THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 75/13

In the matter between:

LEGEA SRL **APPELLANT**

and

GIOVANNI ACANFORA **RESPONDENT**

Neutral citation: ***Legea SRL v Acanfora*** (75/13) [2013] ZASCA 151 (11 November 2013)

Coram: **Lewis, Maya, Leach, Willis JJA and Zondi AJA**

Heard: **1 November 2013**

Delivered: **11 November 2013**

Summary: **Where a court order has no practical effect, an appeal against another court order not to rescind that order on the basis that it was erroneously given, is moot. Appeal dismissed.**

ORDER

On appeal from North Gauteng High Court, Pretoria (Hiemstra AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Lewis JA (Maya, Leach and Willis JJA and Zondi AJA concurring):

[1] This is an appeal against an order of the North Gauteng High Court, Pretoria (Hiemstra AJ), dismissing an application for the rescission of a default judgment (an interdict) taken against one Kim Jong Hun, the manager of the football team of the Democratic Peoples' Republic of Korea. The application was brought by the respondent in this matter, Mr Giovanni Acanfora, who claimed to have the trademark Legea in the class of clothing (25) registered in his name. The application was brought on an urgent basis during the period when the FIFA World Cup was being hosted in South Africa. Neither Mr Hun nor the Democratic Peoples' Republic of Korea Football Association (the Football Association) by which he was employed opposed the application. The record before this court does not indicate whether the Football Association was cited as a respondent. But Mr Hun is on record as saying that he would not oppose the application himself.

[2] Mr Hun was ordered by the North Gauteng High Court (Seriti J) not to allow any member of the football team to wear any sportswear on which the Legea trade mark

was depicted. However, the court suspended the operation of the order until the conclusion of the World Cup, or until 'such time as the North Korean Football Team's last World Cup 2010 match is completed'. The order was in fact granted on 25 June 2010, at which stage the football team had already played its last match. It was accordingly of no practical significance at the time it was granted.

[3] Nonetheless, the appellant, Legea SRL, an Italian company, sought rescission of that order some two years later on the basis that it had been erroneously granted. Legea SRL also claimed the right in the Legea trademark, and Mr Luigi Acanfora, the managing director of Legea SRL and the brother of Giovanni Acanfora, alleged that Giovanni had withheld material facts from the court and had placed incorrect facts before it. It is apparent that there has been a feud between the Acanfora brothers about the right to the trade mark. But in neither the application for the urgent order sought by Giovanni nor the application for rescission sought by Legea SRL was the dispute as to the right in the trade mark in issue. That is the subject of other litigation.

[4] The appeal record does not reveal precisely what was alleged by Giovanni when he applied for the interdict. Nor does it reveal whether a contract concluded between Legea SRL and the Football Association on 9 February 2010 was placed before Seriti J. In terms of the contract, called a 'Technical Kit Supplier Licence and Merchandising Contract', the coaching staff and the team players were obliged to wear clothing bearing the Legea trademark during the 2010 FIFA World Cup.

[5] Hiemstra AJ held that Legea SRL was an affected party in terms of Rule 42(1)*(a)* of the Uniform Rules of Court and thus had locus standi to bring the application for rescission of the judgment. That rule provides that a court may, on the application of any party affected by an order, rescind or vary an order or judgment 'erroneously sought or erroneously granted in the absence of any party affected thereby'. The high court considered that Legea SRL had a direct and substantial interest in the order: it affected its rights under the contract with the Football Association. And it had not been given notice of the application such that it could have intervened in the proceedings.

[6] However, the court considered that there had been a clear infringement by the Football Association of the trade mark in terms of s 34(1)*(a)* of the Trade Marks Act 194 of 1993 (there had been unauthorized use of the Legea trade mark, in the course of trade, in relation to goods in respect of which the trade mark was registered and that was likely to deceive or cause confusion). The trade mark was registered in the name of Giovanni and accordingly the high court held that the earlier order granted by Seriti J had not been erroneously sought or granted.

[7] In fact the application for the order had been brought in terms of s 34(1)*(c)* of the Act. But it is not necessary to consider whether Hiemstra AJ correctly found that there was an infringement under s 34(1)*(a).* He did, however, in granting leave to appeal to this court, indicate that he may have erred in finding that the infringing use was in the course of trade. But he did not limit the leave to appeal to that issue.

[8] The questions whether the Football Association was guilty of any infringement of the Act (ss 34(1)*(a)* or *(c)*), and whether the order interdicting Mr Hun from allowing the team players to wear clothing depicting the Legea trade mark was erroneously granted, are now of no practical significance. Curiously, the order was granted only against Mr Hun. He did not oppose the application for the order, as I have said, advising Giovanni that the disputes in the Acanfora family as to the rights to the trade mark were not his concern. And when Legea SRL brought an application for rescission two years after the interdict was granted, the general secretary of the Football Association advised Legea SRL's attorneys that it did not wish to be joined in that application and Mr Hun confirmed that he too did not wish to be joined as a party: as he put it, 'the dispute is one between Legea SRL and Mr Giovanni Acanfora' and that 'the Association should be left out of the dispute'. There is nothing to prevent Legea SRL from seeking the expungement of the registration of the Legea trade mark in Giovanni's name. There is thus no point in rescinding the order against Hun even if it was erroneously given.

[9] Moreover, the contract between the Football Association and Legea SRL was due to expire before the hearing of the appeal, and although it made provision for a tacit renewal there is no suggestion that the contract has been so renewed. The matter is thus entirely moot. Section 21A(1) of the Supreme Court Act 59 of 1959 provides that at

the hearing of an appeal, if the ‘issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone’.

[10] Counsel for Legea SRL was unable to point to any practical result or effect of reversing the order refusing rescission. Only speculative consequences were suggested. The interdict did not ever have any practical effect and the person interdicted has no interest in its rescission. In my view the appeal is moot and should be dismissed on that ground alone.

[11] The appeal is dismissed with costs.

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C H Lewis

Judge of Appeal

APPEARANCES:

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