

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

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

28 August 2026  
DATE

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SIGNATURE

Case No. 232321 / 2025

In the matter between:

**WINSTON SCHOEMAN**

Applicant

and

**EVEXIA DAY INC**

First Respondent

**EVEXIA CAPITAL (PTY) LTD**

Second Respondent

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**ORDER**

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1. The condonation application is granted and the respondents are to pay the costs of that application on scale C.
  2. The application is dismissed.
  3. The applicant is to pay the respondents costs on scale C.

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**JUDGMENT**

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**TOLMAY J:**

## *Introduction*

[1] This is an application for final interdictory relief under section 34(1)(a) of the Trade Marks Act<sup>1</sup>, seeking to restrain the respondents from infringing the applicant's registered EVEXIA trade mark. The respondents have brought a conditional counter-application, to be considered only if the main application is not dismissed. In the counter-application they seek an order referring the matter to trial or, alternatively, to oral evidence. They also seek interim relief interdicting the applicant, pending final determination of the proceedings, from enforcing Trade Mark Registration No. 2016/31400 EVEXIA against them. The respondents further seek condonation for the late filing of their answering affidavit. The condonation application is unopposed, save that the applicant contends the respondents should pay its costs.

## *Background*

[2] The applicant is the proprietor of Trade Mark Registration No. 2016/31400 EVEXIA, registered in class 44. The application was filed on 27 October 2016 and the mark was registered on 29 March 2019. The first respondent, Evexia Day Inc (registration number 2015/358558/21), was incorporated on 8 October 2015 and has been trading as EVEXIA since then. The second respondent, Evexia Capital (Pty) Ltd (registration number 2017/113285/07), was incorporated on 4 April 2017 and has likewise been trading under the EVEXIA name.

[3] The applicant was an incorporator and director of the first respondent, and is an incorporator, director and shareholder of the second respondent. The first respondent is wholly owned by the second respondent. The respondents have used the EVEXIA trade mark openly and continuously in relation to wellness services since their respective incorporations. The first respondent was incorporated before the trade mark application was filed. The respondents contend that their use of the EVEXIA name and trade mark occurred with the applicant's knowledge and consent.

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<sup>1</sup> 194 of 1993, Section 34(1)(a) reads as follows:

“(1) The rights acquired by registration of a trade mark shall be infringed by-

(a) the unauthorized 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...”

[4] The respondents continued using the EVEXIA name after the trade mark was registered, while the applicant remained involved in their businesses. On 13 October 2025, the applicant, through his attorneys, sent correspondence purporting to withdraw their entitlement to use the EVEXIA trade mark. The respondents have nevertheless continued using the EVEXIA mark after that withdrawal.

*Issues to be determined*

[5] The issues for determination are whether the matter can be decided on the papers, or should be dismissed alternatively, be referred to oral evidence or trial. If it can be decided on the papers, whether the applicant was entitled to terminate the respondents' authority or entitlement to use the EVEXIA mark, whether the respondents' continued use of the mark constitutes infringement under section 34(1)(a) of the Trade Marks Act; and, if infringement is established, whether the applicant is entitled to the final interdict sought.

*Applicant's submissions*

[6] The applicant submitted that the respondents had raised no genuine, real or bona fide dispute of fact. In essence, the applicant argued that, as the registered proprietor of the trade mark, he had terminated his consent to the respondents, rendering their continued use unauthorised. On that basis, the application should be granted and the counter-application for referral dismissed.

[7] It was argued that the answering affidavit merely identifies issues that can be decided on the papers, because the respondents have advanced no contrary facts. Nor do they indicate that such facts could or would be produced if the matter were referred to trial. In relation to the issues relied on to justify a referral - namely, what investors knew about trade mark ownership when they invested and the nature of the consent given - the affidavit relies on unconfirmed and inadmissible hearsay evidence.

[8] The applicant says that the respondents do not allege that the authorisation was granted in perpetuity. The ordinary interpretive position is that, where an agreement is silent on duration, it may be terminated on reasonable notice.<sup>2</sup> The reply also shows, so the argument went, with reference to documents, that royalties

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<sup>2</sup> *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) SA 809 (A) at para 16.

may have been payable for use of the mark and that supports the conclusion that the licence was terminable. The applicant contends that, because the respondents were not the proprietors of the trade mark, they could not lawfully use it without his consent and the respondents accept that their use was authorised by consent.

[9] The applicant contends that the view that the respondents' open and continuous use of the trade mark since incorporation is merely evidence of use; it says nothing about the circumstances in which consent to use them could be withdrawn. Nor is it material that the respondents' operating licence was issued in the name Evexia. The suggestion that the mark is bound up with the respondents' identity, or that they could not exist or trade without it, is misplaced. Evexia is a company name, not an inseparable part of the respondent, nor does the fact that the respondents have the trade mark in their company names have any bearing on the licence terms.

[10] The applicant relies on the principle that goodwill attaches to the trade mark proprietor.<sup>3</sup> The allegation that the applicant has brought the application for an improper motive because he is using his ownership of the trade mark to extract a higher price for his shares, even if it were true, would not constitute a defence as the Trade mark infringement is objective.<sup>4</sup>

[11] The applicant submits that the respondents' reliance on estoppel and waiver is untenable. The evidence does not establish a perpetual licence to use the trade mark. Waiver also requires proof that the applicant chose to abandon his trade mark rights, and no such evidence exists. The applicant therefore contends that he is entitled to the relief sought.

### *Respondent's submissions*

[12] The respondents argue that, because the terms of the use agreement are disputed, the Court must resolve that dispute before finding that their continued use was unauthorised under section 34(1)(a). They contend that, properly interpreted in light of the parties' objectively manifested intention and their conduct over several

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<sup>3</sup> *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) at para 37 – 39.

<sup>4</sup> *Puma AG Rudolf Dassler Sport v Global Warming (Pty) Ltd* 2010 (2) SA 600 (SCA) at para 11 (Puma).

years, they acquired a right to use the EVEXIA trade mark, which the applicant could not unilaterally withdraw in the manner he did.

[13] The respondents contend that oral evidence is required to determine what the terms of the use agreement of the trade mark were and whether the authorisation could have been terminated by mere notice. They also submit that use of the trade mark was incidental to the applicant's continued shareholding. The correspondence, they say, supports that contention and demonstrates the need for evidence on the terms governing use of the trade mark. The applicant bears the onus of proving that the trade mark use was unauthorised and mere use by another party, without more, does not establish infringement.

[14] The respondents argue that, even if their continued use of the EVEXIA trade mark would otherwise constitute infringement, which they deny, the applicant is precluded from relying on it based on waiver alternatively, estoppel.

### *Analysis*

[15] It is undisputed that goodwill in a trade mark vests in the registered proprietor. That, however, is not the issue in this matter. The question is whether the respondents' continued use of the EVEXIA trade mark, after the applicant's unilateral withdrawal of consent, constitutes unauthorised use under section 34 of the Trade Marks Act on the papers before the Court. It is common cause that the respondents used the trade mark for an extended period.

[16] Section 34(1)(a) provides that a registered trade mark is infringed by unauthorised use, in the course of trade and in relation to the goods or services for which it is registered, of an identical mark or a mark so similar that it is likely to deceive or cause confusion. The central issue here is whether the respondents' continued use was unauthorised. The applicant bears the onus of proving that the respondents' continued use of the EVEXIA trade mark is unauthorised and therefore infringes the rights conferred by registration. In his founding affidavit, the applicant relies only on the fact that, as registered owner, he terminated his consent to the respondents' use of the trade mark and therefore continued use constitutes infringement.

[17] In *Rage Distribution (Pty) Ltd v Rage Footwear 1999 CC and Another*<sup>5</sup>, the Court held that, where a trade mark proprietor alleges infringement after terminating a licence or permission to use the mark, the infringement enquiry requires the Court first to determine the existence, nature and terms of that licence. Only then can it decide whether the subsequent use was unauthorised. The Court confirmed that a trade mark licence is simply an authorisation to use the proprietor's monopoly rights, and that such a licence may be written, oral or inferred from the parties' conduct.<sup>6</sup> Where the terms of the use agreement are disputed, the Court must resolve that dispute before determining whether the respondents' continued use was unauthorised under section 34(1)(a).

[18] In deciding whether the respondents' continued use of the EVEXIA trade mark was authorised in terms of the use agreement the Court should consider the intention as objectively manifested by the parties' words and conduct, within the factual matrix applicable to their contract.<sup>7</sup> Oral evidence will be required to determine the conditions governing the respondents' use of the trade mark, having regard to the parties' conduct in performing their obligations.<sup>8</sup> The applicant's argument that in the absence of proof of use in perpetuity, he was entitled to withdraw consent, does not bear scrutiny. It is an oversimplification of the matter and loses sight of the fact that the respondents may still prove the existence of terms of use that may exclude unilateral withdrawal of consent.

[19] The respondents also rely on waiver, alternatively estoppel and argues that objectively considered, the applicant's conduct is inconsistent with an intention to insist that the respondents' use was merely a temporary indulgence capable of being withdrawn at will. The applicant's conduct objectively considered may convey that the respondents are entitled to continue using the EVEXIA trade mark as part of the parties' ongoing commercial relationship. Waiver or estoppel may be proven if evidence is led based on the allegations made in the answering affidavit.

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<sup>5</sup> (037824/2023) [2026] ZAGPPHC 511.

<sup>6</sup> Id. Par23-24.

<sup>7</sup> *Unica Iron and Steel (Pty) Ltd v Mirchandani* 2016 (2) SA 307 (SCA) at para [21]; *Investec Bank Ltd v Erf 436 Elandspoort (Pty) Ltd and Others* 2021 (1) SA 28 (SCA) para [29].

<sup>8</sup> *Rane Investments Trust v Commissioner, South African Revenue Service* 2003 (6) SA 332 (SCA) 346 at para [27].

[20] In *Kootbodien and Another v Mitchell's Plain Electrical Plumbing and Building CC and Others*<sup>9</sup>, the Court dealing with the test for waiver stated as follows:

“ The test for the waiver is succinctly set out as follows in *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at 49H: 'The test to determine intention to waive has been said to be objective (cf *Palmer v Poulter* 1983 (4) SA 11 (T) at 20C – 21A; *Multilateral Motor Vehicle Accidents Fund v Meyerowitz* 1995 (1) SA 23 (C) at 26H – 27G; *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) at 543A – 544D). That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations (cf *Traub v Barclays National Bank Ltd*; *Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634H – 635D; *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 792B – E); secondly, that mental reservations, not communicated, are of no legal consequence (*Mutual Life Insurance Co of New York v Ingle* 1910 TS 540 at 550); and, thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes.’”<sup>10</sup>

This confirms that intention is determined by a party's outward conduct and statements, not by unexpressed reservations, which have no legal effect. Those manifestations must be assessed from the standpoint of the other party.

[21] The respondent's standpoint was that the applicant's understanding of the basis on which the trade mark was used is set out in a letter from his attorneys dated 1 April 2025, which states:

“Evexia Capital was permitted to use the trademark free of charge, as an incidence of his shareholding.”

This the respondents say is indicative of the fact that the use of the trade mark is linked to the applicant's shareholding.

[22] The letter expressly admits that the respondents were authorised to use the trade mark. It identifies the legal basis for that authority, according to the applicant, as his shareholding in Evexia Capital. It does not state that the permission was revocable at the applicant's election, or that it could be withdrawn unilaterally while that shareholding continued. It is common cause that the applicant remains a shareholder. His own explanation is therefore consistent with the respondents' case

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<sup>9</sup> 2011 (4) SA 624 (WCC).

<sup>10</sup> Id. Par.50.

that the authority to use the EVEXIA trade mark arose from the parties' commercial and shareholder relationship. That explanation gives rise to a genuine dispute about the legal basis on which the respondents acquired the right to use the trade mark, whether that right was intended to endure for as long as the applicant remained a shareholder in Evexia Capital; whether the authority could be withdrawn unilaterally; and whether, on the facts, the respondents' continued use became "unauthorised" for purposes of section 34(1)(a) of the Trade Marks Act.

[23] The applicant bears the onus of proving that the respondents' continued use of the EVEXIA trade mark is unauthorised within the meaning of section 34(1)(a) of the Trade Marks Act. Registration alone does not render every use by another party infringing. Where the proprietor initially authorised the use, the decisive enquiry is whether that authority was lawfully terminated.

[24] The applicant does not explain why the authority said to arise from his shareholding ended while that shareholding continued, or on what legal basis he could unilaterally withdraw it. This makes clear that the applicant's case rests on his status as the registered owner of the trade mark and his asserted entitlement to withdraw consent. The issue, however, is not that straightforward.

[25] As recognised in *Rage Distribution*,<sup>11</sup> the Court must determine whether the parties commonly intended the agreement to be terminable. The respondents' version is that use of the mark was not terminable at will and that, even if termination was competent, it could not take effect without having taken regard to the corporate arrangement and shareholder interests.

[26] After years of acquiescence and express acknowledgment of the respondents' entitlement, it may well be inequitable to allow the applicant to contend that use by the respondents has become unauthorised, without first establishing that the legal basis for that entitlement was lawfully terminated. The applicant's own conduct precludes him from asserting that the respondents' continued use of the EVEXIA trade mark is unauthorised.

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<sup>11</sup> Id paras.117-119.

[27] An analysis of the papers and the parties' arguments shows that genuine and bona fide disputes of fact exist that cannot be determined on the papers. The dispute centres on whether the applicant was entitled to terminate consent to use the trade mark and whether the respondents' continued use was unauthorised. It is well established that disputes of fact should not be resolved solely on probabilities arising from contradictory affidavits.<sup>12</sup> In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*<sup>13</sup> it was explained that:

“... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justify such an order ...”

In this instance the facts do not justify the granting of a final interdict.

[28] The terms and conditions governing use of the trade mark are disputed, and the respondents' continued use depends on the parties' common intention. The applicant persisted in contending that no bona fide dispute of fact exists, and that the matter should be decided on the papers. Therefore, the appropriate order is that the application is dismissed.

[29] The respondents argue that the applicant's persistence with the application was vexatious in the extended sense of the term. They submit that it unnecessarily required the delivery of an answering affidavit and argument, despite the disputes being apparent before the answering affidavit was filed. They therefore contend that the applicant should pay costs on the attorney-and-client scale. I am however not in agreement with the view that the application was vexatious even if the application was ill-conceived and will therefore only grant costs on a party and party scale.

[30] The following order is made:

1. The condonation application is granted, and the respondents are to pay the costs of that application on scale C.
2. The application is dismissed.
3. The applicant is to pay the respondents costs on scale C.

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<sup>12</sup> *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162.

<sup>13</sup> 1984 (3) SA 623 (A) at 634.

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**R TOLMAY**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 August 2026.

**APPEARANCES:**

|                     |   |                              |
|---------------------|---|------------------------------|
| For the Applicant   | : | Adv CW Pretorius             |
| Instructed by       | : | Hahn & Hahn Attorneys        |
| For the Respondents | : | Van der Merwe and Associates |
| Instructed by       | : | Adv HP Wessels               |
| Matter heard on     | : | 12 August 2026               |
| Judgment date       | : | 28 August 2026               |