

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
HELD AT PRETORIA**

CASE NO: A135/2025

DOH: 28 JANUARY 2026

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

.....
SIGNATURE

21 APRIL 2026
DATE

In the matter between:

AUSTELL PHARMACEUTICALS

Appellant

And

**BAYER INTELLECTUAL PROPERTY
GmbH**

First Respondent

REGISTRAR OF TRADE MARKS

Second Respondent

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 21 April 2026.

ORDER

The following order is granted:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the Court *a quo* is set aside and replaced with the following:
‘The application is dismissed with costs.

JUDGMENT

CORAM: BAM J (MNGQIBISA-THUSI et KOOVERJIE JJs concurring)

Introduction

1. The sole question before this court is whether the mark *REZALTO*, when used in relation to pharmaceuticals so nearly resembles the mark *XARELTO*, such that it would be likely to deceive or cause confusion. The same question arose before the court *a quo* in cancellation and infringement applications brought in terms of Section 24(1) read with Section 10(14), and Section 34(1), respectively, of the Trade Marks Act¹ (the Act). The court below, per Meadan

¹ Act 194 of 1993.

AJ, sitting as court of first instance on 11 June 2024, answered the question in the affirmative. Pursuant to that conclusion, the court ordered, *inter alia*, the cancellation of Appellant's mark and further interdicted Appellant from infringing First Respondent's trade mark rights. The present appeal is with leave of the Supreme Court of Appeal granted on 6 February 2025² and it is opposed by First Respondent. I commence by introducing the parties before setting out the background facts.

Parties

2. Appellant, Austell Pharmaceuticals (Proprietary) Limited, is a South African company with its principal place of business at 1 Sherborne Road, Parktown, Johannesburg. Appellant is a healthcare company founded in 2005 and is the proprietor of a trade mark registration no 2018/37286 REZALTO, registered in class 5, in respect of:

‘Pharmaceuticals, medical and veterinary preparations, sanitary preparations for medical purposes; dietetic food and substances adapted for medical and veterinary use, food for babies; dietary supplements for humans and animals; plasters materials for dressings; material for stopping teeth, dental wash; disinfectants; preparations for destroying vermin; fungicides herbicides’ (Appellant's registration).

3. The application for registration in respect of the trade mark was filed on 12 December 2018 and proceeded to registration on 26 June 2020. The date of

² This date is per the court stamp. The header suggests that the matter was before Justices Weiner JA and Windell AJA on 29 January 2025.

registration of the mark in terms of Section 29³ of the Act is 12 December 2018.

4. First Respondent, Bayer Intellectual Property GmbH (Bayer), is a subsidiary of its German parent company, Bayer AG. First Respondent is the proprietor of a trade mark 2004/10546 XARELTO, registered in class 5, in respect of:

‘Pharmaceutical preparations and substances, diagnostic preparations and reagents for medical use. (First Respondent’s trade mark registration).

5. The application in respect of Bayer’s trade mark was filed on 28 June 2004 and proceeded to registration on 25 February 2008. Second Respondent played no role in the proceedings from the outset. Thus, I shall refer to First Respondent as Respondent.

Point in limine: The appeal has lapsed

6. Has the appeal lapsed as Respondent argues? According to Respondent, leave to appeal was granted on 29 January 2025⁴, thus the Notice of Appeal should have been delivered on 26 February and not on 6 March as Appellant did. The date, 29 January, is the date set out in the body of the order. However, the order was stamped only on 6 February. Rule 49(2) reads:

³ The effective date of Appellant’s registration in terms of Section 29 of the Act therefore is 12 December 2018.

‘29. Registration

(1) When an application for registration of a trade mark has been accepted and advertised in the prescribed manner and either—

(a) the application has not been opposed and the time for notice of opposition has expired; or

(b) the application has been opposed and has been granted,

the registrar shall register the trade mark as on the date of the lodging of the application for registration, and that date shall, subject to the provisions of section 63, for the purposes of this Act be deemed to be the date of registration...’

⁴ The dates refer to 2025 unless indicated otherwise.

‘2) If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within 20 days after the date upon which leave was granted or within such longer period as may upon good cause shown be permitted.’

7. Respondent has not placed evidence before this court that the order was issued to the parties before it was stamped by the Registrar. Besides, it would be prejudicial to the Appellant if the *dies* were to be counted from 29 January, which is some 6 to 8 days before the order was dispatched to it. I conclude that the point has no merit and must accordingly fail. In the event we are wrong, we take the view that the interests of justice militate in favour of allowing the appeal to continue, as opposed to striking it off the roll. Fortifying our view is the Constitutional Court's reasoning in *Eke v Parsons*, that the rules are made for the court and not the other way round. In this regard, the court noted:

‘[39] Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said “[i]t is trite that the rules exist for the courts, and not the courts for the rules.’⁵

⁵ (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015).

Background

8. Respondent markets and sells an anti-coagulant, colloquially known as blood thinning prescription medication, via Bayer (Pty) Ltd (Bayer South Africa) an indirect subsidiary of Bayer. The medication is used to treat patients with blood clots, and it is marketed and sold under the trade mark XARELTO. The active ingredient in the medication is rivaroxaban. Appellant markets and sells a generic version of XARELTO under the trade mark REZALTO. REZALTO is also an anti-coagulant and it consists of the ingredient rivaroxaban.

Proceedings before the court a quo

9. When it initially instituted the proceedings in February 2023, Respondent had founded its case for cancellation on Sections 10 (12) and (14) read with 24(1) of the Act. However, before the court below, Respondent chose to rely on Sections 10 (14) read with 24(1). I have already indicated that the court a *quo* found that the two trademarks were confusingly and deceptively similar to one another.

Grounds of Appeal

10. Before us, Appellant contested the finding that the two marks are confusingly and deceptively similar, asserting that the marks are visually, aurally and conceptually distinguishable and can in no way be said to be confusingly or deceptively similar. The broad thrust of Appellant's case is that although the court referred to the relevant authorities, including the *locus classicus*,

*Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd*⁶, it shied away from applying the principles espoused therein. In the main, Appellant submits that the court *a quo* failed to undertake the value judgment it is required to do, based on a global appreciation of the two marks and the overall impression they leave. Instead, the court, *inter alia*, subjected the trade marks to close scrutiny and artificially disseminated them in an attempt to find similarities whilst forgetting to consider the general impression or idea conveyed by the respective marks.

11. Respondent denies that the court failed to undertake a value judgment and states that the court correctly applied the law by considering the marks holistically and with a global appreciation of the visual, aural or conceptual similarity.

Before this court

12. Appellant submits that it conducted a search of trade marks registered in class 5. That search revealed that there are no less than 24 trade marks on the trade mark register which incorporate the prefix XA. Further, there are 7 trademarks incorporating the prefix XAR; 12 trade marks with the prefix incorporating ZAR; and 9 trade marks with a prefix incorporating SAR. There are also 9 trade marks on the register which incorporate the suffix, LTO; 12 trade marks with the prefix RE; 13 trade marks which incorporate the prefix REZ; and 30 trade marks which incorporate the prefix RES. Respondent

⁶ (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984).

counters that the entire exercise pertaining to the search was ill-conceived for two reasons: Appellant has provided no substantiation that the marks referred to in its searches are actively being used in trade. It adds that in any event, the search yielded marks that bear no similarity to its mark and not even to Appellant's mark.

13. Appellant says what the court *a quo* ought to have taken into account is that the prescription of medicine by a doctor is a deliberate act with full knowledge of the contents of the medicine in question and a doctor will not rely on a vague recollection of the name of the medication when prescribing medication. Similarly, a pharmacist will not be confused when issuing medication, as they will issue what is prescribed by the doctor and when in doubt, refer to the prescription and not rely on vague recollection of the name of the medication. Further, sufficient weight ought to have been given to the fact that the Medicines Control Council had considered, approved and allowed registration of the trade mark REZALTO as a generic equivalent of the first respondent's XARELTO, on the basis that XARELTO and REZALTO trade marks are not confusingly similar.

14. Appellant adds that the court *a quo*'s criticism of what it saw as Appellant's exclusion of substantive reference to the consumer was unwarranted and ignores:

- (i) That Respondent admitted that patients are most likely to be presented with options verbally, and will make a decision based on what they hear as opposed to what they see, thereby rendering any visual similarities,

if any, irrelevant for the purposes of considering the generic dispensation.

- (ii) The evidence presented and relied upon by Respondent in support of the manner in which the parties' products are likely to be dispensed, and the participation of the patients in the process.

15. As against Appellant's submission regarding the court's failure to take into account that the products in question will be prescribed by doctors and dispensed by pharmacists, Respondent submits that Appellant's submissions, just as they did before the court below, studiously avoid the principles espoused in *Adcock Ingram Intellectual Property (Pty) Ltd and Another v Cipla Medpro (Pty) Ltd and Another*⁷. In this regard, Respondent submits that Appellant does not address the impact of Section 22F of the Medicine and Related Substances Act⁸. The section entitles a patient to participate in any decision concerning their health and treatment. Consequently, when enquiring on the likelihood of confusing and deceptive similarity, the enquiry can no longer disregard the consumer.

Relevant legal principles

16. Section 10 deals with Unregistrable trade marks and it reads in the relevant parts:

⁷ (265/2011) [2012] ZASCA 39; 2012 (4) SA 238 (SCA); [2012] 3 All SA 1 (SCA); 2012 BIP 113 (SCA) (29 March 2012).

⁸ Act 101 of 1965.

‘The following marks shall not be registered as trade marks or, if registered, shall, subject to the provisions of sections 3 and 70, be liable to be removed from the register—

‘(14) subject to the provisions of section 14, a mark [a mark shall not be registered] which is identical to a registered trade mark belonging to a different proprietor or so similar thereto that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which such trade mark is registered, would be likely to deceive or cause confusion, unless the proprietor of such trade mark consents to the registration of such mark;

Section 24(1) reads:

‘General power to rectify entries in register -

(1) In the event of non-insertion in or omission from the register of any entry, or of an entry wrongly made in or wrongly remaining on the register, or of any error or defect in any entry in the register, any interested person may apply to the court or, at the option of the applicant and subject to the provisions of section 59, in the prescribed manner, to the registrar, for the desired relief, and thereupon the court or the registrar, as the case may be, may make such order for making, removing or varying the entry as it or he may deem fit.’

Section 34. Infringement of registered trade mark

‘(1) The rights acquired by registration of a trade mark shall be infringed by—

(a) the unauthorised 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;’

17. The principles to be applied by a court in comparing marks are set out in

*Plascon Evans*⁹ and are summarized as follows:

⁹ Note 6 *supra*.

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- i) 'In an infringement action [proceedings], the onus is on the plaintiff [applicant] to show the probability or likelihood of deception or confusion. It is not incumbent upon the plaintiff 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 establish that a substantial number of such persons will be deceived or confused.
 - ii) When comparing the two marks, regard must be had to the similarities and differences in the two marks;
 - iii) An assessment must be made of the impact which the defendant's mark would make upon the average type of customer who would be likely to purchase the kind of goods to which the marks are applied.
 - iv) This notional customer must be conceived of as a person of average intelligence having proper eyesight and buying with ordinary caution.
 - v) The comparison must be made with reference to the sense, sound and appearance of the marks.
 - vi) The marks must be viewed as they would be encountered in the market place and against the background of relevant surrounding circumstances. The marks must not only be considered side by side, but also separately.
 - vii) It must be borne in mind that the ordinary purchaser may encounter goods, bearing the defendant's mark, with an imperfect recollection of the registered mark and due allowance must be made for this.
 - viii) If each of the marks contains a main or dominant feature or idea the likely impact made by this on the mind of the customer must be taken into account. As it has been put, marks are remembered rather by general impressions or by some significant or striking feature than by a photographic recollection of the whole.
 - ix) Consideration must be given to the manner in which the marks are likely to be employed as for example, the use of name marks in conjunction with a generic description of the goods. In certain of the decided cases it has been held that the Court should include in its comparison what has been termed the "notional use" of the registered mark and of the alleged infringing mark...'

18. In *Adcock Ingram v Cipla*, the court reasoned that when dealing with pharmaceuticals (medication) the question dealing with confusing or deceptive similarity raised in Section 14 must be answered with reference to the patient, thus, incorporating the provisions of Section 22F¹⁰ of the Medicines and Related Substances Act. In the court's words:

'The question whether ZEMAX is 'likely to deceive or cause confusion' as s 10(14) requires must be answered with reference, not to the specialised market of prescription medication only, but with reference to the patient as well. The patient is the ultimate consumer whose wishes may not be disregarded and who has a 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.'¹¹

Analysis

19. Before going any further, it is convenient to first dispose of the point raised by Appellant regarding the approval of its mark by the Medicine's Control Council. Appellant suggests that sufficient weight ought to have been given to the fact that the Medicines Control Council had considered, approved and allowed registration of the trade mark REZALTO, as a generic equivalent of the first respondent's XARELTO, on the basis that XARELTO and REZALTO

¹⁰ The section in the relevant parts reads:
22F. Generic substitution

(1) Subject to subsections (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 for 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;

(b) dispense an interchangeable multi-source medicine instead of the medicine prescribed by a medical practitioner, dentist, practitioner, nurse or other person registered under the Health Professions Act, 1974, unless expressly forbidden by the patient to do so.

¹¹ Footnote 7 supra, paragraph 30

trade marks are not confusingly similar. It will be recalled that the same defence was raised by Cipla in *Adcock Ingram v Cipla Medpro*. However, the court rejected the defence as set out in the paragraph immediately below:

‘This may well have been the view of the Council but its view is irrelevant and inadmissible for the purpose for which it was tendered. It is the function of the Registrar or the court to consider whether the trade marks ZEMAX and ZETOMAX are ‘so similar’ that their use ‘would be likely to deceive or cause confusion’. Section 9.3.1 of the document, in any event, recognises that ‘[t]he issue of whether a particular proprietary name may constitute an infringement of another entity’s intellectual property rights cannot be one of the Medicines Control Council’s concerns and is, therefore, not taken into account during consideration of the acceptability of a proposed proprietary name’.¹²

20. Coming back to the court *a quo*’s finding of confusing and deceptive similarity, the reasoning of the court in relation to the question of confusing and deceptive similarity is located in paragraph 9 of its judgment and it reads:

‘A simple side by side comparison of XARELTO and REZALTO is apt here. XARELTO is pronounced as ZA-RELTO. ZA-REL-TO and RE-ZAL-TO share phonetic elements, namely, ZA, RE, ELTO/ ALTO. These are made up words bearing no meaning and there is no confusion arising on meaning. From a phonetic, including pronounced and ‘mouthed’ perspective; the above trademarks are similar, actually very similar and to the extent of being confusingly similar. The trademarks are also similar visually. These trademarks are so similar that saying the two trademarks one after the other is not easy (creating in the process a ‘tongue twister’) and one has constantly to remind oneself of which litigant owns which trademark.’

¹² Footnote 7, paragraph 19.

21. Quoting from *Adcock Ingram*, the court was critical of what it saw as Appellant's 'emphasis on the prescription and dispensing of medicine occurring at the instance of doctors and pharmacists who can distinguish between pharmaceutical products.' The learned Judge *a quo* was of the view that Appellant's case disregarded the impact of Section 8 of the National Health Act, which affords the patient the right to participate in 'any decision affecting his/her personal health and treatment'. The learned Judge reasoned that,

'the exclusion of substantive reference and consideration of the patient/consumer circumstances when presented with XARELTO and REZALTO, renders first respondent's presentation of its case substantially and substantively incomplete' and that such was fatal to its case.

22. In *Casadobe Props 60 (Pty) Ltd v Fratelli Martini Secondo Luigi SpA*¹³, the court cautioned, with reference to *Orange Brand Services Limited v Account Works Software (Pty) Ltd*¹⁴ that the question of whether there is likelihood of confusion or deception is a question of fact, and that decided cases are of little assistance, save insofar as they lay down any general principle. How then should a court approach its task of making a value judgment? In *Yuppichef Holdings (Pty) Ltd v Yuppie Gadgets Holdings (Pty) Ltd*, it was said that value judgment 'is largely a matter of first impression and there should not be undue peering at the two marks to find similarities and differences'¹⁵

¹³ (759/2023) [2025] ZASCA 14 (25 February 2025), paragraph 10.

¹⁴ [2013] ZASCA 158. (SCA); 2013 JDR 2750 (SCA).

¹⁵ (1088/2015) [2016] ZASCA 118; 2016 BIP 269 (SCA) (15 September 2016), paragraph 26.

23. In *Roodezandt Ko-Operatiewe Wynmakery Ltd v Robertson Winery (Pty) Ltd and Another*, the court elaborated on the issue of value judgment and cautioned:

‘We have had ample time for full consideration and close comparison of the two trademarks with which we are concerned. These advantages, however, carry their own dangers. They have caused us to look at the trademarks with far greater care than they would be looked at by the members of the public whose probable reactions we are required to assess, and with a far keener awareness of similarities and dissimilarities than such people would probably have as they go about their daily lives.

What we have now to do is, therefore, to transport ourselves, notionally, from the court-room or the study, to the market place. We must try to look at the marks as they will be seen, if they are both in fair and normal commercial use, by the hypothetical consumers of [wine]. Those will be people of many races and degrees of education, having varied gifts, interests and talents. We are not to postulate the consumer of “phenomenal ignorance or extraordinarily defective intelligence”. . . We are to consider a person of average intelligence and proper eyesight, buying with ordinary caution.’¹⁶

24. In terms of *Plascon Evans*¹⁷, if each of the marks contains a main or dominant feature or idea the likely impact made by this on the mind of the customer must be taken into account. In addition, marks are remembered rather by general impressions or by some significant or striking feature than by a photographic recollection of the whole. Against this background I now compare the two marks.

¹⁶ (503/2013) [2014] ZASCA 173; 2014 BIP 294 (SCA) (19 November 2014), paragraph 5.

¹⁷ Note 6 *supra*.

25. Appellant says XARELTO and REZALTO are distinguishable in appearance, sound, and meaning. The first letter of Respondent's trade mark is X whereas Appellant's is R. This, according to Appellant is very important as consumers will likely focus on the first letter of each mark when considering them. The first three letters of the respective trademarks are individually different resulting in prefixes XAR and REZ and, even the first two XA and RE are still totally different. Consumers will generally focus on the first part or prefix of each mark when considering the respective marks. These differences, averred Appellant, will no doubt lead to a totally different interpretation of the make-up of the respective trade marks, thus preventing any likelihood of confusion or deception.

26. In fact, submits Appellant, the first four letters of each of the marks, XARE and REZA, further serve to distinguish the respective marks. This is particularly important as it is trite that consumers will focus on the first part of the mark when considering it; and the suffixes of the marks also differ as ELTO and ALTO. On phonetic comparison, Appellant states that XARELTO AND REZALTO are phonetically different. This is apparent from the first syllable of each of the marks, XAR (pronounced as ZAR) and REZ, which are in no way similar from a phonetic perspective.

27. Due to the prominence that will be given to the prefix by the consumers, the marks are likely to be pronounced as XAR-ELTO and RES-ALTO, pronunciation that is in no way similar. This will have the result that both parts (prefixes) of each mark will be emphasized and maintain independence and

meaning. Conceptually, REXALTO and ZARELTO consist of coined words, without meaning. As such, the trade marks are not conceptually similar. The marks, stated Appellant, cannot be said to be confusingly similar.

28. As to how the marks will be encountered in the market, Appellant submits that its REZALTO similar to the Respondent's XARELTO will be prescribed by doctors and dispensed by pharmacist who are trained to distinguish between pharmaceutical products. Further, where the trademarks are so different, such as in the present case, the notional consumer will not be confused between Respondent's XARELTO and Appellant's REZALTO in true market conditions, especially if one takes into consideration the product's intended use, which is very specific, and that the drug is to be prescribed by a medical practitioner and dispensed by a pharmacist. Appellant submits, a decision to purchase or the purchase of prescribed medication is not the type of purchase that is rushed. The suggestion here is that the purchase or the decision will be approached with the necessary caution.

29. Respondent says, the prefix of its mark is typically pronounced as ZAR, thus, the respective marks are therefore likely to be pronounced as ZA-REL-TO and RE-ZAL-TO. Respondent says that both marks share similar phonetic elements ZA, RE, LTO/ALTO. Therefore, the marks are confusingly similar from a phonetic perspective. On the issue of allowance for imperfection, Respondent averred that, patients who are not used to dealing with different pharmaceutical products could easily mispronounce the respective marks and be confused and thus end up believing that both products are one and the

same. As to how the two marks will be encountered, Respondent averred that its mark will be used in relation to prescription medication and so will be Appellant's REZALTO mark which will be used as a generic version of the XARELTO product.

30. Respondent further notes that in terms of section 22F of the Medicines and Related Substances Act¹⁸, unless instructed otherwise by the prescribing doctor, if generic alternatives to the original patented drug are available, it is mandatory for the pharmacist to suggest such alternatives to the patients. Patients are therefore likely to encounter both products for the first time when they visit the pharmacy with their prescription. In that context, patients will not have the opportunity to look at the respective marks and compare them visually. Patients will most likely be presented their options verbally and will make a decision based on what they hear as opposed to what they see, suggests Respondent. In that context, phonetic similarity plays a far more significant role than visual similarity. Respondent added, before finally submitting that the marks are confusingly and deceptively similar, that Appellant's registration covers pharmaceuticals being goods that are identical to the goods for which the Respondent's trade mark is used and registered.

31. To illustrate the point, Respondent suggested an example of two patients discussing their medication, where one of the patients is sharing the benefits of using Respondent's XARELTO medication. The second patient, who will

¹⁸ Act 101 of 1965.

be encountering the medication for the first time, visits the pharmacy with a script for the same medication, and the pharmacy recommends the generic, ZARELTO, as they are required to do in terms of Section 22F. In these circumstances, suggests Respondent, the patient would not be able to make the distinction, because of the confusing similarity in the two marks.

32. A further point the court was requested to consider is that the medication is typically prescribed to elderly patients. It is well known, suggests Respondent, that as a person ages, their hearing and visual ability tends to deteriorate. In that case, continued the argument, elderly patients would likely be confused or deceived into believing that there is a connection between Appellant's and Respondent's medication. Respondent adds that people, including doctors and pharmacists, have imperfect recollection, in particular for words that have no meaning and are difficult to pronounce.

33. The two marks consist of seven letters XARELTO and REZALTO. Appellant's mark emphasizes REZ or even REZA, whereas Respondent's emphasizes XAR or even XARE or ZARE as it is pronounced. These, in my view, are the dominant features of the two marks. I agree with Appellant that from a visual and phonetic perspective, there is a fundamental difference between the two marks. Even if one were to consider the first letter of the two marks R and X, the two letters are distinguishable phonetically with Appellant's sounding 'rrrhhhhh', while Respondent's makes the sound 'zzzzzzzz'. I align myself with the court's remarks when distinguishing the marks, CANTO and CANTI, where it was said:

‘even though CANTO and CANTI are both five letters long and have the same first four letters, the ‘I’ and ‘O’ at the end of the marks make a huge difference. They determine the different visual cues, tones and senses of the two marks. It is improbable that consumers would be deceived or confused.’

34. In considering whether there will be likelihood of confusion or deceit, we are required to notionally transport ourselves to the market place and consider how the two marks are to be encountered by the notional consumer, whom, in terms of Section 22F of the Medicines and Related Substances Control Act¹⁹, and Section 8 of the National Health Act, must be involved in decision making. Both parties submitted that the consumer will be issued a doctor’s prescription note and a pharmacist will issue the medicine. Respondent suggested strongly that the consumer will likely make a decision based on what they hear rather than what they see. The consumer we must postulate is one of average intelligence and proper eyesight, buying with ordinary caution, (*Plascon Evans*). Consequently, a customer with imperfect recollection may remember Appellants medication as something starting with REZ or even REZA something while Respondent’s is ZARE’ or even ZAREL something. There simply is no probability of confusion nor deception as I have illustrated.

Notional use

35. As was said in both *Plascon Evans* and *Adcock Ingram* cases, in making the necessary comparison, the court is not confined to the manner in which the parties have actually used their respective marks; it may have regard to how

¹⁹ (Act No. 101 of 1965).

the parties can use the marks in a fair and normal manner. Here we must bear in mind the broad range of the preparations covered by Appellant's mark and the fact that it can place in the market preparations that do not require a doctor's prescription note. We must answer this question for the protection of the public, as was said in *Adcock Ingram*²⁰. In my view, even taking into account the broad coverage of Appellant's mark, there is simply no probability of confusion or deception, and that is based on the reasoning in this judgment.

Conclusion

36. In order for Respondent to succeed in its pursuit of an interdict in terms of Section 34(1), it had to demonstrate before the court that its rights, as acquired under the registration of the mark XARELTO, are being infringed by Appellant based on (a) the unauthorised use in the course of trade, (b) in relation to goods or services in respect of which the trade mark is registered, (c) of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion. It is common cause that the goods in question are identical. However, based on the reasoning in this judgment, there is no resemblance in the two marks nor can it be said the marks are confusingly or deceptively similar. Thus, the court a quo's conclusion that the two marks are confusingly and deceptively similar was incorrect. The appeal must succeed.

Order

1. The appeal is upheld with costs, including the costs of two counsel.

²⁰ Footnote 7 supra, paragraph 15.

2. The Court *a quo*'s order is set aside and replaced with the following:

'The application is dismissed with costs.

—  —
BAM J

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

Date of Hearing: 28 January 2026

Date of Judgment: 21 April 2026

Appearances:

Counsel for the Appellant: Adv R Michau SC & Adv J.A
Booyse

Instructed by: Bouwers Inc
c/o Nelis Britz Attorneys
Val-De-Grace, Pretoria

Counsel for the Respondent: Adv G Marriott SC & Adv N
Moshiane

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