

1987 December 3

[DEMETRIADES J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MILLER BREWING COMPANY,

*Applicants,*

v

THE REGISTRAR OF TRADE MARKS,

*Respondent*

*(Case No 37/84)*

*Administrative Law — Due inquiry — Application for registration of trade mark — Attention of respondent focussed on word «Miller» — Failure on his behalf to consider the mark as a whole or to consider possibility of disclaimer of said word — Ground of annulment — Arguments of counsel — Cannot supplement the missing reasoning or complete otherwise incomplete administrative records*

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The respondent rejected an application for the registration of a mark consisting, inter alia, of the word «Miller», on the following grounds, name that the word «Miller» is a geographical name and a surname and lack distinctiveness

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It must be noted that at the hearing before the respondent applicants' counsel offered to disclaim the word «Miller»

Held annulling the sub judice decision (1) The respondent mainly directed his mind on the word «Miller» and it does not appear anywhere whether he actually considered the mark as a whole or with a disclaimer of the word «Miller»

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(2) The argument of counsel for the respondent that even after disclaimer the mark continued to be non distinctive cannot be accepted, because arguments of counsel cannot supplement either the missing reasoning or incomplete administrative records

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*Sub judice decision annulled  
No order as to costs*

**Recourse.**

Recourse against the decision of the respondent whereby he

rejected applicants' application for the registration of the trade mark Miller with a label in class 32 of the Register of Trade Marks in respect of beer.

*G. Nicolaides*, for the applicants.

*St. Ioannides (Mrs.)*, for the respondent.

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*Cur. adv. vult.*

DEMETRIADES J. read the following judgment. By this recourse the applicants challenge the decision of the respondent which was communicated to them by his letter dated the 23rd November, 1983, and by which he rejected their application No. 23165 for the registration of the trade mark Miller with a label, in class 32 of the Register of Trade Marks, in respect of beer.

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The applicants, a company registered in Wisconsin, U.S.A., applied on the 5th November, 1982, for the registration of a mark consisting of the word «Miller» and beneath that the words «HIGH LIFE» and «The Champagne of Beers», all enclosed in a big frame. Under the big frame there appears another small frame with the word «Miller» in small letters, and again all parts are enclosed in another bigger frame with the word «Miller» scattered all over it, in fading print (see reds 2 to 5 in the file, which is exhibit No. 1 before me).

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The respondent, having considered the application, informed the applicants' advocate that the proposed mark could not be accepted for registration, on the grounds that it was a geographical name and a surname, and that it lacked distinctiveness, contrary to the provisions of section 11(1)(d) and (e) of The Trade Marks Law, Cap. 268, and, in addition, there was, also, an objection under section 13 of the same Law (red 7 in exhibit No. 1).

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The applicants' advocate requested a hearing, which took place on the 27th October, 1983. What was stated at the hearing, according to the minute kept for it (red 15) is the following:

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«Mr. Nicolaides: I am willing to disclaim the word Miller if you accept the rest of the Mark».

By letter dated the 23rd November, 1983, the respondent informed the applicants' counsel that he could not waive his original objections, which were affirmed by the said letter. The

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applicants' counsel requested a reasoned decision, which was communicated to him by letter dated the 14th January, 1984. As a result, the applicants filed the present recourse.

5 Counsel for the applicants argued that the respondent acted under a misconception of law and/or fact inasmuch as he considered only the registrability of the word «Miller» and failed to consider registrability of the mark as a whole, or its possible registration with a disclaimer of the word «Miller». He further argued that the respondent failed to consider registration under  
10 Part B' of the Register and that the mark did not lack distinctiveness and it was registrable under section 13 of the Law.

Counsel for the respondent argued that registration of the word «Miller» was prohibited by the provisions of section 11(1) of the Law, as being a geographical name and a common surname, and  
15 registration of the mark would have been possible only upon proof of its distinctive character, which the applicants failed to do. She further argued that the mark was considered as a whole but was not found to be distinctive and, also, that registration under section 13 was considered but was not found possible because the  
20 prominent feature of the mark which was the word «Miller» was likely to cause confusion. She, also, contended that registration of the mark with a disclaimer is always considered as a matter of practice, as is also registration in Part B' of the Register.

I agree with the submission of counsel for the respondent that  
25 the reasoned judgment of the Registrar should be read together with his original decision, which was communicated to the applicants' advocate by letter dated the 23rd November, 1983. In fact the actual decision is to be found in red 15 (in exhibit No. 1) which contains the minute of the hearing of the case before the  
30 Registrar, held on the 27th October, 1983. Right below the said minute, which is handwritten, the following appears (also in handwriting) «Objections still stand».

This note bears the date of 4th November, 1983. What were the objections of the Registrar which were still standing after the  
35 hearing appear in red 7 in the file and have already been stated. From what it seems, however, the respondent mainly directed his mind on the word «Miller» and it does not appear anywhere whether he actually considered the mark as a whole or with a disclaimer of the word «Miller».

Counsel for the respondent explained that the mark continued to be non distinctive even after the disclaimer. The views and explanations of counsel cannot, however, be considered as affording the missing reasoning of an administrative decision or as supplementing incomplete records of it. 5

There is no mention in the reasoned decision or anywhere else of the question of consideration by the respondent of the disclaimer of the word «Miller» and this Court cannot read into the sub judice decision things which do not appear there.

It is my view, from the material before me, that the respondent ought to deal, at least in his reasoned decision, with the disclaimer, once such matter was specifically raised at the hearing before him, and explain how and why he continued to have objections in spite of the disclaimer, if such was the case. On the contrary, the whole of his reasoned judgment refers to his objections on the registrability of the disclaimed word, as if the question of its disclaimer was never raised. 10 15

*In the circumstances, I find that the sub judice decision has to be annulled on this ground.*

*In the result, this recourse succeeds and the sub judice decision is hereby annulled with costs in favour of the applicants.* 20

*Sub judice decision  
annulled with costs in  
favour of applicants.*