

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION

HCT – 00 – CC- CS - 395 - 2009

BYTE LEGION TECHNOLOGIESPLAINTIFF

VERSUS

MTN (UGANDA) LTD. DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J u d g m e n t

The plaintiff company a software developer sued defendant Telecommunications Company for breach of confidence and unjust enrichment regarding a proposed SMS based brokerage service.

The case for the plaintiff is that in July 2007, the Plaintiff's Managing Director, Mr. Collins Musunguzi, approached employees in the Marketing Department of the Defendant Company with a proposal for the development of an SMS brokerage content provision system.

Over the next few months, the Plaintiff and Defendant corresponded regarding the possibility of working together to develop the SMS brokerage content provision system. The defendant assured the plaintiff that they were willing to do business with him and correspondence between the parties began. The plaintiff then at the request of the defendant spent Shs 2,000,000/= for the installation of a leased line and SMPTP Port to further their relationship. In September 2008 the plaintiff awaited a formal agreement with the defendant and was assured that all he had to do was wait and be patient.

However in 2009 the defendant launched another but similar product called Google SMS Trader a product said to have technical specifications as the plaintiff's proposed SMS based brokerage content provision system.

It is the case for the plaintiff that the defendant used confidential information of the plaintiff relating to this product and went on to launch Google SMS Trader with the same information without informing the plaintiff of its intentions to do so.

The case for the defendant is that they had no formal contract with the plaintiff regarding the proposal for the development of an SMS based brokerage content provision system. Furthermore the defendant did not authorise its employees or officials to deal with

plaintiff. It is the case for the defendant therefore that any communication between the parties was causal and not official.

The defendant avers that it was under no obligation to notify the plaintiff about the Google SMS Trader Product and that the said product was not tailored on the plaintiff's proposal as it was already in existence and therefore they were not in breach of any duty of confidentiality.

At the pre-trial/scheduling conference the parties agreed to the following issues

- 1. Whether or not the plaintiff has a cause of action against the defendant?**
- 2. Whether or not the launch of Google SMS trader was a breach of the plaintiff's rights?**
- 3. What remedies are available to the parties?**

Issue No. 1: Whether or not the plaintiff has a cause of action against the defendant?

It is the case for the defendant that as a point of law the plaintiff company was not the right party to file the suit.

Counsel for the defendant submitted that the Plaintiff company was incorporated in 2007, but the idea of the SMS brokerage content provision system (hereinafter referred to as "SMS brokerage system") was developed between 2005 and 2006 by the Plaintiff's Managing Director Mr. Collins Musinguzi; therefore, the because the Plaintiff as a company did not create the idea so the Plaintiff has no right to sue the defendant.

Counsel for the defendant submitted that idea of SMS brokerage system was developed by the Plaintiff's Managing Director before he was an employee, director, shareholder, or agent of the Plaintiff company, because the company was not in existence at the time.

He further submitted that the only party that has intellectual property to be protected is the Plaintiff's Managing Director, not the Plaintiff as a company.

Counsel for the defendant submitted that the Plaintiff company failed to show that the developer was its director, agent, or employee at the time the idea was developed.

The case for the plaintiff is that the Plaintiff's proposal stated that the idea was both that of the Plaintiff Company and its Managing Director.

Counsel for the plaintiff submitted that a company is distinct from its members. However, this in no way bars a company from acquiring assets from its shareholders and directors.

He referred to the case **HL Bolton Co. v. TJ Graham and Sons (1956) 3 ALL ER 624, page 630**, where the court held “... *[t]he state of mind of these managers is the state of mind of the company and is treated by the law as such.*”

Counsel for the plaintiff submitted that this point of law indicates that an idea from an individual can be acquired by a company.

He further submitted that the Defendant Company knew that it was dealing with the Plaintiff's Managing Director, acting on behalf of the Plaintiff.

I have addressed my mind to the evidence on record and submissions of both counsels on this point of law.

A review of the evidence on record shows that most of the correspondence was between the defendant and Mr. Collin Musinguzi who did not sign them in any official capacity. However Mr. Musinguzi was using the email address jeff@ubts.go.ug which appears to be a corporate address. Furthermore the receipts issued in this transaction dated 22nd August 2008 issued by the defendant were in the names of the Plaintiff Company which means that the defendant was dealing with both the plaintiff Company and the plaintiff's Managing Director.

While I agree that a company is distinct from its members, this in no way bars a company from acquiring assets from its shareholders and directors. Furthermore on the authority of **HL Bolton Co** (Supra) the law treats managers of a company as the very mind of the company itself.

I accordingly find that because an idea was developed by the Plaintiff's Managing Director before he was an employee, director, shareholder or agent of the Plaintiff does not bar the Plaintiff Company from establishing a contractual right to the intellectual property in question.

Indeed when the Plaintiff Company sued it did so representing both the Plaintiff and the Plaintiff's Managing Director as owner of the property.

The Defendant clearly knew it was dealing with the plaintiff company and that is why it issued receipts in the plaintiff company's names.

I there answer this issue in the affirmative that the plaintiff company had a cause of action against the defendant.

Issue No. 2: Whether or not the launch of Google SMS trader was a breach of the plaintiff's rights?

It is the case for the plaintiff that by reason of the defendant first accepting to use its SMS product but then quietly switching to use the SMS product of Google there was breach of confidence and unjust enrichment on the part of the defendants.

Counsel for the plaintiff submitted that an action for breach of confidence was new in our jurisdiction but is emerging in the developed countries. He further submitted that it covers personal, trade secrets, know how and ideas. He noted that this area was not covered by our laws of intellectual property and so reliance would have to be made on case law.

In this regard I was referred to the case of **Campbell V MGN Ltd** [2004] AC 457 at 464 where **Lord Hoffman** held

“...imposition of a duty of confidence (is) whenever a person receives information he knows or ought to know is fairly and reasonably confidential.”

The learned Judge then citing the decision of **Lord Goff of Chieveley** in the case of **Attorney General V Guardian Newspapers Ltd** [1990] 1 AC 109 at 281 where it was further held that

“...a duty of confidence arises when confidential materia information comes to the knowledge of a person in circumstances where he has notice or is held to have agreed that information is confidential with the effect that it would be just in all circumstances that he should be precluded from disclosing the information to others”

Counsel for the plaintiff submitted that such a duty may exist even where there is no contractual relationship between the parties. In this regard he referred me to the decision of **Lord Greene MR** in **Saltman Engineering Co Ltd V Campbell Engineering Co Ltd** [1948] 65 RPC 203 at 215 where he held

“...the information to be confidential must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property or knowledge. On the other hand, it is perfectly possible to have a confidence document, be it formula, a plan, a sketch or something of that kind, which is the result of work done by the maker on materials which may be available for use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and produced a result which can only be produced by somebody who goes through the same process...”

Counsel for the plaintiff further referred to four tests laid down by **Meggary MC** in the case of **Thomas Marshal (Exports) V Guinle** [1979] 1 CH 222 which include that

“...the owner of the information believes its release would be injurious to him or advantageous to his rivals or others; that the owner of the information must believe it to be confidential and not in the public domain; that the owner’s belief in these matters must be reasonable; and that the information must be judged in the light of the usages and practices of the particular trade or industry concerned...”

The case for the defendant on the other hand is that there was no breach of confidence and therefore there was no unjust enrichment.

Counsel for the defendant submitted that what the plaintiff had if at all was an idea or proposal which did not confer a right which could be breached. He referred to the case of **Fraser and others V Thames Television Ltd** [1983] WLR 2 P 917 for the proposition that for an idea to be the subject of confidence obligations, it must be original, clearly identifiable, of commercial value and sufficiently developed. Counsel liked this to the position under the Copyright and **Neighbouring Rights Act of Uganda (2006)** in which section 6 therefore provides that ideas, concepts procedures or other things of similar nature are not protected.

Counsel for the defendant submitted that there was nothing innovative about the plaintiff’s idea and there was evidence that his idea existed elsewhere too like the Google SMS Trader.

Counsel for the defendant submitted that it was not true that the defendant when in receipt of the plaintiff’s proposal then approached Google and disclosed it to them in which case there was no breach of confidence.

Counsel for the plaintiff further failed to prove technical similarities between his work and that of Google and so there was no nexus between the two. Furthermore there was no evidence that Google copied the plaintiff’s idea.

I have perused the evidence on record and addressed my mind to the submission of both counsels for which I am grateful.

I agree with Counsel for the plaintiff that the action for breach of confidence is not well developed in our jurisdiction. The nearest area is that of copyright. However as seen in the case of **Saltman Engineering Co Ltd** (supra) parties in business may exchange information which they deem to be confidential to protect their business positions and legitimately expect the other party to maintain that confidentiality.

In this case there was no doubt that the defendant did not have the type of product that the plaintiff wanted to provide. There is also e-mail evidence that the defendant actively engaged the plaintiff in trying to source his product for their customers. A formal proposal was then sent by the plaintiff to the defendant dated 7th May 2007. The parties were to conclude a formal contract on this proposal but never did largely because the defendant chose to go with the product from Google.

The question is was there exchange of confidential information in the process. A review of the e-mails exchanged does not show that the parties actual envisaged that there were dealing with confidential information. Further more a look at the proposal especially the section technical specifications reveals to my mind a description of how the product works without any technical information at all like source codes. There was also no comparison of the technical specifications between the plaintiff's product and that of Google within the understanding of the case of **Saltman Engineering Co Ltd** (supra).

To my mind, the Plaintiff is seeking to protect an idea, rather than an original product. Because of this nuance, and the fact that the Defendant never formally accepted the Plaintiff's proposal, the Defendant was free to negotiate with other companies for a similar product. Other nations had used the product before, so it would not have been impossible for Google to come up with the idea of an SMS brokerage content provision system on their own without any help from the Plaintiff's proposal.

Based on the evidence on record the Defendant was under no obligation to inform the Plaintiff of simultaneous negotiations, so when the Defendant chose to work with Google and deny the Plaintiff's proposal after months of negotiation, this was within the Defendant's right to do so. The defendant however could have been more transparent with the plaintiff in their dealings with him as they even went as far as demanding that he procures a leased line from them and SMPTP Port when in reality they did not intend to use his product. In this regard they had to refund the plaintiff Shs 2,000,000/=.

Transparency is a cardinal principle of good corporate governance. The Plaintiff none the less was unable during trial to provide any source codes to distinguish its product from any other, I find that the Plaintiff cannot seek protection of this idea.

I therefore answer the second issue in the negative that there was no breach of the defendant's rights.

Issue No. 3: What remedies are available to the parties?

Based on my findings above I decline to make a declaration that the defendant was in breach of disclosing confidential information.

I accordingly dismiss the suit.

As to costs since the plaintiff incurred expenditure for a proposal that was not used at the prompting of the defendant which they did not intend to use, I only award the defendant half of the taxed costs.

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Geoffrey Kiryabwire
JUDGE

Date: 31/01/13

31/01/13
9:55 a.m.

Judgment read and signed in open court in the presence of;

- A. Kibaya for Defendant
- In court
- None of parties
 - Rose Emeru – Court Clerk

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Geoffrey Kiryabwire
JUDGE

Date: 31/01/2013