



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

- (1) Reportable: No
(2) Of interest to other judges: No
(3) Revised: Yes

Date: 17 April 2026

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SIGNATURE:

CASE NUMBER: 13788/22

In the matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION N.P.C.

APPLICANT

and

SOUTH AFRICAN MEDICAL ASSOCIATION TRADE UNION
GERHARD VOSLOO N.O
REGISTRAR OF LABOUR RELATIONS

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

In the counter application of:

SOUTH AFRICAN MEDICAL ASSOCIATION TRADE UNION
GERHARD VOSLOO N.O

1ST APPLICANT
2ND APPLICANT

and

SOUTH AFRICAN MEDICAL ASSOCIATION N.P.C.
REGISTRAR OF LABOUR RELATIONS
REGISTRAR OF TRADEMARKS

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

Coram: ASL van Wyk AJ

Heard: 9 December 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, by uploading the judgment onto <https://sajustice.caselines.com>, and release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 17 April 2026.

ORDER

1. Leave to appeal is granted to the Full Court of the Gauteng Division of the High Court.
2. Cost of the application for leave to appeal will be cost in the appeal.

3. Should the appeal not be prosecuted the applicant in the application for leave to appeal shall pay the cost of the application for leave to appeal.

JUDGMENT

VAN WYK ASL (AJ)

Introduction

- (1) The applicant in convention applied for a final interdict against the 1st & 2nd respondents in convention based on passing off and the statutory infringement of registered trademarks in terms of the **Trade Marks Act**, No. 194 of 1993. The applicant also applied for ancillary relief.
- (2) The 1st & 2nd respondents delivered a counter application on the basis that the applicant's trademark registrations were wrongly made and / or wrongly remains on the register as provided for in section 24(1) of the Act. Consequently, the respondents contend that the trademark registrations are vulnerable to expungement as provided for in section 27 of the Act.

- (3) I stayed the proceedings, pending registration or rejection of the trademark applications filed by the 1st & 2nd respondent in terms of section 14 of the Act by the Registrar of Trade Marks.
- (4) On 19 July 2024 the applicant delivered a notice of application for leave to appeal.

Issues for determination

- (5) Applications for leave to appeal are governed by rule 49(1) of the **Uniform Rules of Court** and §§ 16 & 17 of the **Superior Courts Act**, No. 10 of 2013.
- (6) In terms of rule 49(1)(b) when leave to appeal is required and it had not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefore shall be furnished within fifteen days after the date of the order appealed against’.
- (7) In terms of section 16(1)(a)(i) of the Act an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted if the court consisted of a single judge, either to the Supreme Court of Appeal or to

a full court of that Division, depending on the direction issued in terms of section 17(6). Section 17(6)(a) of the Act provides:

'If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal."

- (8) Section 17 makes provision for leave to appeal to be granted where the presiding judge is of the opinion that either the appeal would have a reasonable prospect of success or there is some other compelling reason why

the appeal should be heard, including whether there are conflicting judgments on the matter under consideration.

- (9) Considering the statutory and regulatory matrix, three questions for consideration arise in the application for leave to appeal. These questions are not distinct but interrelated. The first question is whether the applicant filed a proper notice of application for leave to appeal which concisely and succinctly set out the grounds upon which leave to appeal is sought. The second question is whether the appeal would have a reasonable prospect of success or whether there are compelling reasons which exist why the appeal should be heard such as the interests of justice. The third question is whether the application for leave to appeal sets out expressly why the default position of an appeal to a full court of the Division should not prevail, as well as the questions of law or fact or other considerations involved which dictate that the matter should be decided by the Supreme Court of Appeal.

Did the applicant file a proper notice of application for leave to appeal

- (10) The notice of application for leave to appeal must set out the grounds upon which leave to appeal is sought. The rules do not define 'grounds', but authorities seem to agree that it should be an error of law or facts alleged by

the applicant as the defect in the judgment appealed against upon which reliance is placed to set it aside.

See for example - **Xayimpi & others v Chairman, Judge White Commission (formerly known as Browde Commission) & others** [2006] JOL 16596 (E).

(11) An appeal may also lie against the exercise of judicial discretion.

See – **Knox D’Arcy Ltd and Others v Jamieson and Others** 1996 (4) SA 348 (A) [also reported at [1996] 3 All SA 669 (A)].

(12) The first enquiry is accordingly whether the notice clearly and succinctly set out in clear and unambiguous terms the incorrect findings of law or fact, or the basis upon which it is contended that the court did not act judicially. For an illuminating discussion on the distinction between findings of law, findings of fact, and judicial discretion

See **Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited** [1992] 2 All SA 453 (A) at pages 457 – 459.

- (13) Incorrect findings of fact cannot arise outside the record of proceedings because, save in exceptional circumstances, an appeal court will not permit disputes of fact or expert opinion to be raised for the first time on appeal.

See - **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others** 2005 (2) SA 359 (CC) at 388F-389A. An applicant in an application for leave to appeal need to show that from the text of the decision appealed against (*ipsissima verba*) that an accepted fact differs from a common cause or undisputed fact in the record of proceedings.

- (14) The **Constitution**, legislation, the common law, and customary law are the laws of the Republic. There is a clear hierarchy of laws, with the **Constitution** being the supreme law of the Republic.

See – Section 2 of the **Constitution**. Common law and customary are subject to any legislation consistent with the **Constitution**, that specifically deals with it. See - **Alexkor Ltd and Another v Richtersveld Community and Others** (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) at par 51.

- (15) An applicant in an application for leave to appeal who relies on an incorrect finding of law must clearly and succinctly identify the incorrect legal principle

applied by the court, and the correct legal principle that should have been applied.

- (16) This is however not the end of the enquiry, since an appeal can only be noted against the judgment itself (i.e., the substantive order), not the reasons for the judgment, or the way the Court arrived at the judgment.

See - **Cape Empowerment Trust Ltd v Fisher Hoffman Sithole** 2013 (5) SA 183 (SCA) at 198I–J. Even if an applicant in an application for leave to appeal succeeds in convincing the Court that it erred in fact and / or in law, it must also show that the judgment (substantive order) would have been different if the Court applied the correct law or facts. The notice should therefore clearly specify what orders will be sought on appeal.

- (17) In the context of a judgment, legal issues and factual issues can never truly be separated and the question of fact must first be answered before the court will know which legal question must be dealt with. To determine whether the court acted judicially, a determination needs to be made with reference to all the relevant facts and principles. If an application is based on the contention that the Court failed to act judicially, the notice should clearly and succinctly set out all the relevant facts and legal principles which the applicant relies

upon, and the decision which in the result should reasonably have been made by the Court properly directing itself.

(18) The applicants advanced six grounds in support of the application for leave to appeal:

(18.1) I applied equities to his consideration as to whether or not to stay the proceedings. The question of a stay involved a judicial discretion which was to be exercised considering the facts and the law, not equities. The applicants therefore contend that I misdirected myself and erred in a fundamental respect. Had I not so misdirected myself, the argument goes, and instead correctly applied the law to the facts, I would not have granted the stay.

(18.2) I held that exceptional circumstances existed to warrant a stay of the proceedings, on the basis that it would be nonsensical for the respondents to be interdicted to use its trademarks whilst proceedings were pending before the Registrar of Trademarks. The applicant contends that those circumstances are not exceptional to warrant delaying the determination of the application for interdictory relief. In the circumstances it is contended that I erred.

(18.3) I failed to consider material facts, including prior findings and likelihood of confusion. Prospects of securing registration are remote, and registration is not an absolute defense to passing off. The applicant contends that I exercised my discretion on a wrong principle and the stay should have been refused.

(18.4) I based my determination on 'honest concurrent use' in the absence of admissible evidence supporting this determination. The applicant contends that I accordingly misdirected myself.

(18.5) I granted a stay in circumstances where the facts demanded that I should have dealt with the interdictory relief sought. The applicant contends I erred in failing to do so.

(18.6) I failed to grant an unopposed amendment which was sought by the applicant. The applicant argues that by refusing the amendment I fundamentally erred.

(19) The notice of application for leave to appeal does not expressly state whether leave to appeal is sought on the basis that there are reasonable prospects of success on appeal, or that compelling reasons exist why leave to appeal should

be granted. In their heads of argument, the applicants contend that there are reasonable prospects of success on appeal.

(20) I am satisfied that the application for leave to appeal sets out the grounds upon which leave is sought; and the proposed appeal will not lie against the reasons for the Court's judgment but against the substantive order.

(21) As I read the notice the grounds are not based on incorrect findings of fact or law, but against the court's purported failure to act judicially. The grounds are directed against the substantive order, and I am satisfied that the grounds are clearly and succinctly set out in the notice. I therefore find that there is a proper application for leave to appeal before me.

Reasonable prospect of success or compelling reasons why the appeal should be heard

(22) In considering the application for leave to appeal I am guided by the criteria laid down in **Ramakatsa v African National Congress** [2021] JOL 49993 (SCA) at par 10.

[10] *Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as opposed to "could" possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in*

this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.'

- (23) As I've already indicated the proposed appeal will be against the court's purported failure to exercise its discretion judicially. The standard of interference and the test was authoritatively discussed in the well-articulated judgment of Khampepe J in the matter of **Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another** (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015) at par 83 - 89.

[88] *When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised:*

". . . judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court

properly directing itself to all the relevant facts and principles"74 (footnote omitted).

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.

[89] *In Florence, Mosenke DCJ stated:*

"Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making."75'

Applicant's argument

(24) *It is submitted that there are important errors made by Acting Justice Van Wyk, as encapsulated in the Application for Leave to Appeal. It is also*

submitted that there are reasonable prospects of an appeal court deciding differently. Indeed, there are reasonable prospects of an appeal court reasoning that the First Respondent should act lawfully whilst its "spes" incubates – if ever to give birth to a defence that will justify its unlawful conduct to continue.

(25) *The following in this regard (and, in not dissimilar circumstances) was stated by Van Dijkhorst J in Abdulhay M Mayet:*

"I accept that I have a discretion to stay these proceedings pending the respondents' application in terms of s 14 of the Act, but at best for the respondents this discretion is to be exercised sparingly and in exceptional circumstances. Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W) at 1340D - 1341A. There are no exceptional circumstances in this case.

The law of trade marks will fall into desuetude should every infringer be allowed to defend himself by saying: I know that I am acting unlawfully, but bear with me; there is a possibility that my actions may become lawful.

The proper course for such infringer would be to comply with the law and desist from infringing until the application to legalise such use is successful. I refuse a stay of proceedings."

- (26) *The primary basis for the grant by Acting Justice Van Wyk of the stay is that it would be equitable. This is a mistaken premise, for equity does not form part of the determination as to whether a stay should be granted. Here is what Streicher ADP stated in Clipsal in this regard:*

"....dealing with a request that an action should be stayed in the exercise of the court's 'inherent discretion to avoid injustice and inequity' Nicholas J said at 1340B - D: 'The Courts do not however act on abstract ideas of justice and equity. They must act on principle. Cf the Western Assurance Co case supra at 275. And see the remarks of Innes CJ in Kent v Transvaalsche Bank 1907 TS 765 at 773 - 774:

"(The appellant) also asked us to stay the proceedings on equitable grounds, urging that we had an equitable jurisdiction under the insolvency law. The Court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word 'equity' in its broad sense, we are always desirous to administer equity; but we can only do

so in accordance with the principles of the Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all.'

Nicholas J then proceeded to deal with the application on the assumption that the court had the power to grant a stay of the proceedings on equitable grounds and concluded that 'even if it had the power to do so' a case had not been made out for such a stay.

- (27) *As I shall presently indicate, I am of the view that if the court below did have a discretion, on equitable grounds, to stay the contempt application, the exercise of that discretion in favour of the respondents was not justified and should be set aside. I shall, therefore, likewise assume that the court below had such a discretion. I shall furthermore assume in favour of the respondents that the discretion is a discretion in the strict or narrow sense, ie a discretion with which this court as a court of appeal can interfere only if the court below exercised its discretion capriciously or upon wrong principle, or has not brought unbiased judgment to bear on the question, or has acted for substantial reasons, or materially misdirected itself*

- (28) *It is clear from this dictum that there is no discretion to be exercised on the basis of equity. The premise of the decision by Acting Justice Van Wyk was therefore crucially erroneous. An appeal court would not apply principles of equity. It is also clear that the discretion to be exercised is a strict discretion and is one that must be based on principles of our law. One of the overriding principles when it comes to considering the grant of a stay, or not, is whether there are exceptional circumstances justifying denying what is in reality the exercise by a party of its Constitutional right of access to justice.*
- (29) *Acting Justice Van Wyk recognised that there must be exceptional circumstances for the exercise of the power to grant a stay. However, the learned Acting Justice did not find any exceptional circumstances. He merely held the view that it would be non-sensical for interdicts to be granted, when the First Respondent might obtain registration of the trademarks at some later stage. This 'view' runs contrary to several considerations. First, it is in conflict with the rationale espoused by Van Dijkhorst J in Abdulhay M Mayet, supra, namely that any infringer can apply for registration and then seek a stay. As his Lordship reasoned, the law of trademarks would fall into desuetude if this were to hold otherwise. These are hardly circumstances of any sort to which to pay cognisance, let alone exceptional circumstances.*

- (30) *Next, the facts before the Court do not sustain the view. The circumstances said to be exceptional must exist as a matter of fact. The trademark applications filed by the First Respondent are not on the basis of honest concurrent use and will most likely never be accepted by the Registrar including in the face of the Applicant's entries in the Register. Therefore, there is no factual premise for the consideration of whether the circumstances are exceptional. The claimed circumstances do not exist at all. This has indeed happened. The trademark applications have been refused and will only be accepted by the Registrar if the Applicant consents - which it will not do.*
- (31) *In any event, "exceptional" means rare, unusual, special, out of the ordinary.¹⁶ As it said, "the exception proves the rule". If the filing of trade mark applications justified a stay of interdict proceedings – on account of the possibility (it cannot be stated any higher than this) that registration might result at some stage down the line and thereby grant a defence to infringement - this would never be exceptional for it could/would happen in every case. Thus, the circumstances of such applications cannot (even as a matter of logic) be exceptional.*
- (32) *Accordingly, it is submitted that there existed no rationale basis for the decision by Acting Justice Van Wyk. An appeal court would not come to the same conclusion (including because it cannot).*

- (33) I am satisfied that there are reasonable prospects that an appeal court would interfere with the way in which I exercised my discretion and accordingly that leave to appeal should be granted.

Appeal to a full court of the Division or to the Supreme Court of Appeal

- (34) Section 17(6) (a) of the of the **Superior Courts Act**, No. 10 of 2013 provides:

'If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

- (ii) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or*

(ii) *that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal."*

(35) With regards to the considerations whether an appeal should be granted to the SCA Ranchod J, in a unanimous full court decision in the matter of **Member of the Executive Council for Co-operative Governance, Human Settlements and Traditional Affairs (COGHSTA) and Others v Mogalakwena Municipality and Another** (89657/2014) [2016] ZAGPPHC 1167; 2017 (2) SA 464 (GP) (10 November 2016) expressed himself as follows:

[14] *The corresponding provisions of the Act's predecessor, the Supreme Court Act 59 of 1959 (the previous Act), form part of the circumstances attendant upon the coming into existence of the Act and must also be taken into account. In MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd it is stated that section 20(2) of the previous Act makes it clear that the primary court of appeal from a single judge of the High Court lies to the Full Court unless questions of law or fact or other considerations involved dictate that the matter should be decided by the SCA, allowing for a deviation from the norm. The provisions regarding the court to which leave to*

appeal must be granted from a single judge are effectively the same in section 20(2) of the previous Act and section 17(6)(a) of the Act and as a result the principle stated in MTN Service Provider is in my view still applicable.

[15] *As was the case in MTN Service Provider the inappropriate granting of leave to appeal to the SCA was deprecated in Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others as well as Swart v Heine. It can safely be assumed that when formulating sections 17(6)(a) and 18(4)(ii) this approach formed part of the material known to the legislature as is clear from the use of the words "must" and "unless" in the introductory part of Section 17(6)(a). This is a further indication that the intention of the legislature is that in the event of an appeal against a decision of a single judge "the next highest court" is the Full Court regard being had to the default position which may be changed when the circumstances in sub-sections 17(6)(a)(i) and (ii) prevail.'*

(36) The application for leave to appeal should set out expressly why the default position of an appeal to a full court of the Division should not prevail, as well as the questions of law or fact or other considerations involved which dictate that the matter should be decided by the SCA, allowing for a deviation from

the norm. The notice of application for leave to appeal does not address the issues enunciated in §17 of the Act and there is accordingly no basis why leave to appeal is sought to the SCA, as opposed to a full court.

Conclusion

(37) On a conspectus of all the issues raised I propose to grant the application for leave to appeal to a Full Court of the Gauteng Division of the High Court of South Africa in Pretoria.



ASL VAN WYK AJ

Acting Judge of the High Court

Date of hearing: 9 December 2024

Date of judgment: 17 April 2026

APPEARANCES:

Applicants: Adv O Salmon SC

Instructed by:

McRobert Inc.

1st & 2nd Respondents:

Adv R Michau SC

Instructed by:

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