IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: 10455/2023

In the matter between:

ADCOCK INGRAM LIMITED	First Applicant
ADCOCK INGRAM HEALTHCARE (PTY) LTD	Second Applicant
ZAMBON S.P.A	Third Applicant

and

CIPLA MEDPRO (PTY) LIMITED	Respondent

Heard: 12 February 2025
Delivered Electronically on: 17 April 2025

JUDGMENT

LEKHULENI J

Introduction

[1] This is an application in which the applicants seek an interdict against the respondent in terms of s 34(1)(a) of the Trade Marks Act 194 of 1993 *("the Trade Marks Act")* from infringing the third applicant's registered trade mark, registration number 1995/00309 URIZONE in class 5, and from using, in relation to a pharmaceutical product, the trade mark FURIZOME or any other trade mark that closely resemble the third applicant's aforementioned registered trade mark, which may likely deceive or cause confusion. In addition, the applicants seek an order that the respondent be interdicted and restrained from passing-off its pharmaceutical products as those of the applicants and/or associated with the pharmaceutical product of the applicants by using in any manner or form, the trade mark FURIZOME or any confusingly similar trade mark or name.

[2] The applicants and the respondent are competitors within the pharmaceutical industry. The applicants manufacture, market and supply URIZONE. URIZONE is an innovator medicine of the third applicant, with the patent having expired some time ago.[1] Products for which patents have lapsed or expired may be legally reproduced by other manufacturers, subject to registration with the South African Health Products Regulatory Authority *("SAHPRA")*, a public entity of the National Department of Health, in terms of the Medicines and Related Substances Act 101 of 1965 *("the Medicines Act")*. SAHPRA is tasked with the regulation of all health products.[2]

[3] The applicants allege that the respondent's use of the trade mark FURIZOME, associated with its broad-spectrum antibiotics containing the active ingredient Fosfomycin for treating urinary tract infections (UTI's), is confusingly and or deceptively

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[1] In terms of s 46 of Patents Act 57 of 1978, the duration of a patent is 20 years from the date of the patent application subject to the patentee or agent paying the renewal fees.
[2] See s 2A of the Medicines and Related Substance Act 101 of 1965.

similar to the applicants' URIZONE trade mark. Accordingly, the applicants seek an order that the respondent be interdicted and restrained from unlawfully competing with them by using the trademark FURIZOME or any confusingly similar trademark. This court is called upon to determine whether URIZONE and FURIZOME trade marks are confusingly or deceptively similar.

The Parties

[4] The first applicant is Adcock Ingram limited, a company duly registered and incorporated with limited liability in accordance with the company laws of the Republic of South Africa. It is a member of the Adcock Ingram Group of Companies and is the company that historically entered into license and supply agreement with the third applicant concerning the pharmaceutical product URIZONE, which is the subject matter of these proceedings. The second applicant is Adcock Ingram Healthcare (Pty) Ltd. It is also part of the Adcock Ingram Group of Companies. Through its consumer division, over the counter division *("OTC")* and prescription division, it manufactures and distributes both OTC and prescription and generic pharmaceutical products, as well as products such as energy supplements, vitamins and sun care products. The URIZONE product that is the subject matter of this litigation is marketed and distributed by the prescription division of the second applicant.

[5] The third applicant Zambon S.P.A is a company incorporated under the laws of Italy. It is the registered proprietor of the trade mark URIZONE, which forms the subject matter of these proceedings. It has entered into a licence and supply agreement with the first applicant regarding the marketing and distribution of the third applicant's URIZONE product in South Africa. The first and the second applicant are licensed to use the third applicant's registered URIZONE trade marks in South Africa.

[6] The respondent is Cipla Medpro (Pty) Ltd a company, registered and incorporated in South Africa in 1995 and falls within the Cipla South Africa Group of Companies. It is the third largest pharmaceutical manufacturer in South Africa with a

product portfolio spanning from complex generics to pharmaceuticals. It also manufactures generic medicines, defined as a pharmaceutical product that is intended to be interchangeable with an innovator product. One such product is FURIZOME, a broad-spectrum antibiotic with the active ingredient Fosfomycin.

The Applicants' Case

[7] The applicants manufacture and distribute medicine under the trade mark URIZONE for the treatment of urinary tract infections and have done so for many years. The third applicant is the registered proprietor of trademark registration numbers 1995/00309 URIZONE and 1995/00513 URIZONE (special form) in class 5. The URIZONE pharmaceutical product is a broad and medium spectrum antibiotic used for treatment of urinary tract infections. The URIZONE product is sold as a single dose in a 3-gram sachet. The active ingredient of the product is Fosfomycin. The third applicant launched the URIZONE medicine in 1988. The applicants aver that this medicine is currently available in 78 countries, albeit in many of these countries the product is sold under different trademarks.

[8] The URIZONE medicine was launched in South Africa in 1993 by the first and the second applicants' predecessor in title, Adcock Ingram Pharmaceutical Limited, in terms of a license and supply agreement concluded at the time with the third applicant. The current distribution and marketing of the URIZONE product in South Africa is regulated in terms of a license and supply agreement between the first, second and third applicant dated 14 December 2016. The URIZONE product is registered with SAHPRA. The second applicant is responsible for marketing and distributing the URIZONE product. The second applicant is authorized by the third applicant to use the URIZONE trade mark.

[9] The applicants assert that 3446 138 sachets of the URIZONE product have been sold over the period 2011 to 2023. The first and second applicants invested approximately R5 million in total on advertising and promoting the URIZONE product

over the period 2018 to 2022. Part of the applicants' marketing efforts consists of distributing pamphlets and educational literature of their URIZONE products to doctors, medical practitioners and pharmacists. The applicants state that until approximately a year ago, URIZONE was in fact the only product of its kind on the South African market. For almost 8 years the URIZONE product had no generic alternative on the South African market.

[10] In February 2023, the second applicant became aware that the respondent had adopted and launched an interchangeable multi source medicine (generic) containing the active ingredient Fosfomycin in 3g sachets under the trademark FURIZOME. The applicants asserted that the respondent was undoubtedly aware of the applicants' URIZONE product and trademark when it opted to adopt and use the FURIZOME trade mark. The applicants challenged the respondent to take this court into its confidence and explain the rationale for its decision to adopt the FURIZOME trademark. The other generic medicines to the applicants' URIZONE medicine in South Africa with the active ingredient Fosfomycin include Actizone from Actor Pharma, Tractinfect of Aspen Pharmacare and Fomnos of Sadoz.

[11] The applicants aver that none of the pharmaceutical companies aforementioned saw any need to adopt URIZONE trademark for their generic medicine. These products have all been launched over the past 12 to 18 months. The applicants asserted that the trade marks used in respect of these products illustrate that the reason for the respondent adopting the FURIZOME trademark was evidently intended to capitalise and to take advantage of the reputation and goodwill attached to the applicants' URIZONE trademark.

[12] The applicants also pointed out that from the respondent's brochure it is clear that the respondent's FURIZOME product is a generic medicine and, similar to the applicants' URIZONE product, is used for the treatment of acute, uncomplicated lower urinary tract infections caused by sensitive e-coli in women. It is also used for

prophylaxis in diagnostic and surgical transurethral procedures in adult men. FURIZOME is sold in a 3-gram sachet, similar to the applicants' URIZONE product.

[13] On 10 March 2023, and on becoming aware of the respondent's FURIZOME product and the respondent's use of the applicants' URIZONE product, and because it would result in deception or confusion, the applicant instructed its attorneys of record to send a letter of demand to the respondent. The respondent was informed in the letter of demand, that the respondent's use of the FURIZOME trademark was unauthorised in the course of trade as a trade mark and in respect of goods covered by the specification of the applicants' URIZONE trade mark. The applicants demanded that the respondent cease all and any use whatsoever of the trade mark FURIZOME or any confusingly similar trade mark. The applicants also demanded that the respondent cease all and any use of the applicants' URIZONE trade mark complained of.

[14] On 06 April 2023, through its attorneys of record, the respondent rebuffed the applicants' claim and contended that the trade marks, when viewed as wholes, are clearly and sufficiently dissimilar from a phonetic, conceptual, and visual perspective. The respondent denied that its FURIZOME trade mark so nearly resembles the URIZONE trade mark as to be likely to deceive or cause confusion. The respondent also refuted the claim that its conduct constituted trade mark infringement, or a violation of the Advertising Regulatory Board *("ARB")* Code, or unlawful competition. The respondent reserved its rights in full and stated that it would not comply with the applicants' demand.

[15] The applicants asserted that there is a danger of deception or confusion between the trade mark URIZONE and FURIZONE, especially having regard to the oral, visual and conceptual similarities between the two trade marks URIZONE and FURIZOME. The applicants alleges that the respondent is unlawfully using the URIZONE trade mark in its brochure and further alleges that this use is tantamount to an infringement under s 34(1)(a) of the Trade Marks Act, as well as a contravention of the SAHPRA Guidelines

for Advertisement of Medicines and Health Products, the Marketing Code Authority, and the Code of Conduct of the ARB.

[16] The applicants pointed out that the respondent's FURIZOME trademark bears a confusing resemblance to the third applicant's registered URIZONE trademark. The applicants seek an interdict in terms of s 34(1)(a) of the Trade Marks Act to prevent the respondent from infringing upon the third applicant's registered trade mark. The applicants assert that the URIZONE trademark has acquired a reputation and goodwill, and that the use of the FURIZOME trademark by the respondent will result in consumer deception and/or confusion. The applicants also seek an order interdicting the respondent from passing-off its FURIZOME product as being that of, or associated with, the applicants and their URIZONE product.

The Respondent's Case

[17] The respondent assert that it is the third largest pharmaceutical manufacturer in South Africa, holding a 7,5% overall market share. It produces world class medicines at affordable prices for the public and private sectors, thereby advancing healthcare for all South Africans. Their strategy emphasises agile and sustainable growth, complex generics, and a commitment to continuously enhancing its portfolio while adhering to good manufacturing and laboratory practices. The respondent asserted that it offers a diverse portfolio of generic medicines that includes both acute and chronic therapies for patients across multiple age groups. Their strong presence is in, *inter alia*, anti-infectives, respiratory care, cardio-metabolic treatments, pain and fever management, as well as vitamins and supplements, amongst others, to name a few. The purpose of the respondent's generic offerings is to make essential medicines readily accessible to all patients. The respondent stated that both the applicants' URIZONE product and the respondent's FURIZOME product are classified as scheduled 4 medication which can only be dispensed upon prescription by a doctor.

[18] On 21 February 2023, the respondent introduced a scheduled generic medication containing the active ingredient Fosfomycin, marketed under the trademark FURIZOME. The FURIZOME product is a broad and medium spectrum antibiotic used for the treatment of urinary tract infections and is also available in a 1 x 3g sachet dosage. The respondent assert that, generally, brand names for pharmaceutical products are chosen or derived by taking into account the Active Pharmaceutical Ingredient, as well as the mode of action or treatment area. In the case of the respondent, the marketing team would provide the suggested names to the Internal Regulatory Affairs team, who then review the proposed name and make a final submission to SAHPRA. Final approval of the brand name is then communicated to the Internal Regulatory Affairs team. The respondent notes further that according to the prevailing practice, all product packaging and product names must receive approval from SAHPRA prior to registration taking place. The Respondent provided two alternatives to SAHPRA for the product name, being FURIZOME and Fosfomycin 3g Cipla. Both names were accepted and officially registered with SAHPRA on 27 September 2022.

[19] The respondent stated that the brand name and trade mark FURIZOME, adopted by the respondent, is an invented word with no meaning in the English language. The prefix “Uri” alludes to the intended use of the FURIZOME product, which is intended for the treatment of urinary tract infections and the letter ‘F’ alluding to the active compound of the FURIZOME product, specifically Fosfomycin. As part of the respondent’s launch of the FURIZOME product, the respondent distributed an informational brochure for purposes of marketing and advertising the newly launched product to doctors and pharmacists specifically. The FURIZOME brochure was circulated during February 2023, in line with the general regulations 45(2)(b) of the Regulations promulgated under the Medicines and Related Substances Act 101 of 1965, as amended.[3]

[3] It provides: ‘Medicines which contain a substance appearing in Schedule 2, Schedule 3, Schedule 4, Schedule 5 or Schedule 6 may be advertised only for the information of medical practitioners, dentists, veterinarians, pharmacists and other persons authorised to prescribe or in a publication which is normally or only made available to persons referred to therein.’

[20] The respondent further asserted that the FURIZOME trade mark is not so similar to the URIZONE trade mark, such that its use in the FURIZOME brochure on the packaging of the respondent's product is unlikely to result in confusion or deception among consumers. The respondent opines that the FURIZOME brochure contains nothing that could possibly be deemed to cause confusion and does not unfairly benefit from the URIZONE trademark or any reputation vesting therein. Furthermore, the respondent stated that it does not require the permission of the applicant to refer to the URIZONE product name in this comparative advertising since such advertising is permitted by intellectual property and the common law.

[21] The respondent postulated four scenarios and contended that there exists no possibility of confusion or deception on the part of patients between the URIZONE of the applicants and the FURIZOME of the respondent. In the first scenario, the respondent asserted that a medical doctor may prescribe the innovator (the original) product to the patient. In this instance, and in terms of s 22F of the Medicines Act, the pharmacist is obliged to inform the patient that a generic substitution exists. It is only after the patient is informed by the pharmacist that a generic option exist will the patient decide which pharmaceutical product to use. The respondent asserted that there exists no likelihood of confusion or deception since the patient is presented with two different options.

[22] In the second scenario, the respondent proposed a situation where the medical doctor prescribes the innovator product and endorse on the prescription "no substitution". In this instance, the respondent asserted that the pharmacist is not obliged to and will in fact not inform the patient that a generic substitution exists. According to the respondent, there can be no likelihood of confusion or deception on the part of the patient in such scenario, since the patient is only ever presented with one pharmaceutical product. In the third scenario the respondent postulated a situation where the medical doctor prescribes the generic product. In this instance, the respondent stated that the pharmacist is not obliged to and will in fact not inform the patient that an innovator product exists. The respondent contended that in such a case,

there is no likelihood of confusion or deception on the part of the patient since the patient is only ever presented with one pharmaceutical product.

[23] In the fourth scenario the respondent postulated a situation where a patient walks into a doctor's rooms and requests a particular medication for a perceived illness or medical condition. In this scenario however, the respondent states that the doctor is still obliged to examine or consult with the patient and only after the examination will the doctor either prescribe the requested medicine or engage in a dialogue with the patient as to why a different medication will be prescribed. According to the respondent, the doctor knows exactly which medicine he or she is prescribing and why. The respondent further asserted that in this scenario there is no risk of confusion or deception on the part of the patient as the patient is already aware of the pharmaceutical product. The doctor informs the patient of a possible alternative pharmaceutical product to the one the patient is already aware of.

[24] The respondent stated that the FURIZOME brochure does not include any content that could be deemed to cause confusion and does not take unfair advantage of the URIZONE trade mark (or any reputation vesting therein). Additionally, there is nothing contained in the FURIZOME brochure which discredits, degenerates, or disparages the URIZONE product. According to the respondent, all comparisons made are factual, truthful, substantiated, and are not left open to interpretation. The respondent emphasised that it is using the FURIZOME trade mark in the FURIZOME brochure to promote its own newly launched product. The Respondent uses the FURIZOME trade mark on the packaging of its own genuine product, and this is reflected in the FURIZOME brochure. To this end, the respondent implored the court to dismiss the applicants' application with costs, including the costs of two counsels.

Submissions by the parties

[25] The applicant's counsel, Mr Michau SC, submitted that the applicants have accused the respondent of deliberately copying its trade mark. Mr Michau argued that

this is not the first instance in which a member of the Adcock Group of Companies has been at loggerheads with the respondent over its use of a trade mark which resembles a successful product of the Adcock Group of companies. Counsel referred the court to the Supreme Court of Appeal *("the SCA")* case of *Adcock Ingram v Cipla Medpro*,[4] where the SCA ordered the registrar of trade marks to cancel a registered trademark ZEMAX because it would infringe the registered trade mark ZETOMAX, both of which were being used on a prescription drug. Mr Michau submitted that a review of that case demonstrates that the same unsuccessful defences raised by the respondent in that matter are yet again being raised in the present matter. The essence of this defence raised by the respondent is that because it is a prescription drug, the prospect of confusion is reduced. Counsel stated that the ZETOMAX case dispelled that notion.

[26] Mr Michau submitted that in the years gone by the law insofar as prescription drugs was concerned was always that because the products are prescribed by medical doctors and dispensing pharmacists, greater care would be taken and therefore the marks had to be even closer together before infringement could be found than was ordinarily the case. The ZETOMAX case, according to counsel, altered that. The SCA concluded that the patient, and thus the average member of the public, now participates in choosing his or her medication and is no longer a passive bystander in the purchasing process as a result of the introduction of generic medications and the provisions of s 22(F) of the Medicines and Related Substances Act 101 of 1965. The applicants' counsel submitted that the respective trade marks, URIZONE and FURIZOME are confusingly similar, and he implored the court to grant the relief sought in the notice of application.

[27] Mr Puckcrin SC, the respondent's counsel, submitted that the question of confusing and/or deceptive similarity in relation to medicines, must naturally take into account the nature of the medication and the ailment it is intended to treat, and is an important factor to consider in determining how involved members of the public actually

[4] [2012] ZASCA 39.

are in deciding upon his or her medication, which has a bearing on whether there is a likelihood of deception or confusion between the respective medications.

[28] Counsel argued that, since the URIZONE and FURIZOME products are classified as schedule 4 products, the involvement of medical professionals, being the prescribing doctor and the dispensing pharmacist in this case, cannot be discounted. Mr Puckrin pointed out that the applicants' URIZONE product and the respondent's FURIZOME product are classified as Schedule 4 medicines. Consequently, there exist several safeguards in place that regulate the supply, prescription, dispensing and sale of schedule 4 prescription medications aimed at protecting consumers (particularly patients), against the likelihood of confusion or deception arising from the names of prescription medications.

[29] Counsel for the respondent submitted that the supply and sale of medicines in South Africa is governed by s 22A of the Medicines Act.[5] Significantly, schedule 4 substances may not be directly advertised to the public. They may only be sold by pharmacists (or pharmacist's interns or assistants under supervision), or manufacturers/wholesalers to individuals licensed to lawfully possess the schedule 4 substance.[6] In counsel's view, the relevant "customer" for purposes of the comparison comprises medical practitioners, pharmacists, and patients.[7] In Counsel's view, the prescribing doctor and the dispensing pharmacist will be a safeguard against potential confusion between the product names. Mr Puckrin implored the Court to dismiss the applicants' application.

Issue to be decided

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[5] See s 22A(5)(a) – (e) of the Medicines Act.
[6] Section 22 of the Medicines Act; General Regulation 45(2) of the Regulations to the Medicines Act; Regulation 5.2 of the SAHPRA Advertising Guidelines.
[7] *Truworths Ltd v Primark Holdings* 2019 (1) SA 179 (SCA) at paras 6-7, 11, 16, 17 and 57; See also *Mcdonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; Mcdonald's Corporation v Dax Prop CC and Another; Mcdonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd And Dax Prop CC* 1997 (1) SA 1 (A).

[30] The key issue this court must consider is whether the URIZONE and FURIZOME trade marks are confusingly or deceptively similar. This question is relevant to the relief sought in terms of the Trade Marks Act and also the common law.

Applicable Legal Principles and Discussion

[31] The Trade Marks Act 194 of 1993 defines a trade mark principally in terms of its purpose to distinguish in that a trade mark means:

> 'a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the markets used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person.'

[32] In terms of s 9(1) of the Act, in order to be registrable, a trade mark shall be capable of distinguishing the goods or services of a person in respect of which it is registered from the goods or services of another person either generally or, where the trademark is registered or proposed to be registered subject to limitations, in relation to use within those limitations. Section 9 establishes the foundational requirement for a trade mark to qualify for protection. On the other hand, s 34(1)(a) of the Trade Marks Act prohibits the use of a mark that is identical to the registered mark or one that closely resembles it to the extent that it is likely to deceive or cause confusion. The applicants herein rely on s 34(1)(a) of the Trade Marks Act. For completeness, the relevant parts of s 34(1)(a) and (b) of the Trade Marks Act provide as follows:

> '34 (1) The rights acquired by registration of a trade mark shall be infringed by —
> *(a)* the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;
> *(b)* the unauthorized use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are

so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion…'

[33] In an infringement action, the onus rests upon the plaintiff to prove, on a balance of probabilities, that the mark used by the defendant so nearly resembles the plaintiff's trademark to the extent so as to likely deceive or cause confusion. Section 34(3) of the Act provides that where a trade mark in terms of this Act has been infringed, a High Court having jurisdiction may grant the proprietor certain relief. The relief envisaged by s 34(3) includes an interdict, an order for removal of the infringing mark from all material, damages, and in lieu of damages, at the option of the proprietor, a reasonable royalty which would have been payable by a licensee for the use of the trade mark concerned.

[34] Assessing the similarity of marks, to ascertain whether they are confusingly similar is an important part of the process of determining possible infringement of a mark. Three general tests are employed.[8] First, marks could be similar on a phonetic basis. Second, marks can be similar conceptually.[9] A third test involves whether the marks are similar from a visual perspective.[10] In considering whether the use of the respondent's trade mark is likely to deceive or cause confusion, the SCA in *Cowbell AG v ICS Holdings Ltd,*[11] held that the essential function of the trade mark is to indicate the origin of the goods in connection with which it is used. The decision whether the use of both marks in relation to both goods and services would likely to deceive or cause confusion involves a value judgment. The ultimate test is whether on a comparison of the two marks it can properly be said that there exists a reasonable likelihood of

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[8] *Bata Ltd v Face Fashions CC and Another Bata Ltd v Face Fashions CC and Another (206/98) [2000] ZASCA* 192 (29 September 2000) at para 9*;* see also *Sabel BV v Puma AG, Rudolf Dassler Sport* [1998] RPC 199.
[9] See *Ramsay Son & Parker (Pty) Ltd v Media 24 Limited and New Media Publishing (Pty) Ltd*, 2008 BIP 149 (C) para 12.
[10] *National Brands Ltd v Blue Lion Manufacturing (Pty) Lt*d 2001 (3) SA 563 (SCA) para 10.
[11] 2001 (3) SA 941 (SCA) para 10; See also *Bata Ltd v Face Fashions* CC 2001 (1) SA 844 (SCA).

confusion if both are to be used together in a normal and fair manner, in the ordinary course of business.[12]

[35] The test to determine whether the two marks are confusingly similar is well established in our law and was set out by the SCA in *Plascon- Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd,*[13] along with subsequent cases that have further elaborated these principles.[14] The test requires the court to evaluate the visual, aural and conceptual similarities between the two marks, based on the overall impression and any dominant features. A court should assess the impact the marks would have on the average consumer in the marketplace, who is reasonably well-informed and observant, taking account the nature of the products and the manner in which they are marketed. The ordinary consumer may not encounter the goods bearing the marks at the same time and place, and an allowance should be made for the consumer's imperfect recollection of the marks. The marks should be viewed side by side as well as separately. The degree of similarity of the goods should be considered in relation to the degree of similarity of the marks. The greater the similarity of the goods the more it may offset some differences in the marks, just as the greater distinctiveness of the goods may require greater similarity of the marks in order to justify a finding of the likelihood of confusion.[15]

[36] In *Century City Apartments Property Services CC and Another v Century City Property Owners' Association,*[16] the SCA referred with approval to what was stated in *Compass Publishing BV v Compass Logistics Ltd,*[17] that:

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[12] *Smithkline Beecham Consumer Brands (Pty) Ltd (formerly known as Beecham South Africa (Pty) Ltd v Unilever plc* 1995 (2) SA 903 (A) at 912H.
[13] *Plascon- Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[14] *Bata v Face Fashions CC and Another* 2001 (1) SA 844 (SCA) para 9; *Cowbell AG v ICS Holdings Ltd* 2001 (3) SA 941 (SCA) para 10.
[15] *Casadobe Props 60 (Pty) Ltd v Fratelli Martini Secondo Luigi SpA* (759/2023) [2025] ZASCA 14 (25 February 2025) at para 12.
[16] *Century City Apartments Property Services CC and Another v Century City Property Owners' Association* 2010 (3) SA 1 (SCA) para 13.
[17] *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 para 24.

> ‘The likelihood of confusion must be appreciated globally, taking account of all relevant factors. It must be judged through the eyes of the average consumer of the goods or services in question. That customer is to be taken to be reasonably well informed and reasonably circumspect and observant, but he may have to rely upon an imperfect picture or recollection of the marks. The court should factor in the recognition that the average consumer normally perceives a mark as a whole and does not analyse its various details. The visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components. Furthermore, if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion.’[18]

[37] It is against this background that I now turn to determine whether the respondent’s FURIZOME trade mark is likely to cause confusion or deception to the public. However, before I do so, I must mention that this matter involves an alleged infringement on a trade mark concerning the sale of pharmaceutical products. It must be stressed from the outset that there are stringent rules and regulations promulgated in terms of the Medicines and Related Substances Act 101 of 1965 and the Pharmacy Act 53 of 1974 applicable to the marketing and retailing of pharmaceutical products. These include the physical handling and storage, promotion and advertising and labelling and display of product, as well as the prescribing and dispensing thereof.[19]

[38] All pharmaceutical products intended for sale in South Africa must be registered with SAHPRA in accordance with the Medicines Act prior to their launch in the South African market.[20] The URIZONE and FURIZOME products have been registered with SAHPRA and have been designated as scheduled 4 products in terms of the Medicines Act. Scheduled 4 products can only be sold by pharmacists, a pharmacist intern or a pharmacist assistant acting under the personal supervision of the pharmacist to

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[18] At para 13.
[19] See sections 8, 18A, 18B, 18C, 19 and 22A of the Medicines Act.
[20] See s 15 of the Medicines and Related Substances Act 101 of 1965.

individuals on prescription, written or verbal, from a medical doctor.[21] Schedule 4 products cannot be bought over the counter or off the shelf. Medicines which contain a substance listed as schedule 2, schedule 3, schedule 4, schedule 5 or schedule 6 may be advertised only for the information of pharmacists, medical practitioners, dentists, veterinarians, practitioners and other authorized prescribers.[22]

[39] In terms of s 22F of the Medicines Act, a pharmacist, with certain exceptions is obliged to inform members of the public who visit his or her pharmacy with a prescription from a doctor of the benefits of the substitution of an original medicine with a generic product. The pharmacist is furthermore obliged to dispense the generic instead of the innovator medicine (the brand name medicine) prescribed by the medical practitioner unless the patient insists on the prescribed medicine. Section 22F acknowledges that a patient to whom medicine is prescribed and dispensed has the right of choice between the products available on the market to cure his or her condition.[23] A patient is entitled to be informed of the available options and to make a choice regarding the pharmaceutical product he wishes to use.

[40] In the present matter, the applicants seek to prevent the respondent, by way of an interdict, from using the trade mark FURIZOME in relation to a pharmaceutical product that is intended to treat urinary tract infections. The respondent's product contains the active ingredient Fosfomycin a Schedule 4 prescription product. The applicants seek an interdict based on s 34(1)(a) of the Trade Marks Act, for passing off as well as under the broader aegis of unlawful competition. The success or failure of the applicants' application depends upon a finding as to whether or not the trade mark

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[21] See paras 1.4.4 and 1.4.5 and 1.1.5 of the SAHPRA Guidelines to scheduling of substances and Medicines of May 2022.
[22] See para 5.2 of the SAHPRA's Guidelines for advertisement of Medicines and Health products.
[23] Section 22F of the Medicines Act provides: 'Generic Substitution: Subject to subsection (2), (3) and (4), a pharmacist or a person licensed in terms of section 22C (1)(a) shall- (a) inform all members of the public who visit the pharmacy or any other place where dispensing takes place, as the case may be, with a prescription of dispensing, of the benefits of the substitution for a branded medicine by an interchangeable multi source medicine, and shall, in the case of a substitution, take reasonable steps to inform the person who prescribed the medicine of such substitution; and (b) dispense an interchangeable multi source medicine instead of the medicine prescribed by a medical practitioner, dentist, nurse or other person registered under the Health Professions Act, 1974, unless expressly forbidden by the patient to do so.'

FURIZOME can be said to be confusingly similar to the trade mark URIZONE, which is the subject of a valid registration in class 5 for a broad specification of goods that includes pharmaceutical preparations.

[41] The URIZONE trade mark is widely recognised as being associated with the same goods that the Respondent markets under the FURIZOME name, which is essentially a generic alternative to the applicants' URIZONE product. It is also acknowledged that the goods associated with the respondent's FURIZOME product falls within the specification of goods in respect of which the URIZONE trademarks are registered and that it is used in the course of trade.

[42] In order to establish infringement in terms of s 34(1)(a) of the Trade Marks Act it is necessary for the plaintiff to show:[24]

(a) use of the registered mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;
(b) that the use is in relation to the goods or services in respect of which the trade mark is registered;
(c) that the use is in the course of trade;
(d) that the use is unauthorised; and
(e) that the use is trade mark use.

[43] In the present matter, the applicants' cause of complaint is about the respondent's use of the FURIZOME trade mark. According to the applicants, the respondent is making such use of FURIZOME in the course of trade as envisaged in s 34(1) of the Act. Furthermore, the respondent is making use of the trade mark in relation to goods in respect of which the third applicant's registered URIZONE trade marks are registered. The applicants assert that the respondent is making use of FURIZOME as a trade mark, a mark so virtually resembling the applicants' registered URIZONE trade

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[24] *Webster and Page***,** *South African Law of Trade Marks* 4th Ed (1997), par 12.7, p 12-13; *Kraft Foods, Inc v All*
Jov Foods (Ptv) Ltd 1999 BIP 122 (T).

mark which is likely to deceive or cause confusion. In the applicants' opinion, there is a real danger of deception or confusion between the trade marks URIZONE and FURIZOME having regard to the real, visual and conceptual similarities between the two trade marks.

[44] As previously stated, the key issue for this court to determine is whether the URIZONE and the FURIZOME trademarks are confusingly or deceptively similar. In an infringement application, as in the current case, the *onus* is on the applicant to show the probability or likelihood of deception or confusion. It is not incumbent upon the applicants to show that every person interested or concerned (usually as customer) in the class of goods for which his trade mark has been registered would probably be deceived or confused. It is sufficient if the probabilities demonstrate that a substantial number of individuals will be deceived or confused.[25] The determination of what constitutes a substantial number is a matter of fact.[26]

[45] The question of the likelihood of confusion or deception is a matter of first impression and entails an objective test.[27] The meaning of the expression 'to be likely to deceive or cause confusion' has been held to mean that there is an onus on the plaintiff to show the probability or likelihood or deception or confusion.[28] In evaluating whether this onus has been discharged, the concept of 'global appreciation' should be applied. This means that a global appreciation of the visual, oral or conceptual similarity of the two marks in question, must be based on the overall impression given by the marks, bearing in mind, particularly, their distinctive and dominant components. Therefore, the general impression of the two marks (URIZONE and FURIZOME) should be considered. The inquiry is not whether there are differences, but whether the general appearance is such that a person looking casually at the marks (with an imperfect recollection) would be deceived, or misled. The infringing party is not permitted to rely

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[25] *Truworths Ltd v Primark Holdings* 2019 (1) SA 179 (SCA) at para 6.
[26] *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; MacDonald's Corporation v Dax Prop CC and Another* 1997 (1) SA 1 (A) at 20 B-E.
[27] *Puma AG Rudolf Dassier Sport v Global Warming (Pty) Ltd* 2010 (2) SA 600 (SCA) at para 11.
[28] Ramsden P *Guide to intellectual Property Law* (2011) 1st Ed at 162.

on a matter that is extraneous to the mark to negate the likelihood of deception or confusion.[29]

[46] It is common cause that the URIZONE trademark is used for the same types of goods as those associated with the Respondent's FURIZOME product. Furthermore, the FURIZOME product is, in fact, a generic substitute for the URIZONE product offered by the applicants. It is also common cause that the third Applicant owns the trademark for the URIZONE pharmaceutical product. Additionally, there is no question that the respondent's FURIZOME product is utilised in the course of business and that falls within the specifications of the commodities for which the URIZONE trademarks are registered. The dispute lies in whether the respective trade marks are confusingly similar.

[47] It is incontestable that the URIZONE trademark has acquired a reputation and goodwill in South Africa. It is renowned to individuals interested in the product or services associated with the mark. The URIZONE trade mark was launched in South Africa in 1993 and is currently available in over 2000 pharmacies throughout South Africa, including all the pharmaceutical chains, wholesalers, and industrial clinics. The URIZONE trademark had been in use in South Africa to such an extent that it enjoyed a considerable reputation and goodwill. It is recognised as a well-known trade mark. It is a well-recognised pharmaceutical product in South Africa and has been widely prescribed and dispensed throughout the country over the past thirty years by thousands of medical practitioners.

[48] On the other hand, the respondent's FURIZOME product is classified as a generic medicine. Similar to the applicant's URIZONE product, it is used for the treatment of acute, uncomplicated lower urinary tract infections caused by sensitive e-coli in women, as well as for prophylaxis in diagnostics and surgical transurethral procedures in adult men. The FURIZONE product, similar to the applicant's URIZONE, is sold as a single dose in 3 grams sachets. On a conspectus of all the facts placed

[29] *Adidas AG and Another v Pepkor Retail Limited* 2013 BIP 203 (SCA).

before the court, I am of the view that when the respondent adopted the FURIZOME trade mark it was clearly aware of the applicant's URIZONE and the respondent took advantage of the reputation and goodwill associated with the URIZONE trade mark of the applicant.

[49] It is important to emphasise that both URIZONE and FURIZOME are terms that have been invented. Both trade marks are aurally similar and are used to treat urinary infection. Since both pharmaceuticals are designed to treat the same condition and are packaged in 3-gram sachets, the potential and risk for confusion between the two is considerable. The two words (trade marks) are markedly similar, confusingly so. In my view, there is genuine and real danger of deception or confusion between the trade marks URIZONE and FURIZOME, especially having regard particularly to the oral, visual and conceptual similarities that connect the two trade marks.

[50] Evidently, the only distinction between the trade marks FURIZOME and URIZONE is that the respondent's FURIZOME trade mark starts with the letter 'F', while the 'N' in the applicants' URIZONE trade mark has been substituted with the letter 'M' in the respondent's trade mark. These differences, in my view, are insignificant. The dominant element of both marks bears substantial resemblance and creates a lasting impact on consumer's minds. Interestingly, when the respondent sought to obtain approval for the name from SAHPRA to be used in respect of this particular product, it submitted two names; namely, FURIZOME on the one hand; and FOSFOMYCIN 3g CIPLA. Both names were accepted. As Mr Michau correctly pointed out, the rationale behind the submission of the two names remain unexplained, but it's clear that the respondent had concerns about the approval of its "FURIZOME" name.

[51] The respondent's FURIZOME trademark in essence consists of letter "F" followed by "Uri", which alludes to the intended use of the medicine, followed by the word with no meaning, namely *"zome"*, that is F-URI-ZOME. The applicants' URIZONE trademark on the other hand, in essence consists of the word 'Uri' which alludes to the intended use of the medicine followed by *'zone'* which means *inter alia* 'region' or 'area'.

The combination of the trademark URI-ZONE is obviously not a known word. However, it is distinctive and imaginative. A detailed comparison of the two trade marks reveals their evident and concerning similarities, which may lead to confusion and deception among consumers. In my view, the two trade marks reveal striking similarities that pose a risk of confusion and deception among consumers.

[52] In addition, the overlapping characteristics between the two trade marks may mislead the public, blurring the lines between the distinct identities that each trademark is intended to present and convey. To my mind, the overall impression conveyed by the marks as wholes closely resemble each other, both in appearance and sound. The respondent's trade mark bears a resemblance to the applicant's trade mark and is likely to deceive or to cause confusion. Furthermore, the essential feature of the applicant's mark Uri and Zone had been incorporated in the respondent's FURIZOME trade mark. Clearly, the substitution of the letter 'N' with an 'M' on the suffixes of the two marks is inconsequential. Accordingly, there is clearly a likelihood of deception and confusion in the two marks.

[53] When comparing the two trade marks, it should be borne in mind that the letters 'N' and 'M' look and sound very similar. Both suffixes *"zone"* and *"zome"* look and sound virtually identical. The letters 'M' and 'N' are virtually indistinguishable in pronunciation. As correctly pointed out by the applicant's expert Stephan Muhr, the 'N' and 'M' sounds are often interchangeable and can be confused in the middle of words. The letters 'N' and 'M' are somewhat unique in English pronunciation as they are both classified as nasal consonants. Nasal consonants are consonants that are formed through air escaping through the nose and not the mouth. This means that the articulation of the two sounds is very similar, which can lead to confusion or interchangeability. In addition, the prefixes *'uri'* and *'furi'* are, both visually and phonetically virtually indistinguishable. Considering the principles of imperfect recollection and deception, it can never be said that, at the very least there would not be transitory confusion.

[54] There is no doubt that potential patients (consumers) will most likely be confused between the trademarks URIZONE and FURIZOME when confronted with these trademarks and when the product is prescribed or dispensed by a pharmacist. I am mindful of the argument made by Mr Puckrin and the evidence of Ms Haigh, the respondent's expert witness who confirms how medicines are dispensed to the public and that there are numerous safeguards against confusion between medicines. However, I believe doctors are not infallible, and do not possess a perfect recollection or perception of even all medicines they prescribe. They too make mistakes.

[55] In my view, pharmacists and doctors are human and are not immune to factors such as imperfect recollection and mispronunciation. They too can be confused or deceived. Even a doctor advising a pharmacist telephonically which drug to provide the patient with can lead to confusion given the virtually identical pronunciation. As correctly pointed out by the applicants, the trade marks are so similar that if a doctor had heard from a colleague (telephonically perhaps) that he/she should prescribe URIZONE and he/she comes across FURIZOME, he/she might wonder if his/her colleague did not perhaps mention the drug FURIZOME and then simply prescribe the incorrect drug.

[56] Most significantly, both pharmaceuticals are intended to treat the same condition. The applicant pointed out in the founding affidavit that, regarding doctors and pharmacists, one should bear in mind the handwriting of doctors on prescription scripts. Situations are likely to arise where a doctor may prescribe the applicants' URIZONE trade mark, and a pharmacist may be confused into believing that the doctor in fact prescribed the FURIZOME product or the other way round. Accordingly, in addition to the above, considering the condition that these products are meant to treat, that both are available in a 1 x 3g sachet, the possibility of confusion is unavoidable even when prescribed by doctors and dispensed by a pharmacist.

[57] I do not intend to deal with the scenarios (discussed above) postulated by the respondent in the answering affidavit and in the heads of argument *ad seriatim*. However, I have to emphasise that in years gone by, the law insofar as prescription

drugs was concerned was always that because the products are prescribed by medical doctors and dispensing pharmacists, a higher standard of care is expected. Therefore, the marks needed to be even more closely align together before infringement could be found than was ordinarily the case. However, by enacting s 22F of the Medicines and Related Substances Act 101 of 1965, the legislature jettisoned this approach from the discourse.

[58] The legislature has acknowledged the emergence of a significant transformative trend in healthcare among the public over the past two decades. Members of the public are far more aware of the types of treatment or different pharmaceuticals available for the treatment of specific conditions, the pros and cons of those treatment as well as the clinical successes associated with those products. Patients have generally started to take greater responsibility for their own healthcare, rather than relying solely upon their doctors and pharmacists to decide. The patient has emerged as one of the three tiers on which pharmaceuticals are promoted and marketed. The patient can exercise this right, *inter alia,* by asking for the prescribed medicine by name. To this end, s 22F creates a tripartite relationship or a "triad" of relevant consumers, consisting of the "*practitioner, pharmacist and patient*" in which pharmaceuticals are marketed.

[59] The existence of the triad was confirmed by the SCA in *Adcock Ingram v Cipla Medpro,*("*the ZETOMAX judgment*"), where the court found that because of the advent of generic medicine and the provisions of s 22F of Medicines and Related Substances Act 101 of 1965, the patient, as such the ordinary member of the public, plays a role in deciding upon his or her medication, no longer remaining a passive participant in the purchasing process. The ZETOMAX judgment was decided in terms of s 10(14) of the Trade Marks Act. The court noted that the question of a likelihood of deception or confusion in relation to chronic prescription medications must be answered with reference not to the specialised market of prescription medication only, but with reference to the patient as well. The court stated:

> ‘The patient is the ultimate consumer whose wishes may not be disregarded and who has the right to participate in any decision concerning his health and treatment. It may well be that there is little likelihood of the medical practitioner or pharmacist being deceived or confused, but the enquiry does not end there’.[30]

[60] Notwithstanding the fact that one is dealing with prescription medicine, the reality is that patients are involved in the process of deciding which medicines they will use, and that creates the risk of confusion. This situation in turn creates a responsibility upon pharmaceutical companies to make sure that they adopt trade marks that are not confusingly similar. A patient, and perhaps also a professional, who knows only the one word and has an imperfect recollection of it is likely to be mistaken. As correctly stated by the SCA in the ZETOMAX matter, one must make allowance for imperfect recollection and the effect of careless pronunciation rather than comparing the two words letter by letter or syllable by syllable. Thus, upon examining the two marks as a whole and recognising their similarities, the general impression is that they are remarkably alike to the point of causing confusion.

[61] Ostensibly the respondent argues that because Schedule 4 medicines are involved one should ignore the role patients play in deciding on the medicines to be prescribed and dispensed. Furthermore, the argument by Mr Puckrin that various safeguards exist that regulate the supply, prescription, dispensing and sale of schedule 4 prescription medications to protect the relevant consumers (particularly patients) against a likelihood of confusion or deception blissfully ignores the role of the public, or patient, in making their own medical choices and in deciding upon which product they wish to be treated with. There are certainly scenarios where patients do play a role in deciding on the medicine for their health and in that process, there exists a great possibility of consumer deception or confusion.

[62] It is incontrovertible that in many cases patient ask doctors to prescribe the medicine that they are familiar with, have used before, or heard about. It is reasonable

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[30] At para 30.

to conclude that this will be the case. When a patient request for a specific medicine by its brand name for a particular condition diagnosed by the doctor, it will likely be a medicine that they are familiar with, or have heard about, or read of. If the name of the medication aimed at the same ailments are confusingly similar, it obviously poses a risk of these patients becoming confused. In this case, there exists a significant risk of deception or confusion to patients arising from the two strikingly similar trade marks URIZONE and FURIZOME.

[63] Distinctive and distinguishable trade mark play a crucial role in the competitive landscape of pharmaceutical products. What I also find concerning is the fact that the respondent selected this particular name, despite having another name, completely different in every respect, that was approved by SAHPRA. The only inference to be drawn is that the respondent wanted to take advantage of the reputation and goodwill of the applicants' URIZONE, and this cannot be countenanced. Accordingly, this court finds that the two trade marks URIZONE and FURIZOME are visually, aurally and conceptually similar and that there exists a likelihood of confusion or deception among consumers.

Order

[64] Given all these considerations, the following order is granted:

64.1 The respondent is interdicted and restrained in terms of s 34(1)(a) of the Trade Marks Act 194 of 1993 from infringing the third applicant's trade mark registration number 1995/00309 URIZONE in class 5 by using in relation to the pharmaceutical product, the trade name FURIZOME or any other trade mark so nearly resembling the third applicant's URIZONE trade mark so as to be likely to deceive or cause confusion.

64.2 The respondent is interdicted and restrained from passing-off its pharmaceutical products as those of the applicants or associated with the

pharmaceutical products of the applicants by using in any manner or form the trademark FURIZOME or any confusingly similar trademark or name.

64.3 The respondent is interdicted and restrained from unlawfully competing with the applicants by using in any manner or form the trademark FURIZOME or any confusingly similar trademark.

64.4 The respondent is ordered to pay the applicants' costs, including the costs of two counsels were so employed.

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LEKHULENI JD
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: Adv R Michau SC
Instructed by: Spoor & Fisher

For the Respondent: Adv C E Puckrin SC
Instructed by: Kisch IP