REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 2024-065619

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

[redacted]

Date: 10 March 2026 E van der Schyff

In the matter between:

REIGN BEVERAGE COMPANY LLC	APPLICANT / OPPONENT
and	
FOXHOUSE TRADING (PTY) LTD	FIRST RESPONDENT/ TRADE MARK APPLICANT
REGISTRAR OF TRADE MARKS	SECOND RESPONDENT

JUDGMENT:

Van der Schyff J

INTRODUCTION

[1] This application concerns an objection to the registration of the trade mark REIGNWATER. In terms of section 59(2) of the Trade Marks Act 194 of 1993, the Registrar of Trade Marks has referred the matter to this court for determination. The first respondent, Foxhouse Trading (Pty) Ltd, seeks to register the mark under class

32 for 'energy and sports drinks; drinks containing nutritional supplements and nutrients, vitamins and multivitamins.'

[2] The applicant in this application opposes the registration on the grounds of section 10(3), 10(4), 10(12) and / or 10(13) of the Trade Marks Act.

[3] The parties are herein referred to as Foxhouse or the trade mark applicant, and the opponent, respectively.

[4] Counsel for the opponent stated at the onset that the court is not called upon to decide between the parties who owns the trademark REIGN or REIGNWATER, nor is the court called upon to decide who was first to adopt use of the word REIGN. The court is not called upon to decide who has the greater right to obtain registration of these marks. The application is solely about the authenticity of the one trade mark application – does it meet the strict requirements of the Act?

THE TRADE MARK APPLICANT'S NARRATIVE

[5] Roberto Renzo Reffo (Mr. Reffo) is the sole director of Foxhouse Trading (Pty) Ltd, the trade mark applicant (Foxhouse). He is also the general manager and a shareholder of Adriatic Ship Supply and Trading Company (Pty) Ltd (Adriatic). Adriatic is a family-owned business established in 1970 by Mr. Reffo's grandfather. Adriatic specializes in the trade, manufacture, import, and export of food, beverages, and catering equipment. Mr. Reffo runs the business with his brother and father.

[6] Mr. Reffo wanted to venture beyond the family business. He decided to develop and introduce a new non-alcoholic beverage into the market under the REIGNWATER brand. He contacted DM Kisch Inc (Kisch IP) to commence preparatory work on name clearance and protection for the REIGNWATER brand name. On 11 July 2017, he instructed Kisch IP to conduct a pre-filing availability search. This instruction was done using the Adriatic email profile. On 28 July 2017, a separate entity, Foxhouse, was incorporated as the vehicle for conducting Mr. Reffo's business, separate from the family business.

[7] Mr. Reffo explains that during the development phase of REIGNWATER, he sometimes "tapped into the Adriatic supplier database" using his Adriatic profile and mailbox. As a result, some correspondence was exchanged through Adriatic's email and mailbox, and some through Foxhouse's. All correspondence, however, was always conducted for and on behalf of Foxhouse. Foxhouse also launched other products in South Africa under the LOS LOCOS, ROBERTO VOLANTE, and MOOCOW trade marks.

[8] On 23 November 2017, the trade mark application for registration of REIGNWATER as a trade mark was filed in Foxhouse's name. Steps were subsequently taken to develop the REIGNWATER product. During August 2018, correspondence was exchanged with a well-known sports supplement producer, United Sports Nutrition (USN), to develop a suitable formulation for the REIGNWATER product. Another health care consultancy firm was eventually engaged in November 2019 to proceed with the formulation of the product. In November 2019, a graphic designer was commissioned to assist with the conceptualisation of the REIGNWATER brand identity and product designs. The graphic designer invoiced Adriatic Ship Supply for conceptualising the brand design, but she confirms under oath that her agency was commissioned by Foxhouse.

[9] In anticipation of the product launch in 2022, Foxhouse commenced with steps to create its REIGNWATER website and social media profiles. Foxhouse, however, experienced various commercial delays and faced numerous technical and mechanical difficulties, as well as issues related to raw material availability. It was thus only from the latter part of April 2023 that Foxhouse was in the position, financially and commercially, to commence use of its REIGNWATER trademark.

[10] The product was first described as 'nutrient enhanced water that sits between the sports drink and energy drink categories'. It is eventually marketed as 'Performance energy water'. The core ingredients comprise water, moringa extract, caffeine, vitamin B3, B5, B6, and B12, and L-Theanine.

THE OPPONENT'S NARRATIVE

[11] The opponent, Reign Beverage Company LLC, represented by Mr. Paul L Dechary (the opponent or Mr. Dechary) opposes the trade mark application. The opponent's principal business office is located in Los Angeles, United States of America.

[12] The opponent objects to the registration of the trade mark and contends that:

i. Foxhouse is not the proprietor of the trade mark REIGNWATER;
ii. The trade mark is not proposed to be used or is not being used for the specification of goods for which it is applied;
iii. A mark containing the word "water' is misdescriptive of any category of goods not being water.

[13] I pause to note that the full extent of the opponent's objection only became clear in the replying affidavit filed, and after an amendment of the papers. Since no objection was raised to the subsequent amplification of the objection and amendment, the application is considered as amplified.

[14] The opponent emphasised that online company searches indicate that Foxhouse has only one director, Robert Renzo Reffo, and is operated from a registered address similar to that of Adriatic Ship Supply and Trading Co. (Pty) Ltd (Adriatic). Mr. Reffo is also a director of Adriatic. The opponent, in its founding affidavit, stated that it's investigation indicated that Foxhouse does not have a functional website, Facebook page or account, nor any other social media footprint. The LinkedIn page and account appear to have been automatically generated. There is no indication that Foxhouse commenced with the REIGNWATER trade mark, or that products were available in the marketplace. Foxhouse is not registered for Value-Added Tax with the South African Revenue Service, which would be expected of a business with a genuine commercial interest. The opponent essentially claims that no evidence of actual commercial activity has been provided.

[15] The opponent is of the view that their investigations do not show that Foxhouse has at any time used the REIGNWATER mark in relation to the specified products listed in class 32. Neither can it be gleaned that the mark is proposed to be used in respect of the goods listed in class 32. Despite requests for evidence of Foxhouses's use or proposed use of the mark in connection with 'energy and sports drinks,' no proof has been provided. The opponent contends that Foxhouse conflates various categories of beverages (energy, sports and water) and that the evidence provided by Foxhouse only supports an alleged intention to use the trade mark in connection with 'water', and 'flavoured' or 'enhanced water'. The use of the word 'water' distinguishes the product from energy or sports drinks. In addition, the notional consumer is likely to understand a water beverage to be a colourless, tasteless beverage which does not contain sweeteners or additives – the trade mark is confusing or deceptive due to the manner of its use. The opponent wants to prevent Foxhouse from entering the market in the energy drinks category under its trade mark REIGN. The opponent further claims that an independent product test revealed that the product contains 76.5mg of caffeine per single serving of 500 ml and not 75mg as claimed by Foxhouse. The product should thus be labeled as high in caffeine, which it is not.

ONUS

[16] The parties raised the issue of who bears the onus in this application, in particular as regards opposition under section 10(4). In *National Brands Limited v Cape Cookies CC and Another*,[1] the Supreme Court of Appeal confirmed that there is an overall onus on the applicant for registration of a trade mark to satisfy the court that there is no bar to registration under the Act.

[17] In *El Baik Food Systems Co SA v Al Baik Fast Food Distribution Co SAE* (*El Baik*)[2] Murphy J provided a practical exposition of the procedural approach to be adopted. The learned judge reiterated that proceedings of this kind are essentially motion

[1] 2024 (2) SA 296 (SCA) at para [6].

[2] (A998/13) [2015] ZAGPPHC 620; 2015 BIP 302 (GP) (1 September 2015).

proceedings governed by the general rules of evidence and pleadings applicable to motion proceedings. Murphy J explained that as a general rule, the trade mark applicant bears the onus of showing that the mark sought to be registered by it is, in fact, registrable. In motion proceedings the question of onus usually does not arise. Where an issue of fact arises, however, it falls to be determined by the Plascon-Evans rule – irrespective of where the legal or evidential onus lies. In a trade mark application, the court may be required to determine whether an evidential burden imposed by the statute has been met.

[18] As held by Supreme Court of Appeal in *New Balance Athletic Shoe Inc v Dajee and Others NNO,*[3] where the issue of "use" is central, the proprietor respondent bears the onus of proving relevant use, as the proprietor respondent can be expected to have comprehensive and peculiar knowledge of the fact of "use" if it has occurred. In these circumstances, it can be expected that a proprietor respondent who alleges relevant use will advance clear and compelling evidence of that fact, and ought not to expect that the evidential burden will be discharged by allegations that are sparse, ambiguous, or lacking in conviction.

[19] Murphy J explained in *El Baik*[4] – "[a]s in all motion proceedings the appellant (the opponent before the Registrar) was required to set out in the founding affidavit sufficient facts to disclose a cause of action and upon which the court could find in its favour." The learned judge reiterated that the allegations in the founding affidavit must make out a *prima facie* case in as complete ways as the circumstances demand, and that bald allegations will not suffice. The respondent (the trade mark applicant) is then required to state in the answering affidavit which of the applicant's allegations it admits and which it denies and set out its version of the relevant facts. Failure to deal with an allegation will amount to an admission.

[20] The determination of whether an opponent established a *prima facie* case requires a fact-specific inquiry. While an opponent may allege *mala fides*, an objection under section 10(4) based on a lack of *bona fide* intention to use the mark as a trade mark,

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[3] (251/11) [2012] ZASCA 3; 2012 BIP 102 (SCA) (2 March 2012) at para [17]

[4] *Supra*, at para [11].

is not invariably linked to an ulterior purpose. Consequently, an opponent relying on section 10(4) is not invariably required to plead that the registration was intended for an ulterior purpose before it can be said that a *prima facie case* is made out.

[21] With these principles in mind, I turn to the specific grounds of objection.

Section 10(3) of the Trade Marks Act

[22] Section 10(3) of the Trade Marks Act prohibits the registration of a mark in relation to which the applicant for registration has no *bona fide* claim to proprietorship. The opponent took issue with Foxhouse's claim to proprietorship in the papers filed but did not address the issue in the heads of argument filed. The draft order handed up by the opponent's counsel, however, still reflects reliance on section 10(3) as a ground of opposition.

[23] The authors of the commentary *The South African Law of Trade Marks, Unlawful Competition, Company Names and Trading Styles*[5] state unequivocally that it is settled law that the person who has appropriated the mark for use in relation to goods or services as a trade mark can claim to be proprietor. No case is made out on the papers that Foxhouse was aware, at the time the application for registration was submitted, that another person or entity held a better claim to ownership. The main complaint that underpins this objection appears to be that Foxhouse did not use the mark prior to its registration.

[24] Foxhouse conceptualised the REIGNWATER mark and brand identity with the intention of using it in the future. As Murphy J held in *El Baik*[6]- "A person who has adopted the mark for its proposed future use in relation to goods or services as a trade mark **can claim to be a proprietor**." (my emphasis.) The mere fact that the mark was not in use when the registration application was filed is thus not in itself a disqualification of Foxhouse's claim to proprietorship. Foxhouse's *bona fide* choice

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[5] CE Webster and GE Morley, 4th ed. LexisNexis.

[6] *Supra*, at para [29].

of the mark and its proposed use is enough to entitle it to claim proprietorship of the mark.[7]

Section 10(4) of the Trade Marks Act

[25] To qualify for registration, a trade mark applicant must have a *bona fide* intention to use the trade mark. While actual use is not a prerequisite for registration, it is subsequently required to immunize the mark against expungement for non-use. This intention must be more than subjective or speculative; it must be a firm, present resolve to use the mark as a trade mark in the course of trade, rather than a mere desire to reserve a monopoly on the mark. While evidence of such intent must be contemporaneous with the filing, it need not predate it.

[26] In *Extraction (Pty) v Ltd v Tyrecor (Pty) Ltd,*[8] the Supreme Court of Appeal held that in determining a *bona fide* intention, a court must examine the course of events leading up to the application. Such an inquiry would distinguish a genuine purpose to use the mark in trade from an application filed for an ulterior purpose.

[27] It is well-established that an intention to use, means a definite and present intention to use the mark as a trade mark in relation to certain goods or services at the time the application is made.[9] There must be an intention to trade commercially in the particular goods for which the mark is registered. This resolve, when expressed in an answering affidavit, must be substantiated by facts for the court to make a finding in this regard.

[28] In this application, the opponent's objection based on section 10(4) is based on Foxhouse not having a sufficiently elaborate social media footprint, that the bulk of the preliminary actions preceding the submission of the application for registration seems to have been done under the banner of another entity trading as Adriatic Ship

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[7] *Oils International (Pty) Ltd v WM Penn Oils Ltd* 1965 (3) 64 (T) at 72G-H.

[8] [2015] ZASCA 78; 2015 BIP 253 (SCA) (28 May 2015) at para [33].

[9] *Ritz Hotel Ltd v Charles of the Ritz Ltd* 1988 (3) SA 290 (A) at 310C.s

Supply, and that Foxhouse has not used the mark in relation to any product in class 32, until at least 2023.

[29] Upon scrutinising the papers filed by the respective parties, I find no material dispute of fact. The extent of Foxhouse's social media footprint is arguably the only issue that can be typified as a factual dispute, and it is not determinative of any of the issues before the court. The alleged dispute arises not from the facts themselves but from the opponent's interpretation of them. Foxhouse does not deny that some of the correspondence and pre-registration actions were done under Adriatic's banner.

[30] I can find no fault with Mr. Reffo's explanation that he initiated investigative steps and sent out correspondence utilising his Adriatic email. Similarly, the fact that the graphic designer's invoice was addressed to Adriatic is of little consequence, as the designer has confirmed under oath that the work was done for Foxhouse. There is no evidence that suggests that Adriatic intended to claim proprietorship of the REIGNWATER mark or that Foxhouse was "stealing a march". The objections in this regard do not account for the process involved in conceptualising and developing a new product and its branding.

[31] The crisp issue is whether *a bona fide* intention to use a mark as a trade mark is established where an applicant conducts only an availability search prior to filing for registration of the mark, but commences recipe development and brand design some months later.

[32] Availability or clearance searches are typically regarded as preliminary legal steps taken to assess whether a mark may be registrable. On its own, it generally demonstrates prudence, and not commercial intention. This position changes when a trade mark applicant files an application for registration subsequent to an availability search being conducted. The filing of a trade mark application is a concrete act through which *bona fide* intent manifests, and in the context of a particular case, it might prove to be sufficient. Again, it is critical not to conflate sections 10(4) with the more onerous burden placed on a proprietor in expungement proceedings. Whether the filing of an application subsequent to an availability search

is enough to ward off an objection under section 10(4) will depend on the facts of each matter and the nature of the prima facie case the objector has made out.

[33] As noted in *The South African Law of Trade Marks,* a court should not lightly draw an adverse inference from a trade mark applicant's inability to provide a precise commencement date for use. To hold otherwise would place an undue burden on applicants who may not yet have finalised the granular details of their business plans by the time they filed their applications.

[34] Section 10(4) does not require the *bona* fide intention to commence using the trade mark within a specific time period after registration. Section 27 suggests that the legislature was mindful of the protracted nature of product development, hence the five-year period before a mark becomes vulnerable for non-use. Foxhouse was under no obligation to commence commercial sales using its trademark immediately upon registration.

[35] Since the ambit of the relief sought in this application is limited, this court is not seized with an application to expunge the trade mark. Foxhouse's initial *bona fide* intention to use the mark as a trade mark in relation to its still-to-be-developed product in class 32, is corroborated by subsequent events that included recipe and brand identity development. That the product was eventually launched serves as objective confirmation of the original intent, notwithstanding any intervening delay.

Sections 10(12) and 10(13)

[36] The final two grounds of objection are closely related. First, the opponent avers that the use of the REIGNWATER mark in relation to the goods specified in the FoxHouse application would be likely to cause confusion and deception. Secondly, that the manner in which Foxhouse has actually used the REIGNWATER mark is likely to cause confusion and deception.

[37] In terms of section 10(12) a mark which is inherently deceptive or the use of which would be likely to deceive or cause confusion shall not be registered as a trade mark. The section is designed primarily to protect the public against possible deception or

confusion.[10] In a particular case a device or word as part of a trade mark may convey a false impression as to the character or quality of the product. In this matter, the question is whether in the compound word REIGNWATER, the use of the last element of the word, also referred to as the head of the compound, WATER, is likely to confuse or cause deception.

[38] The opponent's submission is that while Foxhouse has applied to register the mark REIGNWATER in relation to "energy and sports drinks; drinks containing nutritional supplements and nutrients, vitamins and minerals", it did not seek registration in relation to water or mineral waters. The opponent argues that by adopting a mark signifying "water" for products restricted to energy drinks, the Foxhouse creates a misrepresentation. Reliance was placed on the analogy of using the word 'merino" or the device of a sheep on cotton goods – an example cited in *The South African Trade Marks Law* as inherently deceptive. The risk is exacerbated by the fact that REIGNWATER is a homophone for "rainwater", despite the beverage being fundamentally incompatible with the ordinary and regulatory definition of water.

[39] Foxhouse, on the other hand, submits that the prefix REIGN functions as a qualifier. It argues that "reign" denoting sovereignty or power, transforms the compound into a conceptual whole. Thus, REIGNWATER signifies a beverage that transcends ordinary water – a "powerful" drink consistent with the energy-enhancing nature of the product.

[40] In assessing the likelihood of confusion, the court assumes the perspective of the average consumer, who is deemed reasonably well-informed and observant. I am not persuaded that the mark REIGNWATER inherently conjures images of pure fresh water. On the contrary, it is a creative play on words. In my view, the consumer would recognise the mark as a distinctive brand name for a water-based beverage that has been enhanced into something "more" than its base component. The mark is unusual and possesses a conceptual identity of its own. It is distinguishable from the mark considered by the European General Court in *Caffe Nero Group Ltd v*

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[10] Webster and Morley, *supra*, at para [6.6].

European Union Intellectual Property Office,[11] a matter referred to by the opponent, as the compound word here creates a suggestive, rather than purely descriptive, meaning.

[41] Section 10(13) provides that a mark shall not be registered as a trade mark if the mark, as a result of the manner in which it has been used, would be likely to cause confusion or deception. The opponent formulates its objection as follows:

> 'To the extent that the Court is willing to accept that the evidence adduced in Foxhouse's 2023 affidavit has any bearing on the application, it is apparent that this evidence shows that Foxhouse has used the REIGNWATER mark in a manner that is likely to lead to confusion or deception.
>
> Firstly, Foxhouse's 2023 Affidavit describes REIGNWATER beverage as a berry and tropical fruit flavoured energy water which includes the following ingredients: moringa extract, caffeine, various B vitamins, L-Theanine, citric acid, taurine, flavourings, artificial sweeteners, and sodium benzoate.
>
> However, given the volume of caffeine present, this beverage would fall within what the Soft Drink regulations (also issued under the FCDA) define as a caffeinated beverage. This definition covers flavoured or non-flavoured beverages which contain added caffeine.
>
> Next, it is apparent from the material annexed to Foxhouse's 2023 Affidavit that:
>
> - REIGNWATER is the most prominent element on the can;
> - The beverage is displayed in the same fridges as other beverages including water, in some instances, it is displayed on the same shelf as bottled water, and
> - The beverage is described as a 'berry and topical fruit flavoured energy water.'

[11] Case T-29/16, EU:T:2016:635

https://infocuria.curia.europa.eu/tabs/document?source=document&text=&docid=184903&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=897006 accessed on 6 March 2026.

Accordingly, not only does the mark REIGNWATER communicate that the goods to which it applied are water beverages, but the merchandising of the products exacerbates that (mis)apprehension."

[42] I find no merit in this objection. The product is clearly described as 'energy water', a description that sufficiently distinguishes it from water. The opponent does not make out a case that a trade mark linked to a beverage that falls within the definition of a caffeinated beverage under the Soft Drink regulations is prohibited from being registered in class 32, or that it is legally impermissible to use the descriptive word WATER as part of a soft drink name. I agree with the trade mark applicant that an average consumer would be alive to the range of beverage products sold side-by-side on a store shelf because this is factually what consumers encounter when purchasing such goods.

COSTS

[43] Both parties sought costs on scale C in the event of them being successful. Costs follow success. Matters of this kind are complicated, and the scale sought is justified.

ORDER

In the result, the following order is granted:

1. **The objections, and the application, are dismissed with costs on scale C.**

[redacted]

E van der Schyff

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. In the event that there is a discrepancy between the date the judgment is signed and the date it is uploaded to CaseLines, the date the judgment is uploaded to CaseLines is deemed to be the date that the judgment is handed down.

For the applicant/opponent:	Adv O Salmon SC
With:	Adv. I Learmonth
Instructed by:	Adams & Adams
For the first respondent/ trade mark applicant:	Adv. P Cirone
Instructed by:	D M Kish Inc

Date of the hearing:	16 February 2026
Date of judgment:	10 March 2026