

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MNZAVA S, J.A., MFALILA, J.A and LUBUVA, J.A)**

**CIVIL APPEAL NO. 49 OF 1995**

BETWEEN

CPC INTERNATIONAL INC. .... APPELLANT

AND

ZAINAB GRAIN MILLERS LTD. .... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mwaikasu, J)

Dated the 30<sup>th</sup> day of August, 1994

in

Civil Case No. 121 of 1993

**JUDGMENT OF THE COURT**

**LUBUVA, J.A.**

This is an appeal from an interlocutory order of the High Court (Mwaikasu, J.). The matter arose at the commencement of the trial of the suit in Civil Case No. 121 of 1993. In that case, the appellant filed a suit against the respondent, Zainab Grain Millers Ltd. The appellant was the proprietor of a trade mark "MAZOLA" which was registered in part A, Class

29 (Schedule III) under the Trade Marks Ordinance Cap. 394 of the Laws. Its registration number was 14645 dated 2.8.1971 which was last renewed with effect from 2.8.1992. under the registered trade mark "MAZOLA" the appellant's company has for a number of years been marketing and selling in Tanzania edible corn oil extracted from maize in plastic containers and bottles bearing a distinctive yellow and green device with the word "MAZOLA".

It was the appellant's case that sometime since 1992, the respondent infringed the appellant's registered trade mark by manufacturing and marketing for sale to the public in Tanzania maize meal for human consumption under the trade mark "MAZOLA", the respondent was also using on its packets of maize meal a device of a maize cob which was a colourable and deceptive imitation of the well known device of the appellant. It was the appellant's further claim that the infringement and passing-off caused damage and irreparable loss to the reputation of the appellant's trade damage to the appellant. Among the reliefs sought by the appellant was an injunction to restrain the respondent from further making and marketing its maize meal marked "MAZOLA" or procuring to be sold or passing-off maize meal or any other product not of the appellant's manufacture a merchandise in packaging bearing a device which by reason of colourable resemblance to the appellant's device deceived the public and the customers in particular.

At the commencement of the trial, Mr. Uzanda, learned counsel for the appellant (plaintiff) filed a Chamber summons seeking inter alia, the following orders:-

1. An injunction to restrain the Defendant, by its officers servants or agents or any of them, or otherwise from infringing the plaintiff's Registered Trade Mark "MAZOLA" Number 14645 by ceasing forthwith from producing, making or manufacturing maize meal or any other product marked "MAZOLA".
2. An injunction to restrain the Defendant, by its officers, servants or agents or any of them, or otherwise from selling or offering or exposing or advertising for sale of procuring to be sold or passing off its maize meal marked "MAZOLA".
3. Deliver up by the Defendant to an office of this Honourable Court all packets, boxes, cartons or other containers, labels or advertising material bearing the mark or word "MAZOLA" and or any representation, device or get up similar to that of the plaintiff.

The grounds in support of the application for temporary injunction were infringement and passing off by the respondent/defendant company which was represented by Mr. Kisusi, learned counsel. In a forty (40) page ruling, the application for an interlocutory injunction was dismissed. Dismissing the application, the trial court held that an interlocutory injunction on the basis of infringement failed because, the goods in respect of which the trade mark complained of are different from those for which

the applicant's (appellant) trade mark was registered. On the basis of passing-off it was also held that this was not an appropriate case in which to grant a temporary injunction.

Dissatisfied with the ruling, the appellant has, with leave of the High Court appealed to this court. As before, Mr. Uzanda represents the appellant and Mr. Kisusi appeared for the respondent. The memorandum of appeal four grounds of appeal have been raised. From these, we think the following two issues are crucial for the determination of this appeal.

First, that the learned Judge erred in determining the application for a temporary injunction by deciding issues which should have been resolved and determined at the trial of the main suit.

Second, that the learned Judge misdirected himself on the principles relating to the grant of temporary injunction.

To start with, Mr. Uzanda, learned Counsel stated that the object of a temporary injunction is to maintain the status quo until the rights of the parties are finally determined at the trial. In this case Mr. Uzanda submitted, a temporary injunction was sought in order to restrain the respondent from infringing the appellant's (applicant) registered trade mark – "MAZOLA" until the trial of the case was completed. At that stage Mr. Uzanda urged, it was not the proper stage for the learned judge to consider and decide issues which were to be resolved at the trial of the main suit. For instance, Mr. Uzanda stated, the central issue for

determination at the trial was whether the respondent's device was a colourable and deceptive imitation of the appellant's (plaintiff) trade mark "MAZOLA". On this, Mr. Uzanda further submitted, the learned judge addressed at great length and finally decided that there was no infringement of the appellant's trade mark because the goods for which the appellant's trade mark "MAZOLA" was registered were different from those in respect of which the trade mark was complained of. Having decided that, Mr. Uzanda contended, there were no further issues for determination at the trial of the main suit. In other words, Mr. Uzanda stressed, the learned judge fell in to the error of trying issues which were due for trial at a later stage of the main suit at the time when was dealing with an application for an interlocutory injunction. This, he stated, wa not a proper approach to applications such as this. With this approach Mr. Uzanda charged, the learned judge closely examined and made findings on the issues of passing-off, infringement and the nature of goods on which no evidence had been led as yet at that stage.

The issue before us is whether it was proper for the learned judge to deal and determine at the stage or hearing proceedings for an interim injunction the issues which were due for trial at the hearing of the main suit. Mr. Kisusi, learned counsel fro the respondent was of the strong view that the learned judge properly took into account all the relevant facts at that stage and came to the correct conclusion in dismissing the application for a temporary injunction. With respect, we are unable to accept Mr. Kisusi's submission on this point. From the lengthy and well researched

ruling, it is apparent to us that the learned judge went far beyond the scope necessary for the determination of an application for an interim injunction pending the final determination of the main suit. As correctly stated by Mr. Uzanda, it is elementary that the purpose of an interlocutory injunction is to maintain the status quo until the main suit is finally determined. That is, until the time when the issues involved are finally resolved. In that case, in dealing with the proceedings for an interlocutory injunction the learned judge embarked on resolving issues which were appropriately due for trial of the main suit later when evidence would be led on same.

In doing so, that in our view, amounted to the learned judge trying the main suit, at a stage which had not been reached. That is, with the triable issues in the main suit decided and resolved at the stage, it rendered the subsequent trial of the main suit superfluous. In our considered opinion, the court having decided the crucial and disputed issues on the infringement of the appellant's registered trade mark "MAZOLA" and passing off then, there were no further material issues to be tried in the main suit. And that was the core base of Mr. Uzanda's complaint in this matter which, we accept is well founded. The various cases cited in the ruling which the learned judge has endeavored to distinguish with commendable and unexcelled ability are to our minds, a clear testimony of the various factors which the learned judge took into account in considering the application for a temporary injunction. It is common knowledge that some of these factors such as the nature, class of

goods and how they are marketed are not at all relevant for the granting or otherwise of a temporary injunction on the basis of passing-off. In the instant case, the learned judge went into considerable length examining the nature and class of goods in deciding on the issue of passing off. With respect, we agree with Mr. Uzanda, that this was not relevant for purposes of determining the application for a temporary injunction.

The next important issue raised in this matter concerns the merits of the temporary injunction sought. It was Mr. Uzanda's submission that the learned judge erred in applying wrong principles pertaining to the temporary injunction. For instance, Mr. Uzanda claimed, throughout the ruling, the learned judge persistently referred to the appellant/applicant as having failed to prove infringement or passing-off on which basis it was subsequently held that temporary injunction could not be granted.

This, he stated, was a misdirection in law because the refusal to grant temporary injunction was based on wrong principles. So the question before us is whether the temporary injunction was properly refused. To this Mr. Kisusi, learned counsel for the respondent insisted that it was properly rejected. Later, however, at the prompting of the court, he conceded and rightly so in our view, that the learned judge had overstretched himself on this aspect and as a result, matters that were not relevant in deciding the application for temporary injunction were taken into account. It hardly needs to be overemphasized that in all cases involving the granting of temporary injunction the applicable principles are the same. In the cases of GIELLA V CASSMAN BROWN & CO. LTD. [1973]

E.A. 359 the Court of Appeal for East Africa set out the applicable conditions in clear terms. These are, that the applicant must show a prima facie case with a probability of success and that the applicant might otherwise suffer irreparable loss which would not adequately be compensated by an award of damages. In the light of the principles we think that in the instant case what was expected of the learned judge is to consider whether on the facts as disclosed from the affidavits and the pleadings, a prima facie case had been shown. It would, in our view be premature for the court to require the appellant/applicant to prove infringement of passing off at that stage as no evidence had been adduced. This, it would appear is what the learned judge did in this matter where in refusing to grant a temporary injunction it was held that the applicant had failed to prove either infringement or passing off. This, we are satisfied was a misdirection on the part of the learned judge. It is settled principle that in matters of passing off, a prima facie case could well be shown if upon consideration of the close similarity between the trade marks complained of was on balance such as to cause deception or confusion on the part of the customers.

In this regard it is apparent to us that the learned judge refused to grant the temporary injunction on the basis of condition which were inapplicable to the case at that stage. For that reason, and as stated in the case of Giella V Cassman Brown Co. Ltd. (supra) though the grant of an injunction is the courts' discretion which is not normally interfered with the court of Appeal unless it has not been exercised judicially. In the



circumstances of the case is our view that the temporary injunction was not properly refused.

Other grounds were also raised in this appeal. They relate to the law on infringement of trade marks and passing-off as well as the fact that issues which were not raised in the plaint were considered and decided. As it is our view that the two grounds which we have endeavoured to deal with are sufficient to dispose of this matter, we deem it unnecessary to embark on them.

For the foregoing reasons, the appeal is allowed and the ruling of the High Court dated the 30 August, 1994 is set aside. An order for temporary injunction pending the final determination of the main suit is granted. It is further ordered that the main suit be heard on merits before another judge. Costs to be costs in the cause.