayed for.

3. An account of the profits made by the Defendants by reason of their having carried out the said acts of infringement, or damages of N500,000.

4. Costs.

5. Further or other relief.

In proof of their claim three witnesses testified before the court for the Respondents. The Appellants called no witness but rested their case on the evidence adduced for the Appellants. The learned trial Chief Judge after considering the evidence adduced entered judgement in favour of the Respondents and awarded damages assessed at N5,000. In addition, he restrained the Appellants, their servants and agents from infringing the Respondents’ registered trademarks No. 5452 and 5456. He also ordered for the destruction of all goods, cartons, wrappers, blocks, discs or stamps bearing any mark or set up that would be in breach of the injunction. It is against the said judgement that the Appellants have appealed to this court.

Five grounds of appeal were filed. I do not intend to reproduce them in this judgement, but I shall refer to the arguments submitted in support of the grounds.

From the submissions of the learned counsel for the Appellants, I think I can agree with the counsel for the Respondent that only three issues were canvassed in support of the grounds of appeal, and those issues were

1. That the judgement of the learned trial judge was given per incuriam as neither parties in the court below adverted his mind to the provisions of Decree No. 70 of 1979 – National Office of Industrial Property Decree.

2. That there were more than one Plaintiff in the court below and,

3. That on the evidence the Respondent did not make out a case for infringement in the court below.

The learned counsel for the Appellants, Mr. Omotayo, submitted that there was abundant evidence from the records of proceedings showing that the case was instituted by more than one company, one of them resident in Nigeria. According to the counsel’s submissions, it had been shown in the records of proceedings that there were more than one Plaintiff. In his support for this submission, he referred to pages 49-52 where a number of Plaintiffs’ companies were listed. Counsel further submitted that Section 4(a) of Decree 70 of 1979 provided that the use of trademarks was registrable, and since Beecham Limited of Nigeria is the only authorised distributor of “Lucozade” in Nigeria, then Beecham Group Limited, the 1st Plaintiff, has got no locus standi to institute this action. Mr. Omotayo however concedes that the issue referred to in Decree 70 of 1979 raises a matter which should have been pleaded and evidence given at the lower court.

Nevertheless, in the reply brief, the learned counsel for the Respondents on the provisions of Section 4(a) of Decree 70 of 1979 is of the view that the Decree is not applicable to the case in hand. Counsel argued and quite correctly in my view, that non-registration of such agreements and contracts did not in any way render them invalid or unenforceable. I agree entirely with Mr. Garrick, the learned counsel for the Respondents in his brief that penalty has been provided for a violation of the provisions of Section 4(d) of Decree 70 of 1979. Under Section 7 of the said Decree, foreign exchange will not be released in respect of any contract or agreement which is not registered as provided by Section 4(d) of the Decree. This is the penalty for non-registration of the said agreements. It did not say that failure to register had rendered such agreements unenforceable or invalid.

On the issue about the allegation that there were “Two Plaintiffs” in the suit, counsel for the Appellants held this view because the Respondents have been referring to them in their pleadings and evidence as “Plaintiffs” in the plural. Counsel argued that he had discovered from the documents tendered by the Respondents that the “Plaintiffs” were

i. Lucozade Limited of Great West Road Brentford, Middlesex England.

ii. Beecham Foods Limited also trading as the Lucozade Company of Beecham House Great West Road Brentford, Middlesex England.

iii. Beecham Group Limited of the same address as above.

iv. Beecham Products, a Public Liability Company also at the same address.

v. Beecham Limited, a Nigerian Company as shown at page 31 lines 3 and 4 of the Record of Proceedings.

Mr. Omotayo argues that the first witness for the Plaintiffs represented the parent company in England, which according to him is the first Plaintiff and Beecham Limited of Nigeria is the second Plaintiff.

I have carefully perused the evidence adduced before the trial court and I have failed to find out where Mr. Omotayo got the idea that there were two plaintiffs in this case. In the first place, the issue about one or two plaintiffs in the suit had not been joined in the pleadings. Even if it had been so raised, I cannot see what Mr. Omotayo would like to achieve by this submission. The Respondents had instituted this action, at the lower court under the name “Beecham Group Limited”. If such a company does not exist or is unregistered in Nigeria or is not the registered proprietor of the trademark “Lucozade”, it is for the Appellants to point that out to the trial court.

It seems to me that the learned counsel for the Appellants is unfamiliar with the old age practice of referring to limited liability companies in the plural form. Counsel’s attention is drawn to the Interpretation Act 1964, Section 14(b), where it is provided that words in the singular include the plural and *vice versa*. Mr. Omotayo it is safe to refer to limited liability companies in the plural form. Such reference had been made by the learned trial judge in the record of proceedings were the “Defendants” were referred to in the plural form. This claim had been filed by “Beecham Group Limited” as Plaintiffs and it was against “Esdee Food Products Nigeria Limited”.

Throughout the trial there was no evidence to show that two companies sued the Appellants in this suit. Counsel for the Respondents is therefore wrong to write the name of the Respondents in his brief as follows:

Esdee Food Products (Nigeria Limited)…………..Defendant/Appellant

And

1. Beecham Group Plc.

2. Beecham Limited …………………………………… PlaintiẠs/Respondents

The third point canvassed by Mr. Omotayo in support of this appeal, had been formulated in the following question.

*Whether from the evidence and pleadings, the Plaintiffs/Respondents made out a case for infringement of the registered trademark ‘Lucozade’?*

Omotayo argued that since Beecham Limitedis the only distributor of Lucozade in Nigeria andthat the written agreement between BeechamGroup Limited and Beecham Limited had notbeen registered as provided for by Section 4(d) ofDecree No. 70 of 1979, then Beecham Group Limited had no locus standi to institute this suit in Nigeria. Also, Beecham Limited of Nigeria cannot use the trademark “Lucozade” since no agreement for the company to use the trademark had been registered.

I have earlier in this judgement given an answer to this question. Non registration of the agreement does not make the trademark invalid or unenforceable. However, Mr. Garrick, in his submission, argued that evidence had been adduced before the trial court and documents were tendered and admitted in proof of the fact that Beecham Group Limited are the registered proprietors of the trademark “Lucozade”. I have referred to exhibit A-A1 and I am satisfied that originally the name of the proprietors of the trademark “Lucozade” were Lucozade Limited of Great West Road, Brentford Middlesex England.

However, in 1974 the trademark was transferred to Beecham Group Limited, trading also under the name of the Lucozade company and also as Beecham Products. These facts were given in exhibit A-A1, a document from the Trademarks Registry, Lagos. It is therefore without any doubt that the Respondents are registered proprietors of the trademark “Lucozade” in Nigeria.

Counsel for the respondents submitted that the non-alcoholic beverages put in the market and offered for sale under the trademark “Glucos-Aid” is confusingly similar in sound to the registered trademark “Lucozade”, and therefore offends the provisions of Section 5(1) of the Trademarks Act 1965. Mr. Garrick cited a very helpful Supreme Court case on a matter concerning the registration of trademarks to buttress his argument. This is the case of Bell Sons and Co. v. Godwin Aka & Others (1972) S.C. 215 at 223. In that case, the Supreme Court held as follows:

*“With respect to the issue of application, we point out that the learned trial judge paid but little attention to the possibility of deception at which the law strikes. The law of trademarks is aimed at the subtle as well as to the obvious infraction of it and both the ears and eyes must be together involved in the exercise of comparison. If this test is applied in the present case, we do not think that the mere substitution of the letter “A” in red for the letter “B” in black (but clearly retaining the size and lettering in both designs) is sufficient to dispel the confusion which may likely arise in the mind of a customer who has almost always to go by his recollection.”*

In another Supreme Court’s decision, in the case of Alban Pharmacy Ltd v. Sterling Products (1968) All NLR 300, Ademola C.J.N. held that the criterion is that the mark to be registered must not, when compared with what is already registered, deceive the public or cause confusion.

In that case Ademola C.J.N. held also that the apprehensions of the Appellants were well founded, for if the proposed trademark ‘Casorina’ be registered, the syllable ‘Cas’ will no doubt form the essential part of the name of the medicine and was likely to cause confusion in the minds of the public. Furthermore, the end of the ‘Casorina’ namely ‘Rina’ in itself was not free from causing confusion with ‘Ria’ in ‘Castoria’. These authorities confirm that the learned trial Chief Judge of the Federal High Court was quite right in his findings that ‘Glucosaid’ is calculated to confuse and deceive the public in its sound in their consideration of the trademark ‘Lucozade’.

The submission of counsel for the Appellants to non suit the Respondents at the lower court is without any ground at all. The finding is well supported by evidence that “Glucos-Aid’, in sound, is confusing to “Lucozade” and it will undoubtedly mislead the public. I also see no reason why I should interfere with the damages awarded by the learned trial Chief Judge. It is trite law that a successful litigant in a case of this nature is entitled to damages. The Appellants have admitted putting into the market and sold a product which was mistaken for the product of the Respondents. The court having found that the Appellants were in breach of Section 5(1) of the Trademarks Act 1965, awarded N5,000 as damages to the Respondents. I regard the award as reasonable in the circumstances of the case.

In the end this appeal has failed and it is dismissed. The judgement of the Chief Judge of the Federal High Court in Suit FHC/L/86/80 is affirmed. I award N300 costs in favour of the Respondent.

**NNAEMEKA-AGU, J.C.A.:**

I entirely agree and having nothing to add.

**KUTIGI, J.C.A.:**

I have read the judgement of my brother Mohammed J.C.A., just read, and I agree with it. The pleadings and evidence clearly show that there is only one PlaintiẠ/Respondent i.e. The Beecham Group Limited in the case. I am also of the opinion that the point of law regarding registration of the contract between the Respondents and the proprietor, under the National Office of Industrial Property Decree No. 70 of 1979, which was not raised in the court below cannot be entertained here now since all the facts bearing on the issue were not before the trial judge, and we are not in a position to say whether or not the Respondents would have answered them. See Samuel Fadiora & Anor. v. Festus Gbadebo & Anor. (1978) 3. S.C. 219.

On the issue of general damages of N5,000, which the trial judge awarded to the Respondents, I have a feeling that this is rather to high. The Plaintiffs/Respondents claimed for N500,000 but the judge found that they adduced no evidence as to how they came by that figure or any figure at all. General damages as the judge correctly stated are such damages as the law will presume to be the natural or probable consequence of the act complained of. See Mobil Oil Nigeria Ltd. v. Akinfosile (1969) NMLR 217. There is no evidence that the sales of the Respondents product has dropped and or by how much. In the circumstances, I think an award of N2,000 (Two thousand Naira) would be suẠcient.

The appeal is therefore, dismissed except for the award of general damages, which is reduced form N5,000 to N, 2000.

CASES REFERRED TO

Alban Pharmacy Limited v. Sterling

Products International Inc.

Bell Sons and Co. v. Godwin Alco & Others

Mobil Oil Nigeria Ltd. v. Akinfosile (1969) NMLR 217

Samuel Fadiora & Anor v. Festus Gbadebo & Anor