REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **2023-086367**

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

[redacted]

14 April 2026
DATE   SIGNATURE

In the matter between:

ALTRON LTD	**APPLICANT**
and	
TRACKER (PTY) LTD	**FIRST RESPONDENT**
THE REGISTRAR OF TRADE MARKS FOR THE COMPANIES AND INTELLECTUAL COMMISSION	**SECOND RESPONDENT**

JUDGMENT

Raubenheimer AJ:

Introduction:

[1] This application concerns the removal of four trade mark registrations for '*Taking Back Tomorrow*', registered by the First Respondent ("Tracker") in classes: 35,

37, 39 and 45. The Applicant ("Altron") seeks expungement under s 27(1)(b) of the Trade Marks Act 194 of 1993 ("Act") on the basis of non-use.

[2] The matter raises foundational questions in South African trade mark law, including:

a) the meaning and scope of "interested person" under s 27(1) of the Act;

b) the doctrine of residual reputation and its interaction with non-use;

c) the proper interpretation of s 27(5) of the Act and its relationship to s 35(1) of the Act;

d) the nature of the Court's discretion in non-use applications; and

e) the admissibility of further affidavits in motion proceedings.

The statutory framework:

[3] The trademarks register is intended to reflect marks that are used in trade. This principle is foundational and has been repeatedly affirmed in South African jurisprudence that the purpose of the register is to record marks that are used, or intended to be used, as trademarks,[1] and to reflect marks that function as indicators of origin in the marketplace.[2] It does not serve as a warehouse for unused marks.

[4] The effect is that the non-use provisions serve a public interest function: preventing clutter, ensuring commercial certainty, and maintaining the integrity of the register.

[5] Section 27(1)(b) of the Act provides that a registered mark may be removed where there has been no bona fide use of the trade mark in relation to the goods or services for which it is registered for a continuous period of five years.

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[1] Section 22 *Trade Marks Act 194 of 1993*. *Pepkor Retail (Pty) Ltd v Truworths Ltd* [2016] ZASCA 146 at para 10.
[2] *Koni Multinational Brands (Pty) Ltd v Beiersdorf AG* 2021 ZASCA 24 at para 99.

[6] Bona fide use refers to genuine commercial use, not token or contrived use for the purpose of preserving the registration,[3] and the determination of the existence thereof is and objective and fact-based exercise.[4]

[7] In (supra), the SCA stressed that the inquiry is objective and fact based.

[8] It is common cause that Tracker has not used the '*Taking Back Tomorrow*' mark since 2016. The statutory basis for removal is therefore established unless Tracker establishes a defence or the Court exercises its discretion.

[9] Section 27(5) of the Act provides that Section 27(1)(a) and (b) of the Act,[5] do not apply to marks entitled to protection under the Paris Convention as well-known marks within the meaning of Section 35(1) Act. Which defines such marks as those well known in the Republic as being the marks of a national of a convention country or a person domiciled or having a real and effective industrial or commercial establishment in a convention country.

[10] Section 27(5) of the Act has been interpreted to be applicable to the protection of well-known marks of foreign proprietors and does not extend to domestic proprietors.[6]

[11] Tracker challenged this interpretation and submitted that the purpose of the Paris Convention is to protect well known marks, not foreign nationality, and that the current interpretation produces irrational results.

[12] It relies on constitutional interpretive principles that the interpretation must promote the spirit, purport and objects of the Bill of Rights.[7] The result of the process of interpretation is to avoid irrational or arbitrary outcomes. The process of interpretation must be purposive and context sensitive,[8] avoid absurdity and promote

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[3] *Gulf Oil Corporation v Rembrandt Fabrikante and Handelaars (Edms) Bpk* 1963 (2) SA 10 (T) at paras15C-H.
[4] *Adidas AG v Pepkor* [2013] ZASCA 3 at para 14.
[5] Section 27(5) read with 27(1)(a) and (b) of the *Trade Marks Act* 194 of 1993.
[6] *Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd* 2005 (1) SA 346 (T).Truworths Ltd v Primark Holdings 2019(1) SA 179 SCA par 5
[7] *Kubyana v Standard Bank* 2014 ZACC 1 at para 18.
[8] *Chisuse v Director General Home Affairs* 2020 ZACC 20 at para 52.

coherence,[9] and an interpretation that align with constitutional values should be preferred.[10]

[13] These arguments are compelling, but *Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd* ("Blue Lion"),[11] remains binding authority.

Locus Standi:

[14] The concept of an "interested person" in Section 27(1) of the Act is the successor to the earlier term "person aggrieved" under the Act of 1963. Although the wording changed, the jurisprudence interpreting "person aggrieved" remains relevant and has been consistently applied by South African courts.

[15] The foundational case is in *re Appollinaris Co Ltd,*[12] where the English Court of Appeal held that the concept is intended to exclude mere busybodies or common informers, and to confine the right of complaint to persons who have a real interest in the register being correct.

[16] This principle was adopted in South Africa in *Joshua Gibson Ltd v Bacon,*[13] where the Court held that an applicant must show that he is in some way substantially interested in having the mark removed.

[17] This approach was reaffirmed when the former Appellate Division concluded that an applicant must show a real and not merely fanciful interest in the removal of the mark.[14]

[18] The interest must be genuine and legitimate, and it must arise from the applicant's trading activities or intended trading activities.[15] The interest must amount to a real commercial interest in the removal of the mark, not a hypothetical or academic

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[9] *Independent Community Pharmacy Association v Clicks Group Ltd and Others* [2023] ZACC 10 at para 112

[10] *Aveng Mining Shafts and Underground v Commissioner for the South African Revenue Service* 2025 ZASCA 20 at para 12.

[11] *Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd* 2006 (1) SA 346 (T).

[12] *Re Appollinaris Co Ltd* (1891) 8 RPC 137 (CA).

[13] *Joshua Gibson Ltd v Bacon* 1927 TPD 207 at para 210.

[14] *Ritz Hotel Ltd v Charles of the Ritz Ltd* 1988 (3) SA 290 (A) at para 308A-B.

[15] *Danco Clothing (Pty) Ltd v Nu-Care Marketing* 1991 (4) SA 850 (A) at para 6.

interest.[16] The applicant is furthermore required to show that the continued presence of the mark on the register is likely to cause him substantial damage.[17]

[19] Although standing in trademark litigation is regulated by statute it has to be interpreted in light of constitutional principles of access to courts and purposive interpretation.

[20] In this sense standing must not be understood to be a technical obstacle course but rather a practical inquiry into whether the litigant has a real interest in the outcome and can a litigant not rely on a hypothetical or abstract interest. The interest must be real and grounded in fact.[18]

[21] This duality — liberal access to courts but requiring a real interest — informs the modern approach to s 27(1) of the Act.

[22] Altron asserts that Tracker's registrations "may hamper" its intended use of TAKE ON TOMORROW. On the other hand, Altron simultaneously asserts that the marks are not confusingly similar, that the CIPC has conditionally accepted its applications, that there is no impediment to registration and that Tracker's concerns are unfounded.

[23] Altron is taking a position that are mutually destructive. It cannot claim to be substantially interested in removing a mark while insisting that the mark has no legal or commercial impact on it.

[24] This is the type of contrived interest rejected in *Ritz Hotel, Danco Clothing, and Valentino Globe*.[19]

[25] Altron stated that it brought the application out of an abundance of conservative caution. There is no legal basis for such an approach and has the Appellate Division

[16] *South African Football Association v Stanton Woodrush (Pty) Ltd v Stanton Woodrush* 2002 (2) SA 236 (T) at para 239.
[17] *Valentino Globe BV v Phillips* 1998 (3) SA 775 (SCA) at para 781B.
[18] *Giant Concerts CC v Rinaldo Investments* 2013 (3) SA 571 (CC) at para 34.
[19] *Ritz Hotel v Charles of the Ritz Ltd* above n 14; *Danco Clothing (Pty) Ltd v Nu-Care Marketing* above n 15; and *Valentino Globe BV v Phillips* above n 17.

expressly rejected "precautionary" or "tactical" interests and does the Act not provide for removal proceedings merely to clear the register as a matter of convenience.[20]

[26] Speculative or hypothetical interest is insufficient.[21]

[27] The fact that Tracker believes that the marks are similar cannot assist Altron in establishing standing as its interest must arise from its own trading activities not from the respondent's assertions.[22]

[28] Altron's own position that there is no similarity, no confusion, and no impediment is fatal to its standing and has Altron failed to establish that it is an "interested person" under s 27(1).

[29] However, in case I am wrong, I proceed to consider the merits.

[30] Section 27(1)(b) is a central mechanism for maintaining the integrity of the trademarks register by ensuring that the register reflects marks that are used as indicators of origin in the marketplace.

[31] In *Adidas AG v Pepkor Retail Ltd*,[23] the purpose of non-use provisions was explained as to record marks that are used, or intended to be used, as trademarks.

[32] This principle is rooted in the public interest. A cluttered register impedes commercial certainty, inhibits competition, and undermines the function of trade marks as indicators of origin.

[33] An inquiry under s 27(1)(b) is not punitive; it is corrective. It ensures that the register remains a reliable public record.

[34] The requirement of "bona fide use" has been interpreted to mean genuine commercial use, not token or contrived use.

[35] In *Rembrandt (Edms) Bpk v. Gulf Oil Corporation*,[24] the Court held that genuine use means use:

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[20] *Ritz Hotel v Charles of the Ritz Ltd* above n 19.
[21] *Valentino Globe BV v Phillips* above n 17.
[22] *Danco Clothing v Nu-Care Marketing* see above n 16.
[23] *Adidas AG v Pepkor* above n 4.
[24] *Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk* above n 3 at para 24D.

"with the object or intention primarily of protecting, facilitating and furthering trading in such goods, and not some other, ulterior motive."

[36] This principle aligns with international jurisprudence, including the English decision in *Ansul BV v Ajax Brandbeveiliging*,[25] where the Court held that use must be "consistent with the essential function of a trade mark."

[37] The essential function of a trade mark is to indicate origin. Use that does not serve this function is not bona fide.

[38] It is common cause that Tracker has not been using the '*Taking Back Tomorrow*' marks since 2016.

[39] Tracker does not contend otherwise and does not seriously dispute the absence of advertising, sales, promotional use, internal use, token use or defensive use.

[40] Although the statutory ground for removal is satisfied tracker relies on residual reputation, section 27(5), or the Court's discretion.

[41] The Doctrine of Residual Reputation recognises that goodwill and reputation may persist after use has ceased.

[42] Whether residual reputation exists is a factual enquiry and the court will consider scale, duration and impact of prior use.[26]

[43] A reputation has an element of durability and does not cease to exist on cessation of use.[27] A reputation may endure even after production has ceased.[28]

[44] Residual reputation may be inferred from extensive advertising,[29] scale and manner of use,[30] long term exposure,[31] emotional impact of the campaign, continued public recognition and the conduct of competitors.

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[25] *Ansul BV v Ajax Brandbeveiliging BV* [2003] ETMR 85 (ECJ).
[26] *Diageo North America Inc v DGB (Pty) Ltd* 2004 JDR 0315 (T) at para 10.
[27] *Polakow Brothers v Gershlowitz* 1976 (1) SA 863 (E) at 865B-C.
[28] *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) at paras 15-16.
[29] *Hollywood Curl v Twins Products* 1989 (1) SA 236 (A) at para 249J.
[30] *Adidas AG v Pepkor* above n 4 at para 29.
[31] *Koni Multinational* above n 2 at para 21.

[45] The conduct of competitors is relevant to determining whether a reputation persists.

[46] Where a competitor adopts a get up strikingly similar to that of the plaintiff is a strong indication that the plaintiff's get up is distinctive and the inference is that the plaintiff's get up retains commercial value.[32]

[47] In *Yellow Cabs v Ginsberg*,[33] the Court held that imitation is evidence of reputation.

[48] Tracker's evidence establishes a decade long campaign lasting some nine years, substantial advertising spend exceeding R145 million, national television and radio campaigns, iconic advertisements such as "Memories," continued online availability.

[49] Tracker also relied on expert evidence to which Altron did not object.

[50] In *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd*,[34] the SCA held that expert evidence is admissible where it assists the court in matters requiring specialised knowledge.

[51] The evidence establishes a substantial residual reputation. The acquisition of Tracker's product bundle names (Connect, Empower, Protect) by Netstar in 2025 strengthens the inference of residual goodwill.

[52] The inference that Altron sought to benefit from Tracker's goodwill is consistent with *Blue Lion* and *Yellow Cabs*.

[53] Section 27(5) of the Act provides that s 27(1)(a) and (b) do not apply to marks entitled to protection under the Paris Convention as well-known marks within the meaning of s 35(1).

[54] Section 35(1) of the Act defines such marks as those well known in the Republic as being the marks of a national of a convention country, or a person domiciled or

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[32] *Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd* 1977 (4) SA 434(W) at para 12.
[33] *Yellow Cabs v Ginsberg* 1930 WLD 205 at para 209.
[34] *Price Waterhouse Coopers Inc v National Potato Co operative Ltd* 2015 ZASCA 2 at para 97.

having a real and effective industrial or commercial establishment in a convention country.

[55] The purpose of the Paris Convention is to protect well known marks, not foreign nationality.

[56] Article 6bis of the Paris Convention requires member states to protect well known marks "whether or not they are registered."

[57] In Blue Lion, the Court held that Section 27(5) is directed at protecting the well-known marks of foreign proprietors. It does not extend to domestic proprietors.

[58] Tracker argues that this interpretation is incorrect but Blue Lion remains binding authority.

[59] Even where non-use is established, the Court retains a discretion to refuse expungement.

[60] This discretion is rooted in the equitable nature of trade mark law. And may he court refuse expungement where the equities favour the proprietor. [35]

[61] The discretion must be exercised judicially and must take into account all relevant factors[36] such as residual reputation, likelihood of deception, conduct of the applicant and public interest.[37]

[62] Tracker has established a substantial residual reputation.

[63] Altron's conduct including its denial of similarity, its assertion of no impediment, and Netstar's appropriation of Tracker's product bundle names weighs heavily against granting relief.

[64] The public interest is not served by permitting appropriation of goodwill.

[65] I would consequently exercise my discretion against expungement.

[35] *Adidas AG and Another v Pepkor Retail Ltd* above n 4.
[36] *Koni Multinational Brands (Pty) Ltd v Beiersdorf AG* above n 2.
[37] *Hollywood Curl v Twins Products* above n 29.

[66] The further affidavit concerns facts arising after the answering affidavit. It is relevant to residual reputation and the equities. It is concise, material, and not prejudicial.

[67] Leave to file it should be granted.

Conclusion:

[68] Altron has failed to establish locus standi and even if it was established Tracker has established residual reputation. Although Tracker cannot rely on s 27(5) the Court would exercise its discretion against expungement.

Order:

[69] The following order is made:

1. The application for removal of the First Respondent's trade mark registrations for '*Taking Back Tomorrow*' is dismissed.

2. The First Respondent is granted leave to file its further affidavit.

3. The Applicant is ordered to pay the First Respondent's costs, including the costs of two counsel.

[redacted]

RAUBENHEIMER AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA

COUNSEL FOR THE PLAINTIFF: Adv Salmon SC

INSTRUCTED BY: Edward Nathan Sonnenbergs Inc

COUNSEL FOR THE 1st RESPONDENT: Adv C Puckrin SC

INSTRUCTED BY: Webber Wentzel

DATE OF ARGUMENT: 15 October 2025

DATE OF JUDGMENT: 14 April 2026