

1987 November 12

[PIKIS. J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PLAYBOY BOUTIQUES LTD.,

Applicants.

v.

THE OFFICIAL RECEIVER AND REGISTRAR OF
TRADE MARKS,

Respondent.

(Case No. 143/87).

*Trade marks — Filing opposition to registration not accompanied by proper
authorisation — In the circumstances the irregularity is not material.*

*Trade marks — Filing written address in support of opposition to registration after
expiration of relevant time limit — A non material irregularity.*

*Delay in issuing administrative decision — Omission to comply with Art. 29 of the
Constitution not made the subject of a separate recourse — The omission
ceases to be justiciable after the issue of the decision applied for.* 5

*Trade marks — Proceedings before the Registrar — Advocate of one of the parties
filing affidavit as a witness — Difference between such proceedings and
judicial proceedings — The proceedings before the Registrar are not nullified
by reason of such a fact.* 10

*Evidence — Hearsay evidence — The relevant rule is not applicable as such in
administrative proceedings or in judicial proceedings reviewing
administrative action — The weight to be attached to such evidence is a
different matter.* 15

*Due inquiry — Change of the person holding the office of the single organ
concerned — Whether inquiry should begin de novo — Question determined
in the negative — A different rule applies in case of change in the composition
of a collective organ.*

*The Registrar of Trade Marks dismissed applicants' application for
registration of a trade mark, on the ground that the use of the mark by the* 20

applicants may cause confusion (Section 13 of Cap. 268), because there was a real likelihood that the purchasing public might mistake the products of the applicants for those of the interested parties, who, however, had not registered the mark under which they handed their own products, which were marketed in Cyprus.

The Registrar came to that conclusion on a consideration of (a) the similarity or identity between the two marks, (b) evidence of prior and longer user of the mark by the interested parties, and (c) evidence of knowledge on the part of the applicants of the use of the mark of the products of the interested parties.

10) The decision of the Registrar is challenged by this recourse on procedural grounds, i.e. that the interested parties raised an opposition without simultaneously filing proper authorisation from their principals, that the interested parties were allowed to file their written address at the hearing before the Registrar after the time limited for its submission, that the Registrar delayed to issue the decision after the conclusion of the hearing, that counsel for the interested parties swore an affidavit to fact while an advocate in the case, that the content of the said affidavit of counsel was based on hearsay evidence, and that the official who dealt with the application for registration in its initial stages, namely, Mr. Constantinides, was replaced by his successor Mrs. Kynacou.

Heid. *dismissing the recourse*: (1) There is no substance as regards the first two complaints. The excuse of the irregularities did not cause irreparable damage

25) (2) The delay in issuing the sub judice decision had no bearing on the decision given nor did the delay alter in any way the complexion of the case of the parties. Unless omission to comply with the provisions of Art 29 is made the subject of a separate recourse, it ceases to be justiciable as such after the issue of the decision applied for

30) (3) The inclusion of trade mark registration in the definition of legal practice does not assimilate proceedings before the Registrar and the Court.

35) (4) The hearsay rule has no application as such in administrative proceedings. Of course, the cogency of testimony and the weight to be attached to it by the fact finding body are invariably interwoven with the source and origin of knowledge and the likelihood of mistakes occurring on account of lack of personal knowledge or in the process of repetition

40) (5) The registration of trade marks is entrusted to the Registrar. The manner of exercise of the power is always subject to scrutiny with a view to ascertaining the adequacy of the inquiry and the framework within which the power was exercised. In this case the directions originally given by Mr. Constantinides were designed to elicit the position of the parties in accordance with the Trade Mark Rules governing the exercise of the power. The inquiry was continued by the successor of Mr. Constantinides, again in

accordance with the rules. The ultimate decision was founded on due consideration of the material placed before the Registrar, including the material emerging from the directions given by Mr. Constantinides. The final decision cannot be faulted for failure to take into account material relevant to the inquiry or for excess or abuse of power.

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Recourse dismissed. No order as to costs.

Cases referred to:

Granada v. Republic (1985) 3 C.L.R. 207;

Erotocritou v Soutsos (1965) 1 C.L.R. 162;

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In Re Eftymiou (1987) 1 C.L.R. 329;

I.W.S. Nominees Co. Ltd. v. The Republic (1967) 3 C.L.R. 582;

Merck v. Republic (1972) 3 C.L.R. 548;

Co. Carlo Erba v. Republic (1977) 3 C.L.R. 427;

Kontemeniottis v. C.B.C. (1982) 3 C.L.R. 1027;

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Five Bus Tour Ltd. v. Republic (1983) 3 C.L.R. 793.

Recourse.

Recourse against the dismissal of applicant's application for the registration of the rabbit head within a particular frame in Register A under classification 25 in respect of clothing and footwear products.

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C. Hadjinicolaou, for the applicants.

L. Koursoumba (Mrs.), for the respondent.

A. Poetts, for the interested parties.

Cur. adv. vult. 25

PIKIS J. read the following judgment. The rabbit head within a particular frame is the mark of the products of Playboy Enterprises Incorporated, an American Corporation trading in the manufacture and sale of clothes, footwear and related products. Although their products were marketed in Cyprus too, they did not register the mark under which they branded their products; a mark denoting their origin and make.

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- The applicants are a Cyprus company, namely, Playboy Boutiques Ltd., trading in the sale of clothes and footwear. They applied for the registration of the rabbit head in a similar or identical device as their own mark, seeking its registration in Register 'A' under Classification 25, the class for the registration of marks associated with clothing and footwear products. The interested parties opposed the application as a measure for the protection of their interest in the use of the mark, claiming prior and longer user of the mark not only abroad but in Cyprus as well.
- After hearing the parties and considering the affidavit evidence adduced on their behalf, throwing light on the similarity between the two marks, user of the marks and circumstances of trading, the Registrar dismissed the application in virtue of the provisions of s. 13 of the Trade Marks Law, Cap. 268. The use of the mark by the applicants was likely to cause deception and confusion, according to the decision of the Registrar, among a substantial section of the purchasing public as to the origin of the products of the applicants. There was, as can be inferred from the decision, a real likelihood that the purchasing public might mistake the products of the applicants for those of the interested parties. The interest of Playboy Enterprises Incorporated to oppose the application cannot be doubted. Who qualifies as an aggrieved person for the purpose of opposing an application to register a trade mark, was the subject of discussion and analysis in *Granada v. Republic**.
- The same decision also illuminates the question of the likelihood of deception or confusion arising from the use of a similar or identical mark. The Registrar came to that conclusion on a consideration of (a) the similarity of identity between the two marks, (b) evidence of prior and longer user of the mark by the interested parties, and (c) evidence of knowledge on the part of the applicants of the use of the rabbit head device as the mark of the products of the interested parties.

In fact, affidavit evidence adduced before the Registrar suggested that not only applicants were aware of the fact that interested parties branded their products with the rabbit head, but also passed on occasion their products as those of the interested parties. Other evidence relevant to this issue supported that applicants themselves sold products of the interested parties at their shops.

* (1987) 3 C.L.R. 207.

The findings of the Registrar made his decision inevitable, whereas the similarity between the two marks made deception and confusion as to the origin of the goods of the two traders virtually unavoidable. Applicants made little, if any, effort to persuade the Court that the two marks are anything than similar or that it was reasonably open to the Registrar to conclude on the material adduced at the inquiry that the interested parties had prior and longer user of the mark in the Cyprus market. They challenge the propriety of the decision primarily on procedural grounds rendering in their submission the decision abortive and vulnerable to be set aside for gross irregularity in the conduct of the proceedings.

The first objection of the applicants is that the interested parties raised an opposition without simultaneously filing proper authorisation from their principals as required by the Trade Marks Rules. It is an admitted fact that they were guilty of a similar omission too remedied by the subsequent filing by both parties of the necessary authorization. Another procedural irregularity of which they complain is that the interested parties were allowed to file their written address at the hearing before the Registrar after the time limited for its submission. This failure too was excused in exercise of the power vested in the Registrar by Rule 93 of the Trade Marks Rules allowing an extension of the time limits set by the rules for the taking of relevant procedural steps. I find no substance in either of these two complaints. The excuse of the irregularities did not cause anything in the nature of irreparable damage to the interests of the applicants. Equally inconsequential to the substance of the case was the delay to issue the decision after the conclusion of the hearing before the Registrar. Whereas the decision was reserved on 28th November, 1985, it was issued on 23rd January, 1987. No doubt the delay is deplorable and defies the rule of sound administration and the principle enshrined in Art. 29 of the Constitution. But it had no bearing on the decision given nor did the delay alter in any way the complexion of the case of the parties. Unless omission to comply with the provisions of Art. 29 is made the subject of a separate recourse, it ceases to be justiciable as such after the issue of the decision applied for.

Two other complaints relate to the handling of the case of the interested parties by their counsel, namely, A. Poetis and the advocate who replaced him S. Poetis (Mrs.). The fact that Mr. Poetis swore an affidavit to fact while an advocate in the case,

made the proceedings a nullity. Mrs. Koursoumba for her part while acknowledging that registration of trade marks and steps associated therewith are a species of advocacy in accordance with s. 11(i) and (ii) of the Advocates Law, she argued that the testimony of an advocate in the cause does not have the effect suggested by counsel for the applicants and she invoked the observations of the Court in *Erotocritou v. Soutsos** in support of her position. With due respect, I feel the analogy between judicial proceedings to which the observations of the Court in the above case were directed and proceedings before the Registrar is inappropriate. The inclusion of trade mark registration in the definition of legal practice does not assimilate proceedings before the Registrar and the Court. All it accomplishes is to prohibit anyone other than an advocate from acting in a representative capacity for anyone seeking or opposing registration of trade marks. Proceedings before the Registrar are of an administrative nature and as such are of a different character from judicial proceedings, the conduct of which is governed by the provisions of Art. 30.2 of the Constitution. Very recently I had occasion to review in some detail the implications of Art. 30.2 leading me to the conclusion that there is incompatibility between the capacity of an advocate and that of a witness**. By drawing attention to differences between the two proceedings, I do not in any way wish to encourage the practice of advocates ever acting in a dual capacity in any proceedings. An advocate's position in any cause or matter is, to my comprehension, necessarily compromised on every occasion when he becomes a witness in the cause too. The cogency of his representational endeavours is necessarily weakened. Be that as it may, it does not have the effect of nullifying administrative proceedings. Furthermore, in this case counsel withdrew and another advocate assumed responsibility in his place. That no specific authorization was submitted for his successor is a matter of no consequence in the absence of any indication that the principals had not properly instructed the successor to act on their behalf.

Also objection is taken to the content of the affidavit of Mr. Poetis based on hearsay evidence. The hearsay rule has no application as such to administrative proceedings, nor for that

* (1965) 1 C.L.R. 162.

** *In re Panicos Efthymiou*, (1987) 1 C.L.R. 329.

matter in proceedings of judicial review of administrative action
 Of course, the cogency of testimony and the weight to be attached
 to it by the fact finding body are invariably interwoven with the
 source and origin of knowledge and the likelihood of mistakes
 occurring on account of lack of personal knowledge or in the
 process of repetition. Be that as it may in the present case the
 Registrar was satisfied, as it appears from his decision, that the
 affidavit evidence of Mr. Poetis was corroborated by direct
 evidence coming from another deponent. Viewing the material
 before the Registrar in its entirety, it cannot be denied that it was,
 at the least, reasonably open to the Registrar to find similarity
 between the two marks, prior and longer user of the mark by the
 interested parties and a true likelihood of deception and confusion
 arising from the registration of the mark.

The validity of the proceedings is also impugned on account of
 the replacement of the official who dealt with the application for
 registration in its initial stages, namely, Mr. Constantinides, with
 his successor Mrs. Kyriacou. Counsel for the applicant made two
 points: First, proceedings ought to have commenced de novo
 before the successor of Mr. Constantinides drawing an analogy
 with judicial proceedings. Second, changes in the composition of
 the organ that tried the application rendered the proceedings
 defective in much the same way that continuation of proceedings
 before an altered composition of a collective organ renders them
 defective. Whereas counsel for the applicant acknowledges in his
 address differences between single person organs and collective
 organs he overlooked in raising his final submission, the
 differences between the principles that govern the functioning of
 the two organs, particularly the relatively impersonal character of
 the exercise of the power vested in a single official heading a
 government department. The distinction between single person
 and collective organs is duly noted by counsel for the respondents
 and articulated by reference to a number of works on the exercise
 of different species of administrative authority*.

* *Dagloglou - General Administrative Law 1977, p. 213;*
Spyliotopoulos - Manual of Administrative Law, 2nd Ed., p. 123 et seq.
Stassinopoulos - Lessons of Administrative Law, 1957, pp. 142, 149.
Papahadjis - System of Administrative Law Applicable in Greece, 6th Ed., Vol. 1, pp. 218-219.

In accordance with the provisions of Trade Marks Law registration of trade marks is entrusted to the Registrar who assumes ultimate responsibility for the exercise of the power vested in him by law. The manner of exercise of the power is always subject to scrutiny with a view to ascertaining the adequacy of the inquiry and the framework within which the power was exercised. Carrying out this exercise in the present case reveals that the directions originally given by Mr. Constantinides were designed to elicit the position of the parties in accordance with the Trade Mark Rules governing the exercise of the power. The inquiry was continued by the successor of Mr. Constantinides, again in accordance with the rules, whereas the ultimate decision was founded on due consideration of the material placed before the Registrar, including the material emerging from the directions given by Mr. Constantinides. The final decision cannot be faulted for failure to take into account material relevant to the inquiry or for excess or abuse of power.

Faint suggestions of breach of the rules of natural justice are mostly founded on a false analogy between proceedings before the Registrar on the one hand and judicial proceedings on the other. Proceedings under the Trade Marks Law, Cap. 268, are of an administrative character notwithstanding their semblance to judicial proceedings. This has been acknowledged time and again*. Furthermore, the rules of natural justice are invariably related to the subject of the inquiry and do not find application in administrative action in the same way as they do in judicial proceedings**.

To conclude, not only I find no ground for interfering with the decision of the Registrar, but I regard it as inevitable in view of the similarity of the two marks and circumstances of trading of the two parties.

* See, *inter alia*, *I.W.S. Nominees Co. Ltd. v. The Republic* (1967) 3 C.L.R. 582, at pp. 586-587. *Merck v. Republic* (1972) 3 C.L.R. 548. *Co. Carlo Erba v. Republic* (1977) 3 C.L.R. 427.

** See, *inter alia*, *Kontremeniotis v. C.B.C.* (1982) 3 C.L.R. 1027 (F.B.) *Five Bus Tour Ltd. v. Republic* (1983) 3 C.L.R. 793.

In the end the application is dismissed. The decision is confirmed pursuant to the provisions of Art. 146.4(a) of the Constitution. No order as to costs.

Application dismissed.

No order as to costs.

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