THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 293/2022

In the matter between:

GRUPO BIMBO S.A.B. DE C.V. **APPELLANT**

and

TAKIS BILTONG (PTY) LTD **RESPONDENT**

Neutral citation: *Grupo Bimbo S.A.B. v Takis Biltong* (293/2022) [2023] ZASCA 175 (14 December 2023)

Coram: MOLEMELA P, NICHOLLS and MEYER JJA, KOEN and KATHREE-SETILOANE AJJA

Heard: 8 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 14 December 2023.

Summary: Reconsideration of dismissal of application for special leave to appeal — cancellation of applicant's trade mark — Takis Fuego — likely to deceive or cause confusion by virtue of similarity to respondent's Takis Biltong mark.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Davis J and Nemavhidi AJ concurring and Makgoba J dissenting, sitting as court of appeal):

The application for the reconsideration of the order of this Court granted on 8 March 2022 dismissing the applicant's application for special leave to appeal is dismissed with costs.

JUDGMENT

Kathree-Setiloane AJA (Molomela P, Nicholls and Meyer JJA and Koen AJA concurring):

[1] This is a reconsideration of the order of this Court, dated 8 March 2022, dismissing the application for special leave to appeal against the order of Davis J and Nemavhidi AJ (the majority), in the Gauteng Division of the High Court, Pretoria (the high court). The majority made an order cancelling trademark registration no. 2012/14977 TAKIS FUEGO device in class 30 (the impugned mark). On 31 October 2022, the decision dismissing the application for special leave to appeal against that order was referred by Petse AP (as he then was) for reconsideration and, if necessary, variation, in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). He also referred the application for special leave to appeal for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act.

Background

[2] The applicant, Grupo Bimbo S.A.B.DE C.V (the applicant), a Mexican company which trades in many countries including South Africa, is the proprietor of the impugned mark. It was registered in South Africa on 6 June 2012 and covers the following class 30 goods: 'Bread, pastry, corn flour chips, wheat flour chips, corn extruded, wheat extruded, pop corns'. The impugned mark is depicted as follows:

[3] The respondent, Takis Biltong Pty Ltd (the respondent), is a South African company which sells biltong and other snack products in South Africa. It is the registered proprietor of the following two trademarks (the registered TAKIS LOGO marks):

[4] Both registered TAKIS LOGO marks were registered on 8 May 2007 in class 29. They cover the following goods: 'Meat, fish, poultry, and game, preserved meats, meat extracts, sausages'. On 24 April 2015, the respondent applied to register a TAKIS LOGO mark and three TAKIS word marks. These applications are still pending.[1] The goods covered by these pending applications are: (a) class 29 – meat, meat products, processed meat, biltong, meat extracts, potato crisps and chips, processed nuts, dried fruit; class 30 – sweets and confectionary; and class 31 – nuts of all kinds (unprocessed), raisins, snack foods of all kinds included in this class'.

[5] The respondent applied to the high court, in terms of s 24[2] of the Trade Marks Act 194 of 1993 (the Trade Marks Act), to expunge the impugned mark. Vorster AJ

[1] The respondent relied on all these marks in its expungement application.
[2] Section 24 of the Trade Marks Act provides:

(the court of first instance) dismissed the application. The respondent appealed against that decision to the full court. On appeal, the majority set aside the order of the court of first instance and replaced it with one cancelling the impugned mark. The majority found that on comparison of the marks in question, they are so similar that there is a likelihood of confusion or deception arising in the marketplace. Concerning the goods in question, the majority applied the test in *British Sugar PLC v James Robertson & Sons Ltd*[3] (*British Sugar*) and concluded that the goods are similar. It also found that there was sufficient uncontroverted evidence establishing the requisite reputation of the respondent. The majority, accordingly, held that the requirements of ss 10(12), 10(14), 10(16), and 10(17) of the Trade Marks Act[4] had been satisfied. The minority (Makgoba J) found, to the contrary, that although the marks in question are similar, the goods in question are not. It concluded that there is no likelihood of deception or confusion arising in the marketplace.

[6] For the applicant to succeed in the application for special leave to appeal against the order of the majority, it must show something more than the existence of reasonable prospects of success on appeal. [5] In *Cook v Morrison and Another* this Court held:[6]

'The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list…'

'(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 the making, removing or varying the entry as it or he may deem fit.
(2) The court or the registrar, as the case may be, may in any proceedings under this section decide any question that may be necessary or expedient to decide in connection with the rectification of the register.
(3) In the event of the registrar being satisfied that any entry relating to the registration, assignment or transmission of a trade mark has been secured *mala fide* or by misrepresentation or that any such entry was wrongly made or wrongly remains on the register, he shall also have *locus standi* to apply to the court under the provisions of this section.'

[3] *British Sugar PLC v James Robertson & Sons Ltd* [1997] ETMR 118, [1996] EWHC 387 (Ch), [1996] RPC 281.

[4] These provisions are quoted later in the judgment.

[5] *PAF v SCF* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) para 24.

[6] *Cook v Morrison* [2019] ZASCA 8; 2019 (5) SA 51 (SCA) para 8.

[7] The only ground that the applicant advanced for the grant of special leave to appeal was that there is an equal split, between the judge in the court of first instance and the three judges in the full court, in their findings on the likelihood of deception or confusion arising between the two marks in question. The applicant contends that this factor alone demonstrates special circumstances. I disagree as this would mean that in every case where there is a dissenting judgment, a litigant would be entitled, without more, to an order granting special leave to appeal in terms of s 16(1)(*d*) of the Superior Courts Act.

[8] Although the applicant's failure to establish special circumstances is sufficient reason to dismiss the application for special leave to appeal, I will nevertheless proceed to consider whether there would be a reasonable prospect of success on appeal. The test of what constitutes a reasonable prospect of success is well established. The applicant must convince the court that there is 'a realistic chance of success on appeal'. In other words, it must demonstrate that 'there is a sound rational basis to conclude that there is a reasonable prospect of success on appeal'.[7]

Are the marks so similar that there is a likelihood of deception and confusion arising?

[9] The respondent sought to expunge the impugned mark from the trademark register in terms of s 24 read with ss 10(12), 10(14), 10(16) and 10(17) of the Trade Marks Act. Section 24 entitles an interested party to apply to court to have the trademark register rectified by *inter alia* removing any entry 'wrongly made in or wrongly remaining on the register'. Section 10 provides in relevant part:

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

. . .

(12) a mark which is inherently deceptive or the use of which would be likely to deceive or cause confusion, be contrary to law, be *contra bonos mores*, or be likely to give offence to any class of persons;

. . .

(14) subject to the provisions of section 14, a mark which is identical to a registered trademark belonging to a different proprietor or so similar thereto that the use thereof in

[7] *MEC for Health, Eastern Cape v Mkhitha* and Another [2016] ZASCA 176 paras16-17.

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 will cause confusion, unless the proprietor of such trade mark consents to the registration of such mark;

. . .

(16) a mark which is the subject of an earlier application as contemplated in paragraph (15), if the registration of that mark is contrary to existing rights of the person making the later application for registration as contemplated in that paragraph;

(17) a mark which is identical or similar to a trade mark which is already registered and which is well-known in the Republic, if the use of the mark sought to be registered would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of deception or confusion:

'Provided that a mark shall not be refused registration by virtue of the provisions of paragraph (2) or, if registered, shall not be liable to be removed from the register by virtue of the said provisions if at the date of the application for registration or at the date of an application for removal from the register, as the case may be, it has in fact become capable of distinguishing within the meaning of section 9 as a result of use made of the mark.'

[10] Two questions arise for determination in so far as the application of s 10(12) of the Trade Marks Act is concerned. The first is whether the marks are so similar that there is a likelihood of deception and confusion arising, and the second is whether the respondent enjoys a protectable reputation in its registered TAKIS LOGO mark.[8] In relation to the latter question, the applicant has conceded that the respondent enjoys a protectable reputation in its registered TAKIS LOGO mark in respect of biltong and droëwors products and can rely on that use and reputation for the purposes of an attack based on ss 10(12) and 10(17) of the Trade Marks Act.

[11] For purposes of determining the first question, it is important to draw a distinction between deception and confusion in the comparison of trademarks. Where two trademarks belonging to different proprietors are compared, deception would result if their similarity were to cause consumers to assume that goods bearing the trade marks come from the same source. Conversely, confusion would occur if the similarity in the trade marks would cause consumers to wonder if the goods had a

[8] The wording of s 10(12) is akin to a passing off.

common origin.[9] In comparing the marks to determine whether such confusion or deception is likely to arise, the court must have regard to the impact which the marks would make on a notional person of average intelligence, having proper eyesight and buying with ordinary caution and, who is likely to buy the goods to which the marks are applied.[10] The notional use test envisages the use of the trade mark '…in a fair and normal manner in relation to any or all of the goods or services in respect of which the existing mark is registered and in respect of which the other mark is sought to be registered'.[11]

[12] The court must not compare the marks '…in the calm, quiet intellectual atmosphere of a court room or of a study…' but must notionally transport itself to the marketplace and stand in the shoes of the potential customer.[12] Where the marks contain a dominant feature or idea, it is the impact which this dominant feature is likely to make on the mind of the consumer which must be taken into account. This Court, in *Pepsico Inc v Atlantic Industries*,[13] (*Pepsico Inc*) articulated the test as follows:

'In testing for deception and confusion, courts will usually identify the features, if any, of the respective marks which are dominant. If they share a dominant feature, there is ordinarily a greater likelihood of deception or confusion. As recently affirmed by this court, in the global assessment of the marks 'the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components.'

[13] Trademarks are remembered by general impressions or some significant or striking feature and not by a photographic recollection of the whole.[14] The idea conveyed by a mark is likely to impress itself on the mind and remain in the memory even though the details of the two marks may be very different. This is why the comparison is to be made between the dominant impression of the mark, or the main idea or impression left on the mind by each of the marks, having regard to any essential or salient or leading or striking feature or features in each.[15] Since the first

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[9] *Roodezandt Ko-Operatiewe Wynmakery Ltd v Robertson Winery (Pty) Ltd and Another* 2014 BIP 24 (SCA) para 4.
[10] *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 640G-641E.
[11] G C Webster & N S Page *South African Law of Trade Marks* 3 ed (1986) at 6-27 paras 6-12.
[12] *Oude Meester Groep Bpk & Another v SA Breweries Ltd* 1973 (4) SA 145 (W) at 161C-E.
[13] *Pepsico Inc v Atlantic Industries* [2017] ZASCA 109 para 20.
[14] Ibid.
[15] *International Power Marketing (Pty) Ltd v Searles Industries (Pty) Ltd* 1983 (4) SA 163 (T) at 168H.

impression of a mark is particularly important, a court must not peer too closely at the marks to find similarities or differences. In considering whether a mark is confusing and deceptive, the court must remain mindful that the consumer would not have had the opportunity of carefully considering the marks and comparing them side-by-side.[16] In making the comparison, the court must assume that the trademark applicant will make normal and fair use of its mark. If the mark is likely to be abbreviated in use, this must also be considered.[17]

[14] Applying these considerations to the marks in question, it is evident that the dominant, integral, or essential element of both marks is the identical word TAKIS. It is undisputed, in this regard, that TAKIS is an invented word. It has no meaning in the English language. It is these features of the registered TAKIS LOGO mark which give it an inherent distinctiveness, such that no person can claim an entitlement to use the word in a descriptive context. This means that the addition of any other word or logo will not serve to distinguish. As pointed out by the respondents, the registered TAKIS LOGO mark has the inherent degree of distinctiveness that puts it into the category of a class of trademarks such as, for example, SAMSUNG, TOYOTA, MOTOROLA, and NOKIA. It is the distinct and unique character of the registered TAKIS LOGO mark that distinguishes it from the SOUL SOUVLAKI matter,[18] where this Court found that the word 'soul' is a common word in everyday use.[19] On the contrary, TAKIS is not a common word in everyday use.

[15] A matter which is not intrinsic to the mark, and which has no trade mark significance must be excluded from the comparison.[20] Importantly in this regard, the word FUEGO[21] in the impugned mark does not serve to distinguish the marks. It is a secondary word which, as disclosed by the applicant, serves to describe the flavour of the product in a range of TAKIS flavour variations.[22] The majority correctly excluded the word FUEGO from the comparison as it has no trademark significance. By the

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[16] *Adidas AG and Another v Pepkor Retail Limited* [2013] ZASCA 3 para 22.
[17] *Oude Meester supra* at 161F-G; *Budweiser Budvar National Corporation v Anheuser Busch Corporation* 2002 BIP 126 (RTM) at 130.
[18] *Golden Fried Chicken (Pty) Ltd v Vlachos and Another* [2022] ZASCA 150.
[19] Supra para 24.
[20] *Standard Bank of South Africa Ltd v United Bank Ltd* 1991 (4) SA 780 (T) at 782G-H and 796J-797A.
[21] It is not disputed that 'fuego' means 'fire' in Portuguese – i.e. hot flavoured chips.
[22] Other examples disclosed by the applicant include, TAKIS ORIGINAL, TAKIS SALSA BRAVE, TAKIS HUAKAMOLE, TAKIS PASTOR and TAKIS FUEGO.

same token, the words 'biltong' and 'very lekker' in the registered TAKIS LOGO marks, must also be excluded.

[16] Both marks contain the dominant distinctive common element TAKIS. As held by the majority, this dominant element renders the marks phonetically, visually, and conceptually, deceptively or confusingly similar. Visually, it is the word TAKIS that the consumer sees branded on the goods. The marks are also aurally and conceptually identical to the consumer. The marks are so similar, if not identical, that they arguably meet the standard required to be the same in all respects,[23] for the purposes of being deceptively or confusingly similar. Suffice it to say, the marks must only be deceptively or confusingly similar on one level of comparison.[24]

[17] Given its distinctive character, the applicant has made no attempt to distinguish the registered TAKIS LOGO marks from the impugned one. The assertion, in its answering affidavit, that it intends to oppose the respondent's pending class 30 applications comes as no surprise. By intending to do so, the applicant has accepted that the two marks are deceptively or confusingly similar. In the face of this concession, I see no sound or rational basis for concluding that there is a reasonable prospect of success on this ground. To sum up on this point, the two marks are sufficiently similar to create a likelihood of deception or confusion as contemplated in s 10(12) of the Trade Marks Act.

Are the goods similar?

[18] In *New Media Publishing (Pty) Ltd v Eating Out Webservices CC and Another*,[25] it was held that there is an interdependence between the 'comparison of marks' test and the 'comparison of goods' test. As confirmed by this Court in *Mettenheimer and Another v Zonquasdrift Vineyards CC and Others*, the greater the similarity between the marks in question the lesser will be the degree of similarity required between the goods, and *vice versa*.[26] This is of particular significance in this matter because the

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[23] *Century City Apartments Property Services CC and Another v Century City Property Owners' Association (Century City)* 2010 (3) SA 1 (SCA) para 12.
[24] *Laboratoire Lachartre SA v Armour-Dial Incorporated* 1976 (2) SA 744 (T) at 746H.
[25] *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 (5) SA 388 (C).
[26] *Mettenheimer and Another v Zonquasdrift Vineyards CC and Others* (*Mettenheimer*) 2014 (2) SA 204 (SCA) para 11.

trade marks in question are very similar, if not identical. Thus, the lesser will be the required degree of similarity between the goods in question.

[19] The applicant's primary ground of appeal is that the majority erred in concluding that the goods in question are similar. Its core complaint is that because the impugned marks are registered in different classes, the goods are clearly different. The one covers plant products and the other meat products. Their only similarity is that they are both food products, but their composition is vastly different. This argument is unsustainable as it is common cause that the goods covered by both marks are 'snack foods'. The applicant admitted as much in its answering affidavit when it said:

'Although both are snack foods, [the applicant] is primarily involved in the sale of tortilla chips, falling into class 30, whereas [the respondent] is primarily involved in the sale of meat products, falling into class 29. The products of [the respondent] are considered more 'healthy' snack foods ….'

'It is submitted that the meat products (and, indeed, the rest of the range that the [respondent] claims to sell are considered, by members of the public, as being more 'healthy' snacks. I submit, in this group, are nuts and dried fruit. Crisps are considered as one of the unhealthiest snacks.'

[20] However, the applicant does not dispute that class 29 meat products on which the respondent's registered TAKIS LOGO mark is used include, amongst others, biltong, dry wors, chicken biltong, game biltong, *biltong crisps*, stokkies, chilli *biltong crisps*, chilli biltong, peri-peri biltong, ostrich biltong, chilli stokkies, beef strips, salami sticks and cabanossi sticks etc. It, nevertheless, seeks to differentiate biltong crisps and chilli biltong crisps (as meat products) from 'potato or corn or other conventional types of crisps'. In view of its concession that all the goods in question are 'snack products' – which *de facto* make them similar and related goods – this attempt to differentiate the goods is pointless.

[21] The undisputed photographic evidence annexed to the respondent's founding affidavit confirms that snack foods such as biltong and related snack products are sold in convenience and retail stores side by side to other snack products including crisps/chips, ice-creams, popcorn, peanuts, and nuts in general. Not only did the applicant concede this in its answering affidavit, but it also conceded that the goods in question are sold in the same trade channels and to the same consumers. Notably,

the Sunday Times' GenNext Survey lists the registered TAKIS LOGO mark, in its 2012 to 2015 brand survey, as one of the top ten snack food brands, together with other chip and/or crisp brands. It is common cause, in this regard, that the average consumer is accustomed to offerings of snack foods such as chips and/or crisps and biltong at social functions and parties.

[22] In assessing the similarity of the goods concerned, the majority was correct in taking into consideration the factors set out in *British Sugar.*[27] These factors include (a) the respective uses of the goods; (b) their respective users; (c) the physical nature of the goods; (d) the trade channels; (e) where they are found in the supermarkets; and (f) whether or not they are competitive. On applying these factors to the marks in question, it is clear that:

(a) the respective uses of the respective goods are identical – all the goods are snack foods, and they are consumed as snack foods.

(b) the consumers who use the goods are identical – a consumer is anyone who purchases snack foods irrespective of age, gender, race, nationality etc.

(c) the physical nature of the goods is identical or similar – depending on what goods are considered. Chips and crisps are identical – be they made of potatoes or tortillas. This is conceded by the applicant in its answering affidavit. Meat crisps are also similar to potato or tortilla crisps – they are all crisps. Biltong, droëwors, nuts, Japanese crackers and other savoury snack foods are similar in nature to snack goods such as chips and crisps;

(d) the trade channels through which the goods reach the market are identical;

(e) the goods are sold, in the case of self-service consumer items in, amongst others, the same or the identical convenience and retail stores and are placed side by side on display shelves or even on the same shelf; and

(f) the goods compete as they are snack foods.

[23] The respondent has, accordingly, established for purposes of s 10(14) of the Trade Marks Act that the impugned mark was wrongly entered in the trade mark register as it is (a) identical to or so similar to the respondent's registered TAKIS LOGO

[27] *British Sugar* fn 3 supra which has been imported into our law. See *Mettenheimer* fn 26 para 11; *Pepsico Inc* fn 13 para 19.

marks; (b) used on the same or similar goods (snack foods) as the respondent's registered TAKIS LOGO marks are used; and (c) likely to deceive or cause confusion.

Is the impugned mark likely to take advantage of, or be detrimental to, the respondent's registered mark?

[24] Section 10(17) of the Trade Marks Act provides that a mark can be opposed or cancelled if it is identical to or similar to a trade mark which is already registered and which is well-known in the Republic, if the use of the mark sought to be registered would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of deception or confusion. The applicant has conceded that the respondent's registered TAKIS LOGO mark is well-known for biltong in South Africa. This means, without the need for more, that the respondent has the requisite reputation to sustain its s 10(17) case that the impugned mark is similar to the TAKIS LOGO mark which was registered some six years prior to it. As indicated, the two marks are, in fact, very similar if not identical.

[25] What remains for determination is whether the impugned mark would be likely to take advantage of, or be detrimental to, the distinctive character or repute of the registered TAKIS LOGO mark. As held by this Court in *National Brands Limited v Cape Cookies CC and Another (Cape Cookies)*:[28]

'Concrete evidence of actual advantage or detriment is not required under s 10(17). Only a likelihood needs to be shown. It seems to me that a well-founded basis for why it would be likely that an unfair advantage would be gained if registration takes place suffices. I agree that, as opposed to bare assertions, facts supporting such an inference must be put up. In any event, at the time that opposition proceedings are launched, concrete evidence may well not yet have emerged.'

[26] The applicant's use of the impugned mark is likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of its registered TAKIS LOGO marks. The respondent has provided the following supportive evidence in its founding affidavit:

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[28] *National Brands Limited v Cape Cookies CC and Another* [2023] ZASCA 93; [2023] 2 All SA 363 (SCA) para 38.

'[T]he the average consumer would be confused and deceived into believing that the [applicant's] product emanates from the [respondent] or is in some way associated with the [respondent]. The [applicant] will thus unfairly benefit from the reputation for quality and good products that the [respondent] has worked so hard to achieve over almost 40 years. The [applicant] will simply get a free marketing reputation at the expense of the [respondent]. It will enter the marketplace with a substantial reputation and consumer base already in place, and it will generate revenue at the expense of the [respondent]. This is so because the [applicant] will be selling snack foods that are identical to and similar to the [respondent's] products and it will in fact compete with the [respondent's goods]. The [applicants] goods will thus divert sales from the [respondent] and thus negatively impact on [its] revenue and profitability.'
The applicant responded with a bare denial.

Does the respondent have prior existing rights in class 30 goods?

[27] Section 10(16) of the Trade Marks Act allows for the expungement of a mark which is the subject of an earlier application from the trademark register, if the registration of that mark is contrary to existing rights of a person making the later application for registration. The respondent had sought to demonstrate that in respect of its pending applications in respect of class 30 goods, it had existing rights as of 6 June 2012.[29]

[28] However, as correctly pointed out by counsel for the applicant during argument, the respondent had, in so far as its reliance on s 10(16) of the Trade Marks Act is concerned, only pleaded existing rights in respect of its class 29 goods and not its class 30 goods. The argument that the applicant thus advanced, is that the majority had erred in concluding that the respondent had satisfied the requirements of s 10(16) of the Trade Marks Act. This is not a basis to grant the application for special leave to appeal. I take this view because the provisions of s 10 of the Trade Marks Act are self-standing grounds to either oppose the registration of a mark or seek its expungement from the trademark register. If any one of these grounds is established, then the court must either refuse the registration or expunge the mark from the register, whichever is the case.[30]

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[29] In terms of s 29(1) of the Trade Marks Act, the registration date of a trade mark is deemed to be the date when the application for registration was lodged. The applicant lodged its application to register the impugned mark on 6 June 2012.
[30] *Cape Cookies* fn 28 para 17.

[29] The respondent had succeeded in satisfying the requirements of ss 10(12), 10(14) and 10(17) of the Trade Marks Act. Accordingly, the majority concluded, correctly so, that the applicant's impugned mark was an entry wrongly made in, and wrongly remaining on, the trademark register and it thus fell to be cancelled in terms of ss 10(12), 10(14) and 10(17) of the Trade Marks Act. For these reasons, I am of the view that the proposed appeal has no reasonable prospects of success. More importantly, the applicant has failed to establish special circumstances. The application for special leave to appeal must, therefore, be dismissed with costs.

[30] In the result, I make the following order:

The application for the reconsideration of the order of this Court granted on 8 March 2022 dismissing the applicant's application for special leave to appeal is dismissed with costs.

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F KATHREE-SETILOANE

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	CE Puckrin SC and R Michau SC
Instructed by:	Hahn & Hahn Inc, Pretoria
	Webbers Attorneys, Bloemfontein
For the respondent:	P Cirone
Instructed by:	Kisch IP, Sandton
	Phatshoane Henney Inc, Bloemfontein