

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 095598/2024

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

.....
SIGNATURE

.....27/01/2025.....
DATE

In the matter between:

COLGATE-PALMOLIVE (PTY) LTD

FIRST APPLICANT

COLGATE-PALMOLIVE COMPANY

SECOND APPLICANT

and

BLISS BRANDS (PTY) LTD

FIRST RESPONDENT

ADVERTISING REGULATORY BOARD NPC

SECOND RESPONDENT

LEAVE TO APPEAL JUDGMENT

Manoim J:

Introduction

- [1] In these reasons I deal with three applications which were heard together and are interrelated. For convenience I will refer to the parties as Colgate and Bliss, and the second respondent, the Advertising Regulatory Board NPC, as the ARB.¹
- [2] On 13 December 2024 I delivered a judgment in relation to an application brought by Colgate alleging that Bliss was in contempt of court or at the least in breach of an order I had given earlier that year on 21 February 2024. (I will refer to this earlier order from now on as the Manoim J order and my December 13 order as the ‘December order’ or ‘December decision’, depending on the context.)
- [3] In my December decision I largely found in favour of Colgate and gave the following order (material parts only)

“The First Respondent is directed to comply with paragraph 3 of the Manoim J order, forthwith, and no later than 15 working days from the date of this order, by withdrawing the Offending Packaging and the Latest Offending Packaging, depicted in Annexures B and C annexed to the Notice of motion, from every medium in which they appear, over which the second respondent

¹ Colgate is shorthand used throughout this litigation for the two firms in the Colgate structure, Colgate Palmolive (Pty) Ltd and Colgate Palmolive Company. Bliss is Bliss is Bliss Brands (Pty) Ltd.

has jurisdiction, by virtue of them being member.” (emphasis provided)

- [4] The present three applications followed in consequence of that decision. First, Bliss applied for leave to appeal. Second, Colgate applied for leave to cross-appeal on a narrow point – the underlined portion of the order set out above. Third, Colgate also applied for an order in terms of section 18(3) of the Superior Courts Act not to suspend the December order pending the appeal. That relief was framed in these terms:

“The operation and execution of the order of Manoim J dated 13 December 2024 is not suspended by any application for leave to appeal or any appeal and will continue to operate and be executed in full until the final determination of all present and future leave to appeal applications and appeals.”

- [5] I deal with each of these applications in turn.

Bliss leave to appeal

- [6] In the December decision, one of the key issues I had to decide, was whether a new variation of Bliss’ Securex packaging, contravened the Manoim J order. (Bliss had never sought to appeal that order, so it still stands.)
- [7] Bliss had argued that it had complied with the Manoim J order as it had varied its packaging in October 2024. The debate before me in December was what to compare the October variation with. Was it to be compared with Colgate’s

Protex packaging, which was the basis of Colgate's original complaint to the ARB or was it to be compared with Bliss' Securex that was the subject of the Manoim J order in April.

[8] Bliss argued for the former, Colgate the latter. I decided in favour of Colgate on this point. But this was not the first time this issue had arisen.

[9] The same issue had previously come before Vally J, again as an urgent application, in October 2024. Although the packaging before Vally J was an earlier variant of the packaging that had I had found in February 2024 to be an infringement of the ARB code, (the infringing packaging) he decided the principle in the same manner I did in December. i.e. comparing the variant with the infringing packaging, not the prior Colgate Protex packaging. Bliss then applied for leave to appeal which Vally J granted to the SCA. There was a debate over whether he intended to grant a full appeal or to restrict the issue on appeal. Specifically to whether for the purpose of contempt, wilfulness had been shown. I quote the relevant passage below:

[10] *"Before me, is an application for leave to appeal. Having heard counsel and read the papers before me in this matter, I have come to the conclusion that there is a reasonable possibility that another court would come to a different conclusion, particularly in regard to the question of whether the applicant had successfully proven the presumption of wilfulness and mala fides in its failure to comply with the Manoim J order and thus reverse paragraph 3 of the order issued."*

[11] However, Vally J did not place any restriction on the leave to appeal in his order. Nor can the passage above be read to say any more than he was emphasising the issue of wilfulness, rather than restricting the ambit of appeal to it. Mr Marcus for Colgate correctly conceded that the SCA was thus at large on appeal to consider the correct comparative test.

[12] Given that this is the case I believe since the same issue came up in the Vally J matter and is already going to be before the SCA it is appropriate that I grant leave to appeal as well. This will also avoid a further protracted dispute between the parties as to whether my December order is distinguishable from that of Vally J in October. This is, as I go on to discuss, is a saga of near five years duration. I will therefore grant leave to appeal to the SCA in respect of the Bliss application.

Cross Appeal

[13] The cross appeal is confined to a narrow but not unimportant point. My December order limited the relief to members of the ARB. Colgate contends that this is too narrow an order and that having submitted to the jurisdiction of the ARB Bliss cannot benefit from this limitation which was in any event not contemplated in the Manoim J order. Bliss has not opposed the granting of leave for the cross appeal and for this reason I do not need to consider this issue further save to remark that this is an important issue to be decided not merely for these parties but for the ARB as well for future guidance. Hence, I grant leave to appeal to the SCA in respect of this cross-appeal as well.

Section 18(3) application

[14] Colgate has brought the section 18(3) application. The provisions of that section are well known, and I do not need to summarise them. The parties are agreed that the section requires the applicant, in this case Colgate, to establish the following:

- a. Exceptional circumstances exist
- b. Irreparable harm to the applicant; (i.e. Colgate)
- c. No irreparable harm to the respondent (i.e. Bliss)

[15] In addition, in terms of case law the following interpretation has been applied. Firstly, prospects of success are relevant.² Second exceptional circumstances are looked at strictly. Thirdly the test must not be applied mechanically but holistically.

[16] In this regard the approach taken by Ponnann JA in the *Tyte* case is instructive:³

“The overarching enquiry is whether or not exceptional circumstances subsist. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. As long as a court is alive to the duty cast upon it by the legislature to enquire into, and satisfy itself in respect of, exceptional

² *University of the Free State v Afriforum and another* 2018 (3) SA 428 (SCA) at paras 14 - 15. *Ntlemenza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 37, citing *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, & another* 2002 (6) SA 150 (C) at 156H-157C.

³ *Tyte Security Services CC v Western Cape Provincial Government and Others* 2024 (6) SA 175 (SCA) at paragraphs 14-15.

circumstances, as also irreparable harm, it does not have to do so in a formulaic or hierarchical fashion.

[17] *Although it has been postulated that the second and third are distinct and discrete enquiries, they are perhaps more accurately to be understood as being two sides of the same coin. The same facts and circumstances, which by that stage ought largely to be either common cause or undisputed, will inform both enquiries. The logical corollary of an applicant suffering irreparable harm will invariably - but not always - be that the other party has not. The enquiry into each can thus hardly be mutually exclusive, particularly because, as far as the third is concerned, unlike the second, the onus cast upon an applicant would be to prove a negative, in accordance with the usual civil standard. This suggests that, as with the exceptional circumstances enquiry, a court considering both the second and third must have regard to all of the facts and circumstances in any particular case. Insofar as the third goes, although s 18(3) casts the onus (which does not shift) upon an applicant, a respondent may well attract something in the nature of an evidentiary burden. This would be especially so where the facts relevant to the third are peculiarly within the knowledge of the respondent. In that event it will perhaps fall to the respondent to raise those facts in an answering affidavit to the s 18 application, which may invite a response from the applicant by way of a replying affidavit."*

[18] I have quoted from this decision at some length as not only is it the most recent decision on this section that I have been referred to, but it deals pragmatically with the approach to a section that might otherwise prove daunting to interpret.

The facts

- [19] Colgate makes much for how long this dispute has lasted. It made its complaint first with the ARB in December 2019. For a period, it went through the internal processes of the ARB until the latter's Final Appeal Committee ("the FAC"), in August 2020, decided the matter finally, with its Chairperson, Ngoepe JP, as the presiding member, exercising a casting vote. The matter then went to the High Court. First Bliss sought to interdict the implementation of the ARB's award, but this failed before Yacoob J. Bliss then returned to the High Court bringing a review which was heard by Fisher J.
- [20] Fisher J *mero motu* raised a constitutional issue around the ARB's jurisdiction. She found in favour of Bliss, but the matter then went to the SCA which reversed her decision. Bliss then appealed that decision to the Constitutional Court. That court unanimously decided to refuse leave to appeal. At issue before Fisher J, the SCA and the Constitutional Court, was whether the ARB could exercise jurisdiction against a non-member even where it had consented to its jurisdiction. The Constitutional Court found that where a non-member submits to the ARB's jurisdiction, the ARB can submit directions which are binding on non-members.
- [21] It then came to me on review of the FAC's decision, and I found in favour of Colgate, effectively upholding the relief granted by the FAC. My decision, which was handed down on 21 February 2024, was never taken on appeal. That decision, the Manoim J order, required Bliss to remove the infringing packaging within three months of the date of the order. What happened next was that Bliss

launched new packaging in the market in May 2024, in purported compliance with the Manoim J order. Colgate took the view that the new May packaging was in contravention of the Manoim J order, as it too closely resembled the infringing packaging.⁴ Colgate took the matter back to the FAC. Ngoepe JP ruled that the May packaging was not compliant. Colgate then went to court to get an urgent interdict to place Bliss in contempt.

[22] This is where the Vally J order arose. Vally J found Bliss in contempt. In deciding the matter Vally J held that the May packaging was:

“Wilfully designed so as not to be materially distinguishable from what existed previously.”

[23] Bliss then applied for leave to appeal, which Vally J granted. In the meantime, Bliss introduced another version of the packaging, the ‘October packaging.’ Colgate considered that this too was not compliant with the Manoim J order and brought another urgent application which I heard in December. That decision, which found that the October packaging was in breach of the Manoim J order, is now the subject of this leave to appeal, the cross-appeal, and the section 18(3) application.

[24] Colgate argues that save for the Fisher J order, Bliss has lost every case in this long litany of litigation. More pertinent given the issue on appeal to the SCA is that three judges, Ngoepe JP in his ARB capacity, Vally J and I have all found

⁴ I use the term offending packaging to refer to the Bliss Securex packaging of 2018 which had been found by the ARB; s FAC to contravene its Code in August 2020 and which was the subject matter of the review before me leading to the Manoim J order.

against Bliss on the merits. Fisher J in any event did not decide the matter on the merits of whether Bliss had contravened the Code. Apart from the factual issues of the resemblance between the respective packages, the test adopted in our decisions falls within the mainstream of decisions in this area of law. Put simply Bliss had an election – it could stay as close as possible to the margin line, or it could choose to stay well away from it. It chose the former not the latter. The case law makes it clear that a party faced with such a choice must stay well clear of the margin line. The decisions I have followed then are part of mainstream jurisprudence on this issue. The conclusion I come to is that Colgate has strong prospects of success.

[25] I turn now to the test under section 18(3). The history of this matter when looked at cumulatively shows that Bliss was, despite consistent failure, undeterred from pursuing its goal, of first keeping the infringing packaging in the market, and when that avenue was closed by the Manoim J order, opting to introduce variants that closely resembled the infringing packaging. Its strategy has paid off for it thus far.

[26] Colgate was thus compelled to be the initiating litigant to protect the fruits of its success before the ARB and this court by the two successive contempt applications. Bliss' response has been to appeal both these adverse findings against it. But in between on this journey of litigation Colgate was also forced to defend the powers of the ARB all the way to the Constitutional Court.

[27] This lengthy history viewed holistically takes the matter beyond the ordinary to the exceptional. It must be borne in mind that Bliss has benefited from having

the infringing packaging and then its further offending variants in the marketplace since 2018. Moreover it has been subject to an adverse finding that it had transgressed the ARB code since August 2020.

[28] In essence Bliss has benefitted from exploiting its rival's goodwill undeterred from adverse findings against it for a considerable period of time which will be extended further if section 18(3) relief is not granted to Colgate.

[29] I accept that the term exceptional is subject to different interpretations. As was held in *MV Ais Mamas* in a passage subsequently referred to in later decisions by the SCA:

“Depending on the context in which it is used, the word exceptional has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.”⁵ I

[30] The emphasis of Bliss' argument before me, was that Colgate had failed to show exceptional circumstances. It relied on the dicta in the *University of Free State* case where the SCA had stated:

“I think, in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the

⁵ *MV Ais Mamas: Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C), paragraph cited in *Ntlemenza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) and *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* B 2014 (3) SA 189 (GJ): paragraph 16

*existence of truly exceptional circumstances to justify the deviation.*⁶

[31] Thus, the *UFS* case posits the secondary shade of meaning contemplated earlier on in the *MV Ais Mamas* case. But it is not necessary for me to decide which shade of meaning to apply in this case. On either test the case is an exceptional one.

[32] Moreover, the facts of this case are more closely aligned to those in *Tyte* the more recent decision where the SCA took a less exacting approach to proof of exceptionalism and adopted its holistic test. In the *UFS* case the SCA found that the applicant had failed to make out a case for exceptionalism. There the court decided on the record that the applicant had not gone further than to assert a right. But in *Tyte* the court found that if it did not grant relief to the applicant then the respondent would get a windfall. The respondent in that matter was a firm that had won a tender unlawfully. As the incumbent it appealed against that decision. The losing tenderer had applied for section 18(3) relief. The SCA held that relief under 18(3) was appropriately granted otherwise the delinquent tenderer would gain a windfall. The facts of this case are more closely aligned to *Tyte* than *UFS*. Similarly in this matter Bliss would gain a windfall by being able to market the impugned packaging until the appeal was decided.

[33] Bliss argued that there was no irreparable harm to Colgate because its packaging, which was the subject of the ARB enquiry, has been withdrawn from

⁶ *University of the Free State v Afriforum and Another* [2017] 1 All SA 79 (SCA) ([2016] paragraph 13

the market. Colgate has not addressed this point so I can assume this is correct. Does this change the outcome? Bliss argues that it does and hence Colgate, has not made out a case of ongoing harm.

[34] But Colgate and Bliss are rivals competing for market share in the same type of product. If Bliss is retaining market or even increasing market share on the basis of packaging that is based on Colgate's goodwill, then it will have improved its position in the marketplace illegitimately at Colgate's expense.

[35] Nor does it appear that Colgate can recover damages for this period. I asked counsel this question at the hearing and received two answers. Counsel for Colgate said the only damages would be for an administrative law contravention and stressed that whilst such a claim was possible it was far from certain in law. Counsel for Bliss said the matter was much simpler and could be addressed by a passing off action. But Colgate's case is not premised on common law passing off. It is based on a contravention of the ARB code. So, a remedy for damages is far from certain suggesting that Colgate will indeed suffer irreparable harm from the continued use of its goodwill until the appeal process is concluded.

[36] In contrast Bliss has not made out a case for irreparable harm to itself. In relation to this as was observed in *Tyte* the respondent in an 18(3) application whilst not facing an onus at least has an evidential burden. But Bliss has not made out any case here of how it will be prejudiced in the market going forward.

[37] There was a great deal of debate about whether Bliss was entitled to advertise through one outlet Makro. Colgate complains that it was doing so. Bliss

contends that Makro is not a member of the ARB and so it is entitled to do so. It wrote to Massmart to get clarity and received an equivocal response. If Makro is a member of the ARB and thus subject to its rulings, then it may be because its holding company is a member of a Marketing Association that in turn is a member of the ARB. I cannot make a definitive finding on this point. But it does not prove decisive. The question for the purpose of the breach order on appeal is Bliss' ongoing marketing through members of the ARB. It never gave the obvious undertaking that it would confine its marketing efforts only to non-members. It is clear then that if the relief is not granted Bliss will be able to, and presumably will, continue marketing the October packaging in member outlets.

[38] Nor should there be any sympathy for Bliss. It has had ample time to change its packaging. Given that it has tweaked its packaging twice since the Manoim J order was issued in February 2024, the logistics and expense of changing packaging has clearly not proved insuperable. The fact that it has chosen to make changes so close to the margin line is the reason why it has been found in contempt by Vally J, and in breach by me, in my December order. This is an outcome it could have avoided. There is no reason why Colgate must be further prejudiced as a result of Bliss' decision to take the most minimal steps to comply.

[39] Bliss has not been excluded from the market. Only insofar as its packaging contravenes the ARB Code. Moreover, the order which I granted in December contains a carve out permitting it to market even the impugned October packaging, in non-member outlets.

[40] I find that approaching the elements of section 18(3) holistically that Colgate has made out a case for relief. Bliss is liable for the costs of the application although I do not consider that an award of attorney client costs is warranted.

[41] I just wish to clarify one issue. The order remains the one I issued in December. Even though I have given leave to Colgate to cross appeal on the issue of whether the withdrawal obligation extends to non-members, it is the December order I am reinstating. This means that paragraph 3 of that order remains in its present form.

ORDER: -

[42] In the result the following order is made:

A. Bliss application for leave to appeal:

1. Leave to appeal to the Supreme Court of Appeal is granted against the whole of the order granted by Manoim J, dated 13 December 2024 (under case no. 2024/095598) ("the December order").
2. Costs of the application shall be costs in the appeal.

B. Colgate's application to cross appeal

1. Leave to appeal to the Supreme Court of Appeal is granted against the underlined portion in paragraph 3 of the December order, as it appears in paragraph 3 of that order, as set out below:

"The First Respondent is directed to comply with paragraph 3 of the Manoim J order, forthwith, and no later than 15 working days from the date of this order, by withdrawing the Offending Packaging and the

Latest Offending Packaging, depicted in Annexures B and C annexed to the Notice of motion, from every medium in which they appear, over which the second respondent has jurisdiction, by virtue of them being member."

2. Costs of the application shall be costs in the appeal.

C. Section 18(3) application

1. The operation and execution of the order of Manoim J dated 13 December 2024 is not suspended by any application for leave to appeal or any appeal and will continue to operate and be executed in full, until the final determination of all present and future leave to appeal applications and appeals.
2. The First Respondent ("Bliss") is to pay the costs of this application such costs to include the costs consequent upon the employment of one senior and one junior counsel on scale C.



N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 22 January 2025

Date of Reasons: 27 January 2025

Appearances:

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