

SOUTH AFRICA / JUDGMENT

National Brands Limited v Continental Biscuit Manufacturers (Pty) Ltd (Leave to Appeal) (43416/2020) [2023] ZAGPPHC 1140 (1 September 2023)

[2023] ZAGPPHC 1140

COURT

North Gauteng High Court, Pretoria

BEFORE

MPN Mbongwe

CASE / FILE NUMBER

43416/2020

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO.: 43416/2020

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

SIGNATURE:

DATE: 01/09/2023

In the matter between:

NATIONAL BRANDS LIMITED

Applicant

and

CONTINENTAL BISCUIT MANUFACTURERS (PTY) LTD Respondent

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

MBONGWE J:

INTRODUCTION

- [1] The applicant herein seeks leave to appeal to the Supreme Court of Appeal or, alternatively, to the Full Bench of this division against the whole judgment and orders of this court dated 30 June 2023. The application has been brought in terms of section 17(1) of the Superior Court Act 10 of 2013.
- [2] The applicant has raised six grounds for leave to appeal and none of which relates to the core finding in the judgment sought to be appealed against that the applicant has no right that the respondent has infringed in terms of the provisions of the Trade Marks Act of 1963 and, therefore, not entitled to the final interdict it sought against the respondent. It is worth noting that the applicant has not even attempted to challenge the basis of that finding specifically.

THE CORE ISSUE

- [3] At the heart of the applicant's case is the incorrect perception that the applicant has a protected right in terms of the provisions of section 34(1)(c) of the Trade Marks Act of 1963 in respect of the rectangular savoury biscuit device bearing docking holes and on which the applicant has embossed its registered trade mark, the word PROVITA. A depiction of the embossed biscuit was submitted with the applicant's application for registration of its trade mark which the Registrar of Trade Marks approved in 1966. The approval of registration of the trade mark, PROVITA, came with an explicit restriction that reads:

"Registration of this trade mark shall give no right to the exclusive use of a device of a biscuit as such otherwise than as shown in the application."

- [4] The fact that the applicant's registered trade mark is shown together with and is embossed on the biscuit device should not be construed to mean that the two are bonded together and, therefore inseparable for purposes of the identification of the exact protected interest of the applicant. It is incorrect for the applicant to assume that it has protected rights to the biscuit device merely because both the registered trade mark and the biscuit device are shown in the applicant's application. After all, the device (including its features) was not registrable in 1966. It is apt to quote the following words of Harms JA in this regard:

"It cannot be gainsaid that shapes were not registrable under the 1963 Act as trade marks and calling shapes 'devices' made no difference to the conclusion. See Weber-Stephen Products Co v Registrar of Trade Marks 1994 (3) SA 611 (T) at 615G – I; cf Koninklijke Philips Electronics NV v Remington Products Australia Pty Ltd

- [2000] FCA 876 (30 June 2000) in para 16. But, submitted counsel for the appellants, we must ignore what the appellants had said about the meaning of their trade marks because

what was indeed registered were devices, i.e. visual representations or illustrations capable of being reproduced on a surface, whether by printing, embossing, or by any other means (s 2(1) 'device'). To explain the difference: the appellants' case on the papers was that the transverse stripe referred to represents an indication

that the end of the heel is bevelled. Now the argument is that the stripe printed or embossed on a sole. The argument becomes odd if regard is had to TM 1988/05584. It clearly shows an ordinary heel of a shoe plus three stripes of no particular distinctiveness. Counsel had to submit that what was obviously intended to be a heel was in reality the impression of a heel but that the use of a reel heel would also infringe."

See *Lubbe NO and Others v Millennium Style (Pty) Ltd And Others; Lubbe And Others NNO v Millennium Style (Pty) Ltd 2007 (6) SA 241 (SCA)*.

- [5] It cannot be disputed that without any reference to the biscuit device concerned the applicant can assert no right that has been infringed in its trade mark, PROVITA. The respondent's use of the biscuit device would constitute neither an infringement of the applicant's right in terms of the provisions of the Trade Marks Act of 1963. Nor does the respondent's depiction of the savoury biscuit on its start-up cause confusion as contended by the applicant.
- [6] On the basis of the above two considerations, the law and legal principles, the Applicant is not entitled to the final interdict it seeks prohibiting the respondent from using a biscuit device concerned.

THE GRANTING OF LEAVE TO APPEAL

- [7] The instances under which leave to appeal may be granted are set out in sections 17(1) and 16(2)(a)(i) of the Superior Courts Act 10 of 2013 ('the Act'). In terms of section 17(1) the court may only grant leave to appeal where it is convinced that:
- (a) the appeal would have a reasonable prospect of success; or
 - (b) there is some other compelling reason why the appeal should be heard, including the existence of conflicting decision on the matter under consideration; or
 - (c) the decision on appeal will still have practical effect (section 16(2)(a)(i), and
 - (d) where the decision appealed against does not dispose of all the issue in the case, and the appeal would lead to a just and prompt resolution of all the issues between the parties.
- [8] The applicant's case does not fall under any of the instances aforementioned. Thus leave to appeal ought not be granted as a result. In *Zuma v Democratic Alliance* [2021] ZASCA 39 (13 April 2021) the court held that the success of an application for leave to appeal depends on the prospect of the eventual success of the appeal itself. In *The Mont Chevaux Trust v Tina Goosen and Others* 2014 JDR 2325 LCC the court held that section 17(1)(a)(i) requires that there be a measure of certainty that another court will differ from the court whose judgment

is sought to be appealed against before leave to appeal is granted.

- [9] “An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal.” See *MEC for Health, Eastern Cape v Mkhitha and Another*

[2016] ZASCA 176 (25 November 2016).

- [10] Section 17(6)(a) of the Act makes it mandatory for a judge granting leave to appeal to direct that the appeal be heard by the full bench of the particular division the matter was heard in. Leave to appeal to the Supreme Court of Appeal may only be granted if the decision appealed against entails an important question of law or a decision of the Supreme Court of Appeal is necessary to resolve differences or conflicting decisions, or the administration of justice necessitates a decision by the Supreme Court of Appeal. The Supreme Court has made pronouncements on the core issue referred to in paras [3] to [5], above, including in the matter referred to in para [4]. With the finding in para [6] of this judgment, this court is constrained from granting leave to appeal either to the Full Bench of this division or to the Supreme Court of Appeal.

CONCLUSION

- [11] Following the findings in this judgment, the application for leave to appeal stands to fail with costs.

ORDER

- [12] The following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the costs with costs shall include the costs of senior counsel.

MPN MBONGWE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCE

For the Applicant C E Puckrin SC; LG Kilmartin Instructed by Adams & Adams For the Respondent O Salmon SC Instructed by Norton Rose Fulbright South Africa Incorporated

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