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

**Case No:** 10455/2023

In the matter between:

| | |
|---|---|
| **CIPLA MEDPRO (PTY) LIMITED** | Applicant |
| And | |
| **ADCOCK INGRAM LIMITED** | First respondent |
| **ADCOCK INGRAM HEALTHCARE (PTY) LTD** | Second respondent |
| **ZAMBON S.P.A** | Third respondent |

**Heard: 18 August 2025**
**Delivered: Electronically on 26 August 2025**

**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL**

**LEKHULENI J**

**Introduction**

[1] This is an application for leave to appeal to the Supreme Court of Appeal (*'the SCA'*), alternatively, to the Full Bench of this division, against the whole judgment and order of this Court (*'the main judgment'*), handed down on 17 April 2025. In that judgment, this Court interdicted and restrained the applicant herein, Cipla Medpro (Pty) Ltd, in terms of section 34(1)(a) of the Trade Marks Act 194 of 1993 (*'the Trade Marks Act'* ) from infringing the respondents' URIZONE trademark registration number 1995/00309 by using in relation to the pharmaceutical product, the trademark FURIZOME or any other trademark so nearly resembling the respondents' URIZONE trademark to be likely to deceive or cause confusion.

[2] The Court also interdicted Cipla Medpro from unlawfully competing with the respondents by using in any manner or form the trademark FURIZOME or any confusingly similar trademark. Cipla Medpro was also ordered to pay the respondents' costs, including the cost of counsel.

**Grounds of Appeal**

[3] The applicant raised various grounds of appeal against the main judgment of this Court. The grounds of appeal filed on behalf of Cipla Medpro, can be summarised briefly as follows: Cipla Medpro contends that this Court erred in the application of the global appreciation test required in the comparison of trade marks as set out in *Plascon-Evans*

*Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 640, and subsequent decisions.

[4] To this end, Cipla Medpro contended that this Court erred in failing to give sufficient weight to the distinctive elements of each mark. The applicant asserted that this Court dissected the marks into their constituent syllables, comparing 'URI' with 'FURI' and 'ZONE' with 'ZOME', and assessed these components in isolation, and then concluding that the marks are deceptively similar based on these fragmented comparisons, rather than applying the holistic assessment required by the applicable legal test.

[5] In addition, Cipla Medpro argues that the Court erred by placing undue weight on the alleged reputation and market presence of the URIZONE trademark, without any proof that the trade mark had acquired sufficient distinctiveness or consumer recognition to influence perception meaningfully. A reputation, even if established, so the applicant contends, does not automatically entitle a proprietor to an interdict in the absence of a proper finding of likely confusion. The comparison of the marks must still support such a finding, particularly where no actual evidence of deception or confusion was presented.

[6] The applicant also contended that this Court failed to accord due weight to the critical role played by professional intermediaries, namely medical practitioners and pharmacists, in the prescribing and dispensing of Schedule 4 medications and the inherent safeguards created by the provisions of section 22F of the Medicines and Related Substance Control Act, 101 of 1965 (*'the Medicines Act'*) which reduce or completely eliminate a likelihood of deception or confusion. According to Cipla Medpro, the Court's conclusion that confusion is likely to arise does not take into account the realities of prescribing and dispensing Schedule 4 medications, and it applies the test as set out in *Plascon-Evans* as though the goods in question are ordinary goods.

[7] The applicant contends that medical practitioners and pharmacists, who are responsible for prescribing and dispensing these medicines, respectively, are highly trained professionals familiar with the characteristics, compositions, indications, and

branding of pharmaceutical products. Their expertise serves as a robust safeguard against confusion, as they are unlikely to conflate distinct products based solely on similarities in their brand names. In this context, the potential consumer is not only a member of the public but also includes professional intermediaries whose decisions are informed by clinical knowledge, regulatory compliance, and ethical responsibilities.

[8] Cipla Medpro submitted that this Court placed undue emphasis on the ZETOMAX matter. According to the applicant, the ZETOMAX matter held that section 22F of the Medicines Act meant that the patient was not a passive bystander but plays an active role in the dispensing of his or her medications. The applicant contends that what the Court in the ZETOMAX matter did not examine further, for instance, were the scenarios postulated by the applicant's counsel in the argument presented to the court – specifically, the involvement of doctors who prescribe and pharmacists who dispense medication to patients.

[9] In Cipla Medpro's view, given the relationship between intellectual property law and pharmaceutical regulation, it is in the interest of justice for an appellate court to consider the appropriate legal standard to be applied in such a case. Based on this submission, Cipla Medpro contends that an appeal against the order of this Court has reasonable prospects of success on appeal and that there are other compelling reasons why an appeal should be heard, including the interest of justice.

**Relevant legal principles: Application for leave to appeal**

[10] The applicant’s application for leave to appeal is based squarely on section 17(1)(a) of the Superior Courts Act 10 of 2013. Section 17 of the Superior Courts Act regulates applications for leave to appeal from a decision of a High Court. It provides as follows:

> ‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(*a*) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(*b*) the decision sought on appeal does not fall within the ambit of section 16 (2) (*a*); and

(*c*) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[11] Unlike the old Supreme Court Act, 59 of 1959, section 17 of the Superior Courts Act imposes substantive law provisions applicable to applications for leave to appeal. First, leave to appeal may only be given if, according to the presiding judge's satisfaction: (i) the appeal would have reasonable prospects of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. The use of the word "would" in section 17 (1)(a)(i) of the Superior Courts Act implies that the test for leave to appeal is now more onerous. The SCA has found that the use of the word 'would' in subsection 17(1)(i)(a) of the Superior Courts Act imposes a more stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme Court Act 59 of 1959.[1]

[12] In the *Mount Chevaux Trust [IT2012/28 v Tina Goosen and 18 Others*,[2] Bertelsmann J stated as follows:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court may come to a different conclusion, See *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against'.

[1] See *S v Notshokovu* [2016] ZASCA 112 at para 2.

[2] (LCC14R/2014) (unreported judgment from the Land Claims Court) at para 6.

[13] It is clear from the discussion in the preceding paragraph that the test to be applied is now higher than what it used to be. It is no longer a matter of whether another court may or might come to a different decision than the trial court. It is now whether another court, sitting as court of appeal, would come to a different conclusion. The Superior Courts Act has raised the bar for granting leave to appeal. What is required of this Court is to consider objectively and dispassionately whether there are reasonable prospects that another court may well find merit in the arguments advanced by the losing party, Cipla Medpro.[3]

**Discussion**

[14] As discussed in the main judgment, the URIZONE pharmaceutical product is a broad-spectrum and antibiotic used for the treatment of urinary tract infections. It is sold in sachets of 3g per sachet. The third respondent launched URIZONE medicine in 1988. The respondents (applicants in the main application) asserted that this medicine is currently available in 78 countries. However, in many of these countries, the product is sold under different trademarks. The FURIZOME product of Cipla Medpro is a generic substitution of the URIZONE product of the respondents. The FURIZONE product, like the respondents' URIZONE, is sold as a single dose in 3-gram sachets. Both pharmaceutical products are used to treat urinary tract infections and come in a sachet of 3 grams.

[15] It is incontestable 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. As explained in the main judgment, a thorough comparison of the two trade marks reveals their evident and concerning similarities that pose a risk of confusion and deception among consumers. The overall impression conveyed by the marks as wholes resemble each other closely both in appearance and in sound. I have considered the applicant's grounds of appeal, and I am of the view that Cipla Medpro's

[3] *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Mayya International* [EL926/2016] 137 (ZAECGHC) 137 (10 November 2016) at para 4.

FURIZOME resembles the respondents' trade mark URIZONE and is likely to deceive or to cause confusion. It is my firm view that there are no prospects that another court would come to a different conclusion than the one reached by this Court.

[16] As explained in the main judgment, there is no doubt that potential patients will likely be confused between the trade marks URIZONE and FURIZOME when confronted with these trademarks especially considering that the two trademarks looks similar conceptionally, aurally and visually.

[17] At the hearing of this application, Mr Puckrin SC, counsel for Cipla Medpro, argued on behalf of the applicant that this Court did not consider the expert evidence of Ms Ronel Reyneke in its judgment. I do not agree with counsel's proposition. The expert evidence provided by Ms Reyneke, along with the insights from other expert witnesses, was thoroughly considered. The fact that her report was not specifically mentioned by name in the judgment does not mean that her evidence was not taken into account. This extends to the scenarios that Mr Puckrin postulated. Those scenarios presented by Mr Puckrin were not dealt with individually (*ad seriatim*) in the judgment; however, the reasons advanced in the judgment covered all the scenarios he raised.

[18] The main judgment notes that doctors and pharmacists are not infallible, and don't have a perfect recollection or perception of even prescribed medicines. They, too, make mistakes. Pharmacists and doctors are human and are not immune to factors such as imperfect recollection and mispronunciation. They, too, can be confused or deceived. To suggest that doctors are infallible is not credible. The main judgment found that even a doctor advising a pharmacist telephonically which drug to provide the patient with can lead to confusion, given the virtually identical pronunciation of the two trade marks. The trade marks URIZONE and FURIZOME are so similar that if a doctor had heard from a colleague (perhaps via telephone) that they should prescribe URIZONE and then came across FURIZOME, they might wonder if their colleague had perhaps not mentioned the drug FURIZOME and then simply prescribed the incorrect medication. A patient, and

perhaps also a professional, who knows only one word and has an imperfect recollection of it is likely to be mistaken.

[19] As correctly pointed out by Mr Michau SC, counsel for the respondents, the issues raised in this matter and in the grounds of appeal fall squarely within the ZETOMAX judgment of the SCA. The main judgment clearly followed the principles espoused in that judgment. That case made it clear that the patient, and as such, the ordinary member of the public, plays a role in deciding upon their medication and that they are no longer a passive bystander in the purchasing process. Clearly, there are scenarios where patients play a role in deciding on the medicine. In this process, there exists a possibility of consumer deception or confusion in differentiating between URIZONE and FURIZOME, as acknowledged by the SCA in the ZETOMAX judgment. As the main judgment explains in para 57 thereof, the old approach of disregarding the patient in the dispensation of medication has been jettisoned from the discourse.

[20] Furthermore, the main judgment found that 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 increasingly aware of the types of treatment or different pharmaceuticals available for treating specific conditions, the pros and cons of those treatments, the clinical successes of those products, and the like. Patients, in general, have begun to accept greater responsibility for their own healthcare and have not simply left it up to their doctors and pharmacists to decide.

[21] Demonstrably, the similarities existing between FURIZOME and URIZONE are clearly confusing and deceptive. Patients will, in many cases, ask doctors to prescribe the medicine that they are used to or know. Common sense dictates that that will be the case. If a patient does ask for a medicine by brand name for a particular ailment identified by the doctor, it will only be a medicine that they know of, or heard of, or read of. If the name of the medicines aimed at the same ailments are confusingly similar, it obviously creates a risk of these patients being confused, especially bearing in mind imperfect recollection. Surely, the similarity between the trade marks URIZONE and FURIZOME, which are

aimed at treating similar ailments, will obviously create a risk of confusion for patients between the two.

[22] The applicant's main ground of appeal is that there are reasonable prospects that another court would find that this court erred in granting an interdict against it in terms of section 34 of the Trade Marks Act. I do not agree. I am not persuaded at all that there are any reasonable prospects that those assertions would (or for that matter might) be upheld by another court. On a conspectus of all the facts placed before this Court, I believe that there are no prospects of success in granting leave to appeal.

**Order**

[23] In the result, the applicant's application for leave to appeal is hereby dismissed.

[24] The applicant is ordered to pay the costs of this application on a party and party scale, including the costs of counsel on Scale A.

_____

**LEKHULENI JD**

**JUDGE OF THE HIGH COURT**

**APPEARANCES**

For the Applicant: Adv Puckrin SC
Instructed by: Kisch Africa Inc

For the Respondents: Adv Michau
Instructed by: Spoor & Fisher