

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2011-03-30

Case Number: A362/08

In the matter between:

NEW BALANCE ATHLETIC SHOE INC

Appellant
(Respondent in court a quo)

and

ABDULLAH MOHAMED DAJEE NO

First Respondent

HASSEN GOOLAN MOHAMED KAROHA NO

Second Respondent

BASHIR AHMED MOHAMED NO

Third Respondent

In re: Application for leave to appeal

NEW BALANCE ATHLETIC SHOE INC

Applicant

and

ABDULLAH MOHAMED DAJEE NO

First Respondent

HASSEN GOOLAN MOHAMED KAROHA NO

Second Respondent

BASHIR AHMED MOHAMED NO

Third Respondent

JUDGMENT

SOUTHWOOD J

[1] This is an application in terms of section 20(4)(b) of the Supreme Court Act 59 of 1959 for leave to appeal against the judgment of this court handed down on 2 March 2011. The judgment of this court was given in an appeal to it against a decision of the Registrar of Trade Marks in terms of section 53(2) of the Trade Marks Act 194 of 1993. The applicant appealed against the judgment and order of the Registrar of Trade Marks expunging two of its registered trade marks and dismissing its application to expunge Mohamed Ismail Dajee's registered trade mark.

[2] At the request of the court the parties filed heads of argument dealing with two issues:

- (1) Whether leave to appeal against the judgment and order of this court is necessary; and if so
- (2) Whether this court (a full court) can grant leave to appeal or whether the applicant must seek special leave to appeal in terms of section 20(4)(a) of the Supreme Court Act.

The parties agree that leave to appeal is necessary but disagree as to whether this court has jurisdiction to grant leave to appeal. The applicant contends that this court has the necessary jurisdiction and

the respondents contend the contrary and that the application should be struck from the roll with costs.

- [3] Under the Trade Marks Act 62 of 1963 leave to appeal was not necessary from either the full court or the Appellate Division as the provisions of the Trade Marks Act gave to a party an untrammelled right of appeal – see ***Cowbell AG v ICS Holdings Ltd 2001 (3) SA 941 (SCA)*** at paras 4 and 5 and ***Levi Strauss Ltd v Coconut Trouser Manufacturers (Pty) Ltd 2001 (3) SA 1285 (SCA)*** para 3.

- [4] The provisions of the Trade Marks Act 194 of 1993 are very different and, with some exceptions expressly stipulated in the relevant section, provide that appeals against decisions of the Registrar and further appeals to the Appellate Division are to be dealt with in terms of the Supreme Court Act. The relevant parts of section 53 of Act 194 of 1993 provide as follows:

‘(2) Any party to any opposed proceedings before the Registrar may appeal to the Transvaal Provincial Division of the Supreme Court against any decision or order pursuant to such proceedings.

(3) ...

(4) Every appeal to the Transvaal Provincial Division of the Supreme Court from a decision or order of the registrar shall be noted and prosecuted in the manner prescribed

by law for appeals to that division against a civil order or decision of a single judge of that division, save that –

- (a) no leave to appeal to the said division shall be necessary;
- (b) the period within which such appeal shall be noted shall be 3 months after the date of the decision or order;
- (c) the appeal shall be prosecuted within 6 weeks from the date upon which it was noted:

Provided that the said division may, on application and on good cause shown, allow such extension of time for noting or prosecuting the appeal as it may deem necessary.

- (5) The parties to proceedings before the registrar shall be deemed to be parties to civil proceedings for the purposes of the Supreme Court Act, 1959 (Act No. 59 of 1959).
- (6) Every appeal to the Appellate Division of the Supreme Court by virtue of subsection (5) shall be governed by the Supreme Court Act, 1959 and shall be noted and prosecuted in the manner prescribed by law for appeals to the said division in civil proceedings.'

The issue must therefore be resolved by reference to the relevant provisions of the Supreme Court Act which govern appeals from the Full Court to the Appellate Division: in particular when special leave is

required to be sought from the Appellate Division and when leave is required to be sought from the Full Court whose decision is to be appealed against.

[5] Section 20(4) of the Supreme Court Act provides for two possibilities:

‘No appeal shall lie against a judgment or order of the court of a provincial or local division in any proceedings or against any judgment or order of that court given on appeal to it except –

- (a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division;
- (b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division.’

To determine whether special leave must be sought from the Appellate Division in terms of subsection 20(4)(a) reference must be had to subsection 20(3) read with subsection 20(2). Subsection 20(3) provides for which Full Court is to hear an appeal in terms of a direction under subsection 20(2). That subsection provides that the single judge who grants leave to appeal or the Appellate Division, if it grants leave to appeal, may direct that the appeal should be heard by a Full Court unless satisfied that the Appellate Division should hear the appeal because the questions of law and of fact and the other considerations

involved in the appeal require the attention of the Appellate Division. Subsection 20(4)(a) therefore applies to a situation where the single judge whose judgment or order is appealed against or the Appellate Division directs that the appeal be heard by a Full Court because of the considerations referred to. Clearly subsection 20(4)(b) applies to all other cases. This is one of them.

[6] This court therefore has jurisdiction to hear the application and the applicant correctly seeks leave to appeal from this court.

[7] As far as the merits of the application the majority of this court are satisfied that there are reasonable prospects of success in an appeal and that the application should be granted.

[8] The following order is made:

I Leave is granted to the applicant to appeal to the Supreme Court of Appeal against the judgment and order of this court given on 2 March 2011.

II The costs of this application will be costs in the appeal.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

A.M.L. PHATUDI
JUDGE OF THE HIGH COURT

I agree

T.M. MAKGOKA
JUDGE OF THE HIGH COURT

CASE NO: A362/08

HEARD ON: 30 March 2011

FOR THE APPLICANT: ADV. O. SALMON

INSTRUCTED BY: Jacobson & Levy

FOR THE RESPONDENT: ADV. I. JOUBERT

INSTRUCTED BY: Adams & Adams

DATE OF JUDGMENT: 30 March 2011