

SOUTH AFRICA / JUDGMENT

Monster Energ Company v Trade Kings SA (Pty) Ltd and Another (33735/18) [2019] ZAGPPHC 569 (17 October 2019) [2019] ZAGPPHC 569

COURT

North Gauteng High Court, Pretoria

BEFORE

C J Van Der Westhuizen

CASE / FILE NUMBER

33735/18

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO

OTHER JUDGES: YES/NO

(3)

REVISED

CASE

NO.: 33735/18

17/10/2019

In

the matter between:

MONSTER ENERGY COMPANY
Applicant/Opponent
and
TRADE KINGS SA (PTY) LTD
THE REGISTRAR OF TRADE MARKS
Respondent/Trade Mark Applicant
Second Respondent

JUDGMENT

VAN DER WESTHUIZEN, J

[1] This matter relates to an application for the registration of a trade mark and an opposition thereto. The matter originated in the Tribunal of the Registrar of Trade Marks. In terms of the provisions of section 59 of the Trade Marks Act, 194 of 1993 (the Act), the matter was referred to this court for adjudication by the Registrar of Trade

Marks.

[2] The applicant (opponent) is a Delaware, US Company, a subsidiary of Monster Beverage Corporation. The first respondent (trade mark applicant) is a South African Private company with limited liability. The latter is a subsidiary of a Zambian company, Trade Kings (Zambia) Limited. It was established in 2005.

[3] The trade mark applicant has joined the Registrar of Trade Marks as second respondent.[1]

[4] The trade mark applicant initially imported confectionary goods from the Zambian mother company, but subsequently decided to install production lines for chews and hardboiled candies. The largest lollipop line in the Southern Hemisphere was installed in 2010 at Crown Mines, Johannesburg. The mother company exports its goods that include confectionery and the like, under the trade name AMAZON. It exports to other African countries, Australia and the United Arab Emirates.

[5] The opponent is the registered proprietor of several registered trade marks and trade mark applications. It opposes the trade mark applicant's applications for a number of trade marks that include the marks "MONSTA" and "MONSTER" respectively.

[6] The subject matter applications are the following:

(a) 2009/26282: AMAZON MONSTA POPS, in class 30 for coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereal, bread, pastry and confectionery,

sweets, candies of all kinds, nuts of all kinds, including nuts, ices; honey;

(b) 2009/26283: AMAZON MONSTER POPS, in class 30 for coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereal, bread, pastry and confectionery,

sweets, candies of all kinds, nuts of all kinds, including nuts, ices; honey;

(c) 2010/19559: AMAZON MONSTA POPS Device, in class 30 for chewing gum, not for medical purposes; chocolate; cocoa products; confectionery; edible ices;

- (d) 2010/19564: AMAZON MONSTA POPS Device, in class 30 for chewing gum, not for medical purposes; chocolate; cocoa products; confectionery; edible ices;
- (e) 2011/16280: MONSTA, in class 35 for advertising; business management; business administration; office functions; wholesale; retail; offering for sale and the sale of goods; the bringing together for the benefit of others, of a variety of goods enabling customers to conveniently view and purchase those goods;
- (f) 2011/20553: MONSTA MAGIG, in class 30 for chewing gum, not for medical purposes; chocolate; cocoa products; confectionery; edible ices;
- (g) 2011/20554: AMAZON MONSTA POPS MAGIC XXL Device, in class 30 for chewing gum, not for medical purposes; chocolate; cocoa products; confectionery; edible ices;
- (h) 2011/27782: ATLANTIC MONSTA JELLIES, in class 30 for chewing gum, not for medical purposes; chocolate; cocoa products; confectionery; edible ices;
- (i) 2011/27784: ARCTIC MONSTA GUM, in class 30 for chewing gum, not for medical purposes; chocolate; cocoa products; confectionery; edible ices; and
- (j) 2012/06547: AMAZON MONSTA, in class 30 for chewing gum, not for medical purposes; chocolate; cocoa products; confectionery; edible ices.

[7] Considering the opponent's opposition, the following is gleaned:

- (a) Only nine of the trade mark applicant's ten applications for registration of a trade mark are opposed. Those all stand to be registered in class 30;
- (b) The opponent does not oppose trade mark application 2011/16280: MONSTA, in class 35 for advertising; business management; business administration; office functions; wholesale; retail; offering for sale and the sale of goods; the bringing together for the benefit of others, of a variety of goods enabling customers to conveniently view and purchase those goods.
- (c) Furthermore, the opponent does not indicate in its Form TM3 on which section(s) of the Act it relies in opposition to the applications. It merely states that it opposes the applications for registration of

trade marks on the grounds stipulated in its founding affidavit.

- (d) In its founding affidavit, the opponent indicates that it relies on the provisions of sections 10(6), (12), (14), (15) and (17) of the Act in its opposition to the registration of the trade mark applicant's applications in class 30.

- [8] In its founding affidavit, the opponent does not deal with Trade Mark Application 2011/16280: MONSTA, in class 35 for advertising; business management; business administration; office functions; wholesale; retail; offering for sale and the sale of goods; the bringing together for the benefit of others, of a variety of goods enabling customers to conveniently view and purchase those goods. It follows that that application may proceed to registration.
- [9] The opponent opposes the said applications on the premises that it has prior rights in and to the word “MONSTER” standing alone or in combination with other words. The rights upon which the opponent relies are prior registrations of marks or applications for the registration of marks that incorporate the word “MONSTER”. Only one of the opponent’s registered trade marks contains solely the word “MONSTER”. The balance of the opponent’s registered trade marks have either the word “MONSTER” in combination with other words that make up the trade mark, or the word “MONSTER”, is used with the claw-icon to make up the trade mark, with or without other words. In the latter instance, the word “MONSTER” is in specific type form or font.
- [10] None of the opponent’s pending applications for trade marks is prior to the trade mark applicant’s applications.
- [11] Section 10 of the Act (only the relevant subsections) provides as follows:

“10. Unregistrable trade marks. The following marks shall not be registered as trade marks or, if registered, shall, subject to the provisions of sections 3 and 70, be liable to be removed from the register:

...

- (6) subject to the provisions of section 36 (2), a mark which, on the date of application for registration thereof, or, where appropriate, of the priority claimed in respect of the application for registration thereof, constitutes, or the essential part of which constitutes, a reproduction, imitation or translation of a trade mark which is entitled to protection under the Paris Convention as a well-known trade mark within the meaning of section 35 (1) of this Act and which is used for goods or services identical or similar to the goods or services in respect of which the trade mark is well-known and where such use is likely to cause deception or confusion;
- (12) a mark which is inherently deceptive or the use of which would be likely to deceive or cause confusion, be contrary to law, be contra bonos mores, or be likely to give offence to any class of persons;
- (14) subject to the provisions of section 14, so similar thereto that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which the mark would be likely to deceive or cause confusion, unless the proprietor of such trade mark consents to the registration of such mark;

- (15) subject to the provisions of section 14 and paragraph (16), a mark which is identical to a mark which is the subject of an earlier application by a different person, or so similar thereto that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which the mark in respect of which the earlier application is made, would be likely to deceive or cause confusion, unless the person making the earlier application consents to the registration of such mark;
 - (17) a mark which is identical or similar to a trade mark which is already registered and which is well-known in the Republic, if the use of the mark sought to be registered would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of deception or confusion, unless the proprietor of such trade mark consents to the registration of such mark: Provided that a mark shall not be refused registration by virtue of the provisions of paragraph (2) or, if registered, shall not be liable to be removed from the register by virtue of the said provisions if at the date of the application for registration or at the date of an application for removal from the register, as the case may be, it has in fact become capable of distinguishing within the meaning of section 9 as a result of use made of the mark.”
- [12] From the foregoing quote the following relevant jurisdictional requirements may find application:
- (a) a mark that is inherently deceptive or the use of which would be likely to deceive or cause confusion;
 - (b) a mark that is so similar to a registered mark that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of the registered mark would be likely to deceive or cause confusion;
 - (c) a mark which is identical to a registered trade mark belonging to a different proprietor or so similar thereto, or the use thereof, would be likely to deceive or cause confusion;
 - (d) a mark that is so similar to a registered mark that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which the registered mark that the use thereof would be likely to deceive or cause confusion;
 - (e) a mark which is identical or similar to a trade mark which is already registered and which is well-known in the Republic, if the use of the mark sought to be registered would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark;
 - (f) In respect of the provisions of section 10(14) of the Act, a further jurisdictional requirement is set, namely that the registered trade mark proprietor has not consented;

- (g) A further jurisdictional requirement in section 10(6) of the Act is that it constitutes, or the essential part thereof constitutes, a reproduction, imitation or translation of a trade mark which is entitled to protection under the Paris Convention as a well-known trade mark within the meaning of section 35 of the Act in relation to goods or services in respect of which the trade mark is well-known.
- [13] It is trite that when considering an opposition to the registration of a mark, the mark is to be considered globally and in respect of the visual, aural and conceptional issues of the marks that stand to be compared.[2] Furthermore, the respective distinctive and dominant components based upon the overall impression given by the respective marks are to be considered as well.[3]
- [14] When applying the foregoing jurisdictional requirements in the context of the global consideration with regard to the respective distinctive and dominant components, it is trite that the potential purchaser, or user, is the ordinary person, one who is neither very careful nor very careless and ignorant. Such person is of average intelligence and proper eyesight, buying with ordinary caution.[4]
- [15] The requirement of “use” was restated by the Supreme Court of Appeal that the question that falls to be decided is not how the parties use or intend to use their marks, but how they would be entitled to use the marks if both were to be registered. What is to be considered is notional use as opposed to actual use.[5]
- [16] In respect of the requirement of likelihood of confusion or deception, that requirement requires that marks must be appreciated globally with reference to the visual, aural or conceptual similarity of the marks, whilst bearing in mind, in particular, the respective distinctive and dominant components based upon the overall impression given by the respective marks.[6]
- [17] The consideration of the issue of “confusion” is stated by the Supreme Court of Appeal to be a value judgment.[7] In so doing, the value judgment is largely a matter of first impression without undue peering at the two marks to be compared in respect of similarities or dissimilarities.[8]
- [18] It was held in *Mettenheimer v Zonquasdrift Vineyards CC*[9] that depending on the issue of similarity, where there is a high degree of similarity in the marks, a lesser degree of similarity of the relevant goods are required, and vice versa.
- [19] It is to be noted that only one of the opponent’s trade marks is registered in class 30. The balance are registered in classes 5, 9, 18, 25 and 32. The trade mark applicant seeks registration in class 30 and 35. The latter is not opposed as recorded earlier.
- [20] A perusal of the Trade Mark Register in respect of the opponent’s registered marks reveal the following:
- (a) the mark “MONSTER” is associated with marks registered in classes 5, and 32;

- (b) the mark “MONSTER ENERGY” is associated with marks registered in class 18;
- (c) the mark “NITROUS MONSTER ENERGY” is associated with classes 5, 32;
- (d) the mark “X-PRESSO MONSTER” is associated with classes 5;
- (e) the mark “M MONSTER ENERGY” with claw icon brand is associated with classes 9, 18 and 25.

[21] It follows that, but for one, the opponent’s registered trade marks are not registered or associated with class 30. The only one that is registered in class 30 is the mark “MONSTER REHAB” for ready to drink tea, iced tea based beverages; ready to drink flavoured tea, iced tea and tea based beverages.

[22] Although the opponent submits that it primarily relies upon sections 10(12),

(14) and (17) of the Act in its opposition, the opposition can readily be separated in respect of the issue of likelihood of deception or confusion (sections 10(12), (14) and

(15) of the Act), and the issue of well-known (sections 10(6) and (17) of the Act).

[23] The approach taken by the opponent in its opposition is not that of comparing the marks side by side, but on a broad basis. In respect of the opposition premised upon sections 10(12), (14) and

(15) of the Act, the opponent states:

- (a) “The common element that is a requisite (sic) in these sections is that the similarity between the marks must be so pronounced so as to be likely to deceive or cause confusion.
- (b) ... that Monster Energy and the Trade Mark Applicant’s trade marks are so similar that this similarity is not removed or diluted by an additional element or word.
- (c) The goods covered by the Trade Mark Applicant’s applications are confusingly similar to those that Monster Energy has acquired

registered trade mark protection for. These similarities in the marks themselves, will ..., result in the likelihood of deception or confusion.”

[24] In respect of the third premise, i.e. relating to the goods and services for which the opponent has obtained registration, the goods and services in classes 5, 9, 18 and 25 are completely different to the goods and services in classes 30 and 35 for which the trade mark applicant applies for registration.

[25] In respect of the goods and services of the opponent’s trad mark registered in class 30, the specification for registration reads: “ready to drink tea, iced tea based beverages; ready to drink flavoured tea, iced tea and tea based beverages”.

[26] In this regard, the trade mark applicant's specification in respect of all the marks to be registered in class 30 reads: coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereal, bread, pastry and confectionery,

sweets, candies of all kinds, nuts of all kinds, including nuts, ices; honey; or, chewing gum, not for medical purposes; chocolate; cocoa products; confectionery; edible ices.

[27] Clearly the specifications of the respective marks of the opponent and the trade mark applicant differ extensively. There is no overlap. Furthermore, bearing in mind that the global approach in respect of the conceptual requirement is entirely different, there is in my view no possibility of deception or confusion should the trade mark applicant's marks be registered. The opponent's mark registered under class 30 is not associated with any of its other registered trademarks. There is further no overlap in the specifications in respect of class 30, but for the issue of "tea". The opponent's specification in respect of "tea" is very specific. However, the respective marks are not comparable.

[28] It follows further that the marks registered in respect of classes 5, 9, 18 and 25 do not require any consideration or comparison and can be ignored for purposes of this opposition, in particular where the similarity of the goods and services is a jurisdictional requirement.

[29] The first and second contentions of the opponent referred to above, i.e. the alleged pronounced similarity, the opponent states that the respective marks are conceptually, visually and phonetically similar. In that regard, the opponent compares the elements "MONSTER" and "MONSTA".

[30] The flaw in the opponent's perception, and thus its comparison is apparent. The test is to compare the marks globally and then to ascertain the similarities or dissimilarities. The opponent ignores the global comparison and focusses on only two words, "MONSTER" and "MONSTA".

[31] Visually the marks differ, and there is no phonetic similarity. The word "MONSTER" is not pronounced in the same manner as the word "MONSTA". Neither of the two marks appear visually the same.

[32] Conceptually, in the context of the mark globally, the marks are clearly different. In five of the trade mark applicant's marks, the word "MONSTA" is used together with the word "AMAZON" and the word "POPS", with or without a specific device. On one of the trade mark applicant's marks the words, "AMAZON MONSTA POPS", are used together with the word "MAGIC XXL", and in combination with a specific device. The remaining marks are "AMAZON MONTA" (two marks), "MONSTA MAGIC", "ATLANTIC

MONSTA JELLIES", and "ARCTIC MONSTA GUM".

[33] There is no pronounced similarity between the respective marks.

- [34] As recorded earlier, the trade mark applicant's mother company uses the word "AMAZON" in respect of its goods. That word used in the context of the trade mark applicant's marks, constitutes a badge of origin.
- [35] In my view, the word "MONSTA" in the trade mark applicant's marks is not the dominant feature of any of the marks. The marks globally seen, constitute one conceptual idea, the mark as a whole with no dominant feature. The words of the trade mark applicant's marks, with or without a device, are used conjunctively and not disjunctively.
- [36] The opponent's marks that are to be compared, including those that have different goods and services as relevant to the particular class, are globally visually, aurally and conceptually on the overall impression, entirely different.[10] An example will suffice. The word "MONSTER" is used with words dissimilar visually, aurally and conceptually to that of the trade mark applicant's marks. The device with which some of the opponent's words are used, is that of a claw, visually, aurally and conceptually dissimilar to that of the trade mark applicant's marks. Where the opponent uses the word "MONSTER" in conjunction with the claw icon device, the word appears in a special form or font.
- [37] When applying the principle of imperfect recollection, the global visual, aural and conceptual overall impression of the two marks is so dissimilar that the principle of imperfect recollection will not assist the opponent. This is even more so, where the class of goods or services are so dissimilar.[11]
- [38] It follows that conceptually the opponent's marks are entirely dissimilar to that of the trade mark applicant's marks.
- [39] Considering the global visual, aural and conceptual dissimilarities of the opponent's marks to that of the trade mark applicant, and bearing in mind the dissimilarities in the goods and services, the possibility of deception or confusion is thus not a real tangible danger.[12]
- [40] In view of all of the foregoing, the opponent's opposition with special reference to the particular sub-section of section 10 of the Act, the following is found:

(a) Section 10(6) of the Act:

The primary requirement for opposition in terms of section 10(6) relates to a mark that constitutes, or the essential part of which constitutes, a reproduction, imitation or translation of a mark protectable under the Paris Convention. From the foregoing, the trade mark applicant's marks sought to be registered are neither a reproduction, an imitation nor a translation of the opponent's marks. The second requirement, namely, that the opponent's mark is protectable under the Paris Convention because of it being well-known does not require consideration. In respect of the third requirement, i.e. of similarity of goods and services, I have found that the goods and services for which the opponent's marks are registered, are dissimilar to those goods and services for which the trade mark applicant seeks registration. The opposition under this section stands to be dismissed.

(b) Section 10(12) of the Act:

The opposition under section 10(12) of the Act similarly stands to be dismissed. Furthermore, the opponent has not proven that any of the trade mark applicant's marks are inherently deceptive. In view of all of the foregoing, the opponent has not proven that the use thereof would be likely to deceive or cause confusion, be contrary to law, be contra bonos mores, or be likely to give offence to any class of persons.

(c) Section 10(14) of the Act

The requirements of section 10(14) have not been proven in view of all of the foregoing. The primary requirement is that the mark is to be identical to the registered mark of a different proprietor, in the present instance that of the opponent. This requirement can hardly be said to have been complied with. The respective marks of the opponent and the trade mark applicant are clearly not identical. Furthermore, the goods and services are not the same, nor similar. Likewise, for all the foregoing there would not be any likelihood of deception or confusion. Consequently, the requirement of consent does not enter the arena. The opposition on this ground stands to be dismissed.

(d) Section 10(15) of the Act

Section 10(15) does not find application. The trade mark applicant's marks are not identical nor similar to that of a different proprietor's earlier applications. All the opponent's pending applications are of a later date than the applications of the trade mark applicant. Furthermore, the goods and services are neither identical, nor similar. Thus, the issue of deception or confusion does not enter the fray. Likewise, the issue of consent does not find application. Consequently, the opposition on this ground fails.

(e) Section 10(17) of the Act

The primary requirement of section 10(17) is that of a mark that is identical or similar to an already registered trade mark. I have already found that the respective marks of the opponent and the trade mark applicant are neither identical, nor similar. The second requirement is that the prior registered mark is well-known in the Republic. In view of the fact that there is no compliance with the first requirement, the second requirement behoves no consideration. Further, in this regard, I have found that there is no real tangible danger of confusion if the trade mark applicant's marks are placed on the Trade Mark Register. There is no probability of confusion or deception. The word "AMAZON" in the trade mark applicant's marks is clearly a badge of origin. I have further found that the overall impression of the respective marks are globally entirely different.^[13] The users or potential users of the goods or services of the trade mark applicant's marks are not the same. The physical nature of the goods are entirely different and the parties' goods do not compete with one another. The third requirement is that the subject mark of the application for registration would be likely to take unfair advantage of, or be detrimental to the distinctive character or the repute of the registered trade mark unless the proprietor of the registered trade mark consents to the registration. This requirement does not

require consideration in view of the fact that the first two requirements are not met. However, further in view of the entirely dissimilarity of the competing marks, there is no possibility or probability that the trade mark applicant's marks would enjoy an unfair advantage of or be detrimental to the distinctive character of the opponent's marks or its repute. The issue of consent does not require consideration. There is no consent by the opponent. The opposition on this ground fails.

[41] It is pointed out by the trade mark applicant that there are trade marks on the register, which were registered prior to the opponent's marks that contain the word "MONSTER". These are:

- (a) Trade Mark Registration no. 1979/05036 – MONSTER MUNCH;
- (b) Trade Mark Registration no.1992/03514 – MONSTERGHETTI;
- (c) Trade Mark Registration no. 1997/05559 – MONSTER-AFRICA'S BIGGEST BURGER; and
- (d) Trade Mark Registration no. 2008/068003 – MONSTERCHEWS.

[42] It follows that the opponent cannot claim exclusivity in the word "MONSTER", or for that matter, any derivative thereof.

[43] In my view, considering all the foregoing, the opponent has failed to prove compliance with any jurisdictional requirement of each of the grounds of opposition relating to sections 10(6), (12), (14), (15) and (17) of the Act. It follows that the opposition to the trade mark applicant's applications for registration of the trade marks fails and stands to be dismissed.

[44] Consequently, the trade mark applicant's applications for registration as trade marks are to mature to registration.

I grant the following order:

- (a) The opposition to trade mark applications 2009/26282 in class 30; 2009/26283 in class 30; 2010/19559 in class 30; 2010/19564 in class 30; 2011/20553 in class 30; 2011/20554 in class 30; 2011/27782 in class 30; 2011/27784 in class 30; and 2012/06547 in class 30, is dismissed;
- (b) The Registrar of Trade Marks is directed to register trade mark applications 2009/26282 in class 30; 2009/26283 in class 30; 2010/19559 in class 30; 2010/19564 in class 30; 2011/20553 in class 30; 2011/20554 in class 30; 2011/27782 in class 30; 2011/27784 in class 30; 2012/06547 in class 30; and 2011/16280 in class 35 on the Trade Mark Register in so far as this may be required in respect of the latter application;
- (c) The applicant/opponent is ordered to pay the costs of opposition.

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

On behalf of Applicant: I Learmonth

Instructed by:

Adams & Adams

On behalf of Respondent: Ms I Joubert

Instructed by:

Kisch IP

- [1] Maryland Products Distributors v Liddel 1978(4) SA 455 (T)
- [2] Century City Apartments Property Services CC et al v Century City Property Owners' Association 2010(3) SA 1 (SCA) [13]
- [3] Century City Apartments Property Services CC, supra
- [4] Roodezandt Ko-Operatiewe Wynmakery Ltd v Robertson Winery (Pty) Ltd et al (503/13) [2014] ZASCA 173 (19 November 2014)
- [5] Orange Brand Services Ltd v Account Works Software (Pty) Ltd 2013 BIP 313 at [6]
- [6] Century City Apartments Property Services CC, supra
- [7] Bata Ltd v Face Fashions CC 2001(1) SA 844 (SCA) [9]
- [8] Yuppiefchef Holdings (Pty) Ltd v Yuppief Gadget Holdings (Pty) Ltd 2016 BIP 269 (SCA) [26]
- [9] 2014(2) SA 204 (SCA) [13]
- [10] Cowbell AG v ICS Holdings Limited 2001(3) SA 941 (SCA) at 947H-948D
- [11] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 640G-641E
- [12] American Chewing Products Corporation v American Chicle Co 1948(2) SA 736 (A) at 741; New Media Publishing (Pty) Ltd v Eating Out Web Services CC 2005(5) SA 388 (C) at 394C-F
- [13] Dinnermates (Tvl) CC v Piquante Brands International et al (401/17) [2018] ZASCA 43 (23 March 2018)

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