

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2023/115430

And CASE NO: 2023/114803

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

Date

Signature

In the matter between:

SAN MIGUEL BREWING INTERNATIONAL LIMITED Applicant

and

POWER HORSE ENERGY DRINKS GMBHG

Respondent

In re:

POWER HORSE ENERGY DRINKS GMBH

Applicant

REASONS FOR THE ORDER MADE ON 28 OCTOBER 2025

MOSHOANA, J*Introduction*

- [1] Parties involved herein were embroiled in a never-ending litigation since the year 2020. As at the handing down of these reasons, there was no visible ending sight of this litigation. It seems to be an acceptable norm that trademark litigation ought to be conducted tortuously. Litigants in this type of litigation happily take a nonchalant approach to finality.
- [2] Let me explain why. Two applications (trademark registration opposition proceedings) launched two years ago were enrolled for argument before the heavy opposed motion roll beacons by me. Literally at the eleventh hour, the respondent in those applications launched an application seeking to stay the consideration of those applications pending a determination of the expungement application placed before the Registrar of Trade Marks. Alternatively, that the expungement proceedings be consolidated with the two applications to be heard in this Court.
- [3] The stay application was vociferously opposed by the applicants' counsel to a point of labelling the application to stay as a disguised postponement application. Almost half a day was consumed hearing submissions for and against the stay application. After hearing the submissions, this Court issued an order in the following terms:
1. The application for a stay order is dismissed.
 2. The costs attendant to the application shall be costs in the cause.
- [4] This Court undertook to provide reasons of the order when delivering its judgment in the main application. The applicants were ready to proceed and move the consolidated main applications shortly after the dismissal of the stay application.

However, since the respondent had not delivered its heads of argument in the main application, its counsel Mr Michau SC sought to be indulged until 30 October 2025 to prepare for argument on that day. As if this was carefully planned, instead of preparing the heads of argument as indulged, an application for leave to appeal the interlocutory order was delivered.

- [5] On 30 October 2025, counsel for the applicants, who informed this Court that her clients are overseas, submitted to this Court that for the purposes of 'fairness' she was instructed to remove the application from the roll owing to the provisions of section 18(1) of the Superior Courts Act, 2013. She further submitted that the order dismissing the interlocutory stay application is suspended, thus, the stay application is brought back from the ashes, as it were. This posture perplexed this Court beyond measure. Why was the stay application so vociferously opposed? Why was it labelled a postponement in disguise? This Court is left in wonderment. Nevertheless, perhaps those were the instructions from a client overseas.

Background facts

- [6] This being an interlocutory application, a brief summation of the salient facts shall suffice. Power Horse Energy Drinks GMBH (Powerhorse) is an international company. In 2015, it registered two trademarks in class 32. San Miguel Brewing International (San) which is also an international company applied to register trademarks. Powerhorse opposed the registration of the trademarks. Ultimately, the opposition was referred to this Court in terms of the Trade Marks Act. Powerhorse contends that the proposed trademarks offends the provisions of section 10(12) and or 10(14) of the Trade Marks Act. San opposed the application of Powerhorse. San also brought an application in terms of section 27(1) of the Trade Marks Act seeking the removal of the trademarks of Powerhorse from the register, for reasons of *bona fide* non-use. This expungement application is pending before the Registrar of Trade Marks. Various attempts were made for the parties to consent to the referral of the expungement application to this Court. All of those attempts drew blank.

- [7] As indicated earlier, literally few days before the hearing of the opposition application, San launched a stay application. The application was opposed by Powerhorse. As mentioned before, the application was dismissed and the brief reasons for the order follows hereunder.

Analysis

- [8] An application to stay is effectively an application for an interim interdict. San contends in its founding papers that the opposition and expungement applications traverse a consideration of substantially the same issues of fact and law. Further, it contends that a *lis pendes* situation exists in that same parties and same issues are to be determined both by the Registrar and this Court. It was also contended that a stay will avoid conflicting judgments and it will serve the interest of justice. Importantly, San contended that should the expungement application succeed, the injustice will be unquantifiable and irreparable. This statement was not expatiated upon and was devoid of details as to how and the extent of the unquantifiable irreparable harm. However Powerhorse with reference to section 28 of the Trade Marks Act contended that the success will have no effect at all.
- [9] The basic principles for the granting of a stay are (a) in the exercise of its discretion a Court will grant a stay where real and substantial justice requires it or where injustice would otherwise result; (b) a Court will be guided by factors usually applicable to interim interdicts; (c) the applicant must show a well-grounded apprehension that irreparable harm will result if a stay is not granted; and (d) irreparable harm will usually result if there is a possibility that the underlying *causa* may be removed.
- [10] The claim of Powerhorse is predicated on either section 10(12) or 10(14) of the Trade Marks Act. Primarily, section 10 deals with unregistrable trademarks. Powerhorse contends that the trademarks proposed to be registered are inherently deceptive or the use thereof would be likely to cause confusion and if used on same or similar goods or services, it would be likely to cause confusion. Therefore, properly considered if opposition succeeds, all it means is that the trademarks of San will not be registered for use.

- [11] On the other hand, the expungement application is aimed at removal from the register on ground of non-use. For San to succeed with such an application it has to show that (a) the mark was registered by Powerhorse without *bona fide* intention to use in relation of goods or services; (b) that was as a matter of fact no *bona fide* use of the mark and; (c) a specified period of years had passed without *bona fide* use. It is common cause that the expungement application was launched on 25 April 2022. In terms of section 28 of the Act; the operating date should San succeed would be 25 August 2022. Should San wish to have an earlier date of operation, San must satisfy the Registrar or a Court that grounds existed at an earlier date than 25 April 2022.
- [12] There is no evidence before this Court to demonstrate that an application supported by grounds to satisfy the Registrar was placed before him. In the absence of that evidence and on application of the *Plascon Evans* rule, it must be so that the operative date will be 25 April 2022, which operative date has no irreparable harm effect as averred by Powerhorse. In any event the removal which as section 27(2) of the Act provides is defeated by (a) in relation to goods or services if it is shown that the trademark is used or proposed to be used in relation to such goods or services. Powerhorse averred that there is sufficient evidence of use to discharge the onus contemplated in section 27(3) of the Act.
- [13] Regard been had to the above exposition, this Court was not satisfied that the requirements for a stay order were met by San. Thus, it was inappropriate for this Court to have exercised its discretion by granting the stay. In fact, given the timing of the application, there is merit in a submission that the application was a postponement application in disguise. The argument by Michau SC that section 28(1)(b) of the Act does not require some form of an application before another date of operation is ordered, is without merit. Where a party is required to satisfy that grounds existed, such implies an application in order for the Registrar or a Court to make a finding for an earlier date.
- [14] Michau SC placed heavy reliance on a case before a single judge, which he erroneously submitted that it was the decision of the Supreme Court of Appeal until he was graciously corrected by his opponent. The case is that of *Farmer's Table*

(Pty) Ltd v Kentucky Fried Chicken (South Africa) (Pty) Ltd¹. Regarding *Farmer's Table*, this Court takes a view that it is distinguishable from the facts of the present case. Weyers J accepted various authorities cited therein that a stay must be granted in the clearest of cases. I agree with the conclusions reached in those cited authorities.

- [15] Weyers J was persuaded that Kentucky was faced with a very real possibility of prejudice. Before me, San failed to demonstrate any real risk of prejudice. No details were provided by San in its founding papers. The principle of *lis pendes* as discussed in *Farmer's Table* was considered by the learned Steyn AJ in *New Reclamation Group (Pty) Ltd v Chicks Scrap Metal (Pty) Ltd*². There, *Farmer's Table* was distinguished. The learned Steyn AJ expressed himself in the following terms:

“[13] ...The facts of the *Farmer's Table* case revealed that KFC had detailed the prejudice suffered in the papers should a stay not be granted. In *casu* the respondents failed to demonstrate any prejudice in the event of the stay not being granted. I am therefore satisfied that the *Farmer's Table* case is distinguishable from the present matter...”

- [16] To the extent that *lis pendes* is relied on, I am in agreement with the sentiments expressed by Steyn AJ that the defence of *lis pendes* operate in respect of dispute resolution bodies of the same status. In *casu* the expungement pends before the Registrar whilst the opposing application pends in this Court. The deeming provisions referred to by counsel for San in section 53(2) of the Act does not elevate the status of the Registrar to that of a Court. The deeming provisions relates to parties as opposed to the status of the Registrar vis-à-vis that of a High Court. The outcome to be reached by this Court and the Registrar are not similarly aligned. The one would lead to a refusal to register due to the provisions of section 10. The other would lead to a removal, due to *bona fide* non use, from register on a date contemplated in section 28(1) of the Act.

- [17] Last issue to be dealt with is that of *locus standi* to continue with the expungement application should the opposition application be granted. Counsel for San forcefully

¹ Case number 9763/88 dated 19 October 1988 wrongly cited by LexisNexis as [2011] JOL 27552 (SCA).

² 2012 JDR 2195 (KZD).

argued that should San be prevented to register its mark because of the legal position outlined in section 10, San will no longer be an interested person referred to in section 27(1) of the Act and that will mark the end of the pending expungement application. With considerable regret I do not agree. In law, *locus standi* simply means a standing in law. Once a standing in law is acquired it cannot be lost until the proceedings are completed. The phrase *interested person* can in the context of section 27(1) include any person desiring to compete with a trademark holder even if such a person is not an applicant for a trademark.

[18] Accordingly, there is no merit in a submission that the opposition of a trademark proceedings cannot proceed whilst the expungement application awaits determination. There is no discernible relationship between the two applications. They are capable of running side by side and no conflicting decisions are possible to be made in respect of them. Just because in *Farmer's* case a similar order was, in the exercise of judicious discretion, granted, it does not axiomatically follow that as a matter of course where expungement of a trademark is brought, a stay application is inevitable. Where the requirements of a stay are not met, the applicant like here must fail. In *Farmer's*, the main application was that of interdicting the infringement and passing off. Discernibly, a relationship between an infringement, passing off and expungement seem clear. In *OUTA*, the Constitutional Court refused to grant an interdict pending a review because of the misalignment between the harm and the review application. The same principle finds application in this instance.

[19] It was for all the above reasons that the application for a stay was dismissed. This being an interlocutory application, it was appropriate to make an order that costs be in the cause.

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

Counsel for the Applicant:

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Poala Cirone

Instructed by:

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Date of the hearing:

28 October 2025

Date of Reasons:

4 November 2025