

IN THE COURT OF APPEAL OF SIERRA LEONE

CORAM:

HON. MR. JUSTICE S. T. NAVO - JUSTICE OF APPEAL
HON. MR. JUSTICE D.E.M. WILLIAMS - JUSTICE OF APPEAL
HON. MR. JUSTICE G. GELAGA-KING - JUSTICE OF APPEAL

BETWEEN:

GALINA BLANCA S.A. - APPELLANTS

AND

T. CHOITHRAM (S.L.) LTD. - RESPONDENTS

B.C.J. THOMPSON ESQ FOR APPELLANTS

E.J. AKAR ESQ FOR RESPONDENTS.

JUDGMENT DELIVERED THE 14TH DAY OF JULY 1988

NAVO, J.A.:— The Appellants (Plaintiffs in the Court below), are a Company based in Barcelona, in Spain who, through their business Associates or Licencees, an Incorporated Company in Sierra Leone known as JUMBO CUBES, manufacture and distribute cubes of concentrated Broths, dehydrated bullion and other soup products. Their products have no doubt earned wide reputation in the country, with their concentrated soup Broths registered as JUMBO CUBES.

The respondents, (defendants in the Court below) are general merchants who do business in various places in Sierra Leone, more so in Freetown. The respondents sell various types of merchandise, manufactured locally or imported from elsewhere in the world. Some of the merchandise they deal in include various types of soup broths like MAGGI CUBES, OXO CUBES, the appellants' JUMBO CUBES and what they themselves on experiment, imported for the first time from the same Spain, known as CHAMBO CUBES. There is undisputed evidence that Chambo Cubes are much milder and less spicy in taste and also a little cheaper in cost than their elder brothers the JUMBO CUBES.

It is also common ground with the parties that all these soup broths are often referred to by ordinary buyers, especially the illiterate ones, as MAGGI CUBES which are probably the oldest in the market.

The appellants brought this action in the High Court for infringement of their trade mark which is registered in the Office of the Registrar General in Freetown, and, for passing off of the respondents' CHAMBO CUBES in their shops for the appellants JUMBO CUBES, thus allegedly causing them loss in the reputation they have already acquired and also financial loss in their sales. The appellants therefore claimed.:

- "1. Damage for passing off and infringement of Trade Mark of the plaintiffs' good to wit:-- CHAMBO CUBES as "JUMBO CUBES" of which the plaintiffs are the registered owners of the Trade Mark.
2. An Injunction to restrain the defendants either by themselves their servants or agents or otherwise howsoever from selling or offering for sale as CHAMBO CUBES Cubes of concentrated broths, dehydrated soups, bouillon Cubes and other broths not of the plaintiffs' manufacture.
3. Damages or at the plaintiffs' option an Account of Profits.
4. Delivery-up or Destruction upon Oath of ALL "CHAMBO CUBES" the sale of which the defendants would be in breach of the injunction herein.
5. Further and other reliefs.
6. Costs."

In summary, the respondents admit that as general merchants dealing in all classes of manufactured goods they sell, among other things, appellants JUMBO CUBES which the appellants themselves as distributors sell to them for sale on retail. They however deny infringement of the appellants' Trade Mark or passing off of their CHAMBO CUBES for the appellants' JUMBO CUBES or causing them any loss in reputation or finance. They deny having ever sold chambo cubes to any customer who asked for Jumbo Cubes. They contend that the appellants brought this action solely for the purpose of stiffling and destroying free ^{and} honest trade

competition of Cubes Broths in the Sierra Leone market.

The action came before Thompson Davies J who heard it without a jury and dismissed it with costs to the respondents on the 4th July, 1984. It is against the judgment and orders of the learned trial judge that the appellants now come to this court on appeal.

Let me say straightaway at the outset of this judgment that having gone through the records in this case and the evidence of the witnesses and observed the exhibits put in evidence, several times over, for my part, this is not a case that presents any difficulty or created any anxiety whatsoever. In this, like in almost all other cases, the onus of proof is on the plaintiffs as the saying goes 'he who asserts must prove'. This is trite law. And to me the whole case boiled down to question of facts which the learned judge, sitting without a jury was required to determine.

But let me first state the principles governing a case of this nature, i.e. infringement of 'Trade Marks and Trade Names' and 'Passing Off' of goods. These principles were enunciated by Lord Kingsdown in the case LEATHER CLOTH CO. V. AMERICAN LEATHER CLOTH CO. (1865) H.L.C. 523 at p. 538 thus:

"the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader and he cannot therefore (in the language of Lord Langdale in the case of Perry Vs. Bruft (1842) (Beav 66) be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person".

Lord Halsbury, L.C. in Reddaway V. Banham (1895-96) T L R 295, put it this way at page 296.

"For myself I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence....."
(Emphasis mine)

These cases are followed by a string of cases decided both locally and in the English Courts which were cited by Counsel on both sides, each claiming that they support his clients' case.

Let me at this stage acknowledge that I have had the privilege of reading in draft the judgment that ^{was} just been delivered by my learned brother Williams J.A. and I only wish to add a few words of my own and in my own style. I entirely agree with his ratio decidendi and the conclusion ^{has} he had arrived at. I shall try to avoid the boredom of repeating his exposition of the principles involved in complaints of this nature and his assessment of the facts. I only wish to examine ^{as} briefly as I can, what I consider to be the material evidence the appellants have led to discharge the onus placed on them to prove their case. This evidence comes from two witnesses viz: Nabil Naimar Saad who gave evidence as P.W.3 in the Court below and one ^{particular} ~~Kadjetu~~ Koroma who was P.W.4. Saad's evidence in brief was that he was General Manager of Jumbo Cubes Ltd. who 'are sole agents in connection with Jumbo for the plaintiffs in this country' and ^{with} they manufacture and distribute Jumbo Cubes. On 10th August, 1982 he heard about Chambo Cubes. He went to Choithram at 15 Kissy Road, Freetown and bought a packet of 100 cubes. In his opinion the wrapper on Chambo Cubes are similar to those of Jumbo Cubes. After doing different tests ^{on} of both products in their laboratory he ~~now~~ came to the conclusion that Chambo Cubes were lighter in colour than Jumbo Cubes. In taste, Chambo was milder than Jumbo. On 11th September, 1982 he went to Guard Street where he met a woman selling Chambo Cubes and Maggi Cubes. A lady asked the woman selling for Jumbo Cubes. She gave her Chambo Cubes which the lady refused to accept even though the seller was trying to say that Chambo Cubes were a new type of Jumbo Cubes.

It is significant to observe here that on these two occasions there is no evidence that either Saad or the lady at Guard Street was deceived by the names or the colours or design of the two products; neither was there any likelihood of any person being deceived by either the names or the Trade Mark of Jumbo Cubes and Chambo Cubes.

This witness Saad who was the General Manager of Jumbo Cubes and who prosecuted this case for the plaintiffs/Appellants very honestly admitted under cross-examination, when he said:-

"I see Exh. 'J' that colour on it has a deep orange. See Exh. 'L' the colour is deep red. They are different. See Exh. J we have a designing of orange and yellow a draught kind pattern.

See Exhs. 'M' 'Q' 'P' 'Q' 'R' 'S' they all have a coronet as part of our design
 See Exh. 'L' it has two ^{red} bands running across." (Emphasis supplied)

Exhibit L is Chambo Cubes. Exhibit J is Jumbo Cubes; while exhibits 'M' 'Q' 'P' 'Q' 'R' and 'S' are various other products (vests, caps etc.) of the appellants company with their registered Trade Mark. What then is the appellants' complaint about infringement of their registered Trade Mark in view of the evidence of this witness Saad?

The next witness I wish to consider is Kadyatu Koroma. We have no evidence that she is a minor. Whatever she is, her evidence is not of any help to the appellants' case; instead, in my opinion, it goes to help the case for the respondents. Inter alia, she testified as follows:

"Sometime in September, this year my aunt sent me to buy Jumbo Cubes, have been buying them for more than two years. My aunt asked me to go to the shops on Kissy Street, Freetown for some of the product. She asked me to buy her a packet and gave me Le8.50. I went to Choithrams Kissy Street. I went there and asked for Jumbo Cubes, they took a packet and sold it to me for Le8.00. I cannot read or write. I took the packet home; my aunt said she does not want the new type Jumbo Cubes, but the old one. She gave me an old packet of Jumbo Cubes, told Choithram that I wanted the old type and not the one which was sold to me. I was told that they are one and the same products and added that what they had sold me was the new type Jumbo Cubes." (Emphasis mine).

Without being too technical, let me pose this question -- who in Choithram shop sold to the witness and in which shop? -- there being evidence that there are at least two Choithram shops on Kissy Street. The appellants did not bother to find out, or put the Chambo Cubes in evidence. The witness at the outset had testified that she had been buying Jumbo Cubes for over two years and there is no evidence that she doubted what she went for and what was given to her (if at all) or that she was deceived in any way. To my mind her evidence is most suspect; orchestrated to entrap Choithram but which evidence totally emasculates. Of course what was said of her aunt was inadmissible and irrelevant -- she not being called as a witness. All I can say about Kadyjatu Koroma is that she is either not saying the truth or that she is the careless and indifferent type of person referred to by Wilberforce J. in NORMAN KARK LTD V. OLDMAN PRESS LTD (1962) 1 ALL E R 636 at p. 640, who, it is not enough to say was led into error. Also the alleged conversation between the trader and the lady at Guard Street market should be totally ignored. Why were they not called as witnesses even though they were known to Saad who gave inadmissible evidence of what allegedly took place at that meeting. In my judgment, there was no act of passing off of respondents 'cubes for the plaintiffs'.

On the evidence before me, as it was before the learned trial judge, I dismiss the charge of "passing off" brought against the respondents, of their Chambo Cubes for the appellants Jumbo Cubes.

I now come to the appellants' complaint of infringement of their Trade Mark and trade names against ^{the} respondents. The principle was enunciated by Lord Cranworth L.C. in the case SEIXO V. PROVEDENDE (1835 - 36) Law Reports Ch. Appeal Cases 195 where he said at page 196.

"What degree of resemblance is necessary from the nature of things, is a matter incapable of definition a priori. All that courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled."

Let me again refer to the evidence of P.W.3 Nabil Kameh Saad the General Manager of the appellant company who is prosecuting this case on their behalf,

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which I have quoted earlier in the judgment. After describing them in the minutest detail, he honestly admitted that the two trade marks are not the same. Need I go beyond this to say that they are not? Perhaps it is necessary to do so in order to come to my own finding and arrive at my own decision.

When this appeal came for hearing before this court, we were informed that two important exhibits in the Lower Court i.e. exhibits J1-100 and L1-40 - the two packets of Jumbo and Chambo Cubes respectively, were missing for good. Let it be enough to say that an application was made and leave granted for appellants to lead fresh evidence and tender similar wrappers on Jumbo Cubes and Chambo Cubes. Mr. Saad P.W.3 then put them in evidence as exhibits A1-6 and B1-4 respectively.

I have carefully examined both exhibits and I think that there is in this case no infringement. The respondents' trade mark is certainly not the same as that used by the appellants. Here the differences are so palpable that no one can be deceived. And to anyone at all acquainted with the appellants' trade mark in this case, I can hardly think that even on the most cursory glance there could be any deception. As far as the names are concerned the only thing they have in common in the spellings are the last three letters - MBO. But by no stretch of imagination can anyone pronounce CHA-MBO for JU-MBO. Incidentally the two products being of Spanish origin, it may be possible that Chambo and Jumbo are Spanish words with quite different meanings.

Before I close the door on this judgment let me make some observations on the other cases cited by counsel.

(1) MATTER V. CYPRUS WINE ASSOCIATION (1957 - 60) A I R (S L) 179.

Here Hearn, Ag. P. held that

"The learned Chief Justice discussed the evidence and made a careful comparison of the two labels. He unhesitatingly came to the conclusion that the appellant had embodied in his label so many of the features of the respondents' trade mark....."

It is the similarity in the

(ii) ABOUD & SONS V PERE GEE & SONS (1970 - 71) A L R (SL) 125

Here Browne Macke J found as a fact that through "King Brand" and "^{mark}King Brand" mosquito repellants may not be similar in name, there was such similarity in the packages in which they were packed and displayed, as to lead to confusion and mislead ordinary purchasers.

(iii) T. CHOITHRAM & SONS V. P. CHOITHRAM & SONS (1964 -) A L R (SL) 253

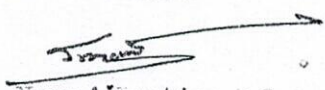
Beoku-Betts J found as a fact that the two names brought confusion when he said

"In this case, the plaintiff brought instances of business letters being misdirected, advertisements being confused, cablegrams being misdirected, all because of the similarity of the names of the plaintiff company and the defendant firm....."

We have no such instances in this case.

^{The instant}
In this case the learned judge discussed the evidence and made a careful comparison of the two labels. He unhesitatingly came to the conclusion that the two trade marks were not similar in any way. I have done the same as the learned trial judge did and have come to the same conclusion.

I accordingly dismiss this appeal with costs in this court and in the court below to the respondents, such costs to be taxed.


S. T. Navo, Justice of Appeal

(Presiding)

