REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA.

Case Number: 59246/21

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

[redacted]

9 September 2024

DATE SIGNATURE

In the matter between:

DESIGNER WATER (PTY) LTD (Registration Number: 2013/007954/07)	Applicant
and	
ALKAMAX BEVERAGES (PTY) LTD **(Registration Number: K2021/903693/07)**	First Respondent
SIPHO PADINGTON VILAKAZI	Second Respondent
THAMSANQA SUNNY MDLALOSE	Third Respondent
SONIA MBELE	Fourth Respondent

JUDGMENT

NOKO J

Introduction

[1] The applicant launched an application for leave to appeal the judgment and order I granted on 11 July 2024. I had dismissed an application for interim order against the respondents from, *inter alia*, using the name AlkamaX for its bottling water business as it allegedly infringes on the applicant's trademark, alternatively, Copyright Act, or unlawful competition of passing off.

Background

[2] The background facts of the case are detailed in my judgment and will be summarised for the purposes of this judgment. The applicant is in the water bottling business which is caried under the name and style Alkaline water PH 10 (*"logo"*). It is alleged that it is the only company whose bottled water can retain PH of 10 for a period of three years. It has established itself in the market and has a sizeable market share. The said logo is registered as a trademark with Companies and Intellectual Property Registration Commission ("*CIPC"*) under registration number 2019/05158 and as such the applicant is entitled to the exclusive use thereof. The applicant stated that a decision was taken to establish and launch and new brand name Alkamax. The second respondent who was the designer on the employ of the applicant was instructed to design a logo intended for Alkamax products to be used in future. The said name was also reserved as a domain name on internet for future use. The word supercharged is also used on its website.

[3] The second respondent had access to confidential information, master suppliers and clients of the applicant in his position as an employee of the applicant. he in addition had access to the fabric where the bottling was done.

[4] The second respondent took employment with first respondent who is a competitor and provided some information obtained during his tenure at the applicant which has the effect of giving the first respondent unfair advantage. The applicant specifically contends that the second respondent took photos of the manufacturing factory, name and the logo and availed same to the first respondent and the later has exploited them. The first respondent is currently exploiting that information to its advantage and with no benefit to the applicant.

[5] The applicant sought an interim interdict that the respondents be ordered not to use the name Alkamax water of PH 10 as it infringes on its trademark registered under registration number 2019/05158 which conduct is in contravention of section 34 of the Trade Marks Act[1]. Further that the applicant should be interdicted from making false declaration of its water quality which is in contravention of section 41 of the Consumer Act.[2] Such declaration including usage of its nutritional table on its products.

[6] The respondent contended, correctly as mirrored in my judgment, that the applicant's case is found wanting for various reasons, first, the applicant has failed to satisfy the requirements for the application of an interim interdict. Second, the applicant has failed to satisfy the requirements set out for a recourse in terms of Trade Marks Act or Copyright Act and Consumer Protection Act. Thirdly the applicant failed to attach agreements which set out the terms and conditions which clearly restrain the second respondent not to disclose confidential information. Fourth, the applicant has failed to disclose list of companies with whom the applicant has Master Agreements despite having undertaken to avail same at court. Finally, that the applicant has failed to prove that the CEO of the applicant has failed to prove that he is a South African.

[7] The applicant is aggrieved about my judgment and brought application for leave to appeal which set out grounds though not clearly delineated.

[8] The applicant contends that it was not necessary that the court should consider whether the requirements for the CPA were satisfied as contravention of the statute in itself is sufficient to warrant issuing of an interdict. In retort the respondent submitted that this should not be considered since it has not been raised as a ground for the leave to appeal.

[9] In relation to the argument that the applicant is not entitled to the design as the draft thereof was rejected by the applicant the latter retorted that even though the logo may have been rejected the applicant remains the owner thereof. The respondent contended in retort that the requirements set out in terms of section 21(1)(d) of the

[1] Trade Marks Act 194 of 1993.
[2] Consumer Protection Act

Copyrights Act were not satisfied. The applicant failed to advance argument to gainsay this contention.

Legal principles and analysis

[10] Section 17 of the Superior Courts Act provides that leave to appeal would be granted where the court is, *inter alia*, of the opinion that the appeal would have a reasonable prospect of success and/or further that there is a compelling reason for the appeal to be heard.

[11] It is now trite[3] that the provisions of section 17 introduced a higher threshold to be met in the application for leave to appeal and the usage of the word "would" require the applicant to demonstrate that another court would come to a different conclusion.

[12] The mere possibility of success, an arguable case, or one that is not hopeless is not enough.[4] There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.[5]

[13] The applicant has still failed to present a persuasive argument that a prima facie right has been established that the recourse in terms of section 41 of the CPA has been satisfied. The applicant seek to introduce a new argument that its redress could still be granted even if there is no reference to section 41 of the CPA. This argument cannot be correct as the judgment was based on section 41 as pleaded. In any event the applicant failed to comply with the procedural requirements necessary to introduce news fact during the leave to appeal.

[14] The applicant has failed to demonstrate the basis to contend that I erred in concluding that the applicant is entitled to the exclusive use of the words AlkamaX,

[3] *Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325; *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 "*Mkhitha*"); *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] ZAGPPHC 489.
[4] *Mkhitha* id at para 17.
[5] *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at para 7.

supercharged and or PH 10 and further that there is a good grounds for a recourse under passing off for the usage of those terms.

[15] The applicant has still failed to advance a persuasive argument that an interdict should be granted despite its failure to attach correct employment agreement upon which a claim breach of confidential information is predicated and further failing to disclose the said confidential information. That such interdict should be granted without proving that there are agreements entered into with any major distributor or at least attaching few agreements of those.

[16] I also remained impervious that there is no need for the CEO of the applicant to prove that he is a South African in relation to a prayer for the respondent to be interdicted that the CEO is not a South African. To this end the applicant contends that an allegation to that effect is sufficient and there was no need to attach his parents' affidavits to support the allegation. The applicant still failed to explain the basis for failing to attach even a copy of the identity document.

[17] The objective of an interim order is to arrest certain conduct from continuing pending the finalisation of the adjudication of the main dispute. The applicant appears not to be eager to see to the finality of the main application which was launched some four years ago and the conduct complained of appears not continuing to warrant any intervention by the court.

[18] In the premises, I remain impervious that the applicant has succeeded in demonstrating that another court would come to a different conclusion. There is also no other reason why the appeal should be heard or there are conflicting judgments on the matter under consideration. In the premises, the application for leave to appeal is bound to fail.

Costs

[19] It is trite that the issue of costs is within the discretion of the court. In addition, it is also a general principle that the costs should follow the results. There is no basis to uproot the said principle and I therefore hold that the application is bound to be dismissed with costs.

Order

[20] In the premises I grant the following order:

That the application for leave to appeal is dismissed with costs

[redacted]

M V Noko
Judge of the High Court

This judgement was 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 of the judgment is deemed to be 9 September 2024.

Date of hearing:	19 July 2024
Date of judgment:	9 September 2024.

Appearances

For the Applicant:	Adv T L Marolen
Attorneys for the Applicant:	Lawtons Incorporated
For the Respondent:	Adv M Desai
Attorneys for the Respondent	Govender Patel Dladla Inc