Online Lottery Services (Pty) Ltd v National Lotteries Board and others
[2007] 1 All SA 618 (T)

Division:	Transvaal Provincial Division
Date:	4 October 2006
Case No:	21917/2004
Before:	J Motata J
Sourced by:	M Snyman and D Cloete
Summarised by:	D Harris

. Editor's Summary . Cases Referred to . Judgment .

[1] Delict - Unlawful competition - Passing off - Test - Whether the resemblance between the competing products is such that there is a reasonable likelihood that ordinary members of the public, or a substantial number thereof, may be confused or deceived into believing that the merchandise of the alleged wrongdoer is that of the aggrieved party or is connected therewith.

[2] Intellectual property - Trade marks - Application for expungement - Whether trade mark is distinctive.

[3] Intellectual property - Trade marks - Infringement of - Application for interdict - Trade Marks Act 194 of 1993 - Section 34(1) - Applicant must establish 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.

Editor's Summary

Two applications were before the Court. The first, referred to as the "interdict application", was brought by the National Lotteries Board ("the Board") and the holder of the sole licence to conduct the national lottery ("Uthingo"). The latter two parties sought an interdict against the respondent in that application ("Online"). The second application was brought by Online, for the expungement from the trade marks register of a trade mark registered by the Board and Uthingo.

The Board was the registered proprietor of the trade mark "LOTTO", and Uthingo was a registered user of the mark.

Held - *(i) The interdict application*

Uthingo had at all times used the registered trade marks strictly under the directions and control of the Board. Without the Board's authority, Online began selling tickets for the lottery via internet and via the small message service provided by mobile telephone networks. It used the trade name "LottoFun". In doing so, it was, according to the Board, infringing the latter's trade mark and unlawfully competing with the Board and Uthingo.

The Court set out the established requirements for a final interdict, viz a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other remedy.

To succeed in an application based on section 34(1)(*a*) of the Trade Marks Act 194 of 1993 the applicant must establish 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.

The respondent was unable to satisfy the court that its use of the LottoFun mark was not in relation to services in respect of which the trade marks were registered or that the services which it rendered were not services which were similar to the services in respect of which the trade marks were registered. Thus, the issue in dispute was limited to whether there was a likelihood of deception or confusion.

The evidence established that there was no business relationship between Uthingo and Online. However, the latter went on to conduct business as if authorised by the Board and Uthingo. The Court pointed out that passing-off is a species of the broader delict of "unlawful competition", characterised mainly by misrepresentation of a particular kind. A passing-off is unlawful because it is calculated to result in the improper filching of another's trade and an improper infringement of his goodwill and/or because it may cause injury to that other's trade or reputation. The test remains whether the resemblance between the competing products is such that there is a reasonable likelihood that ordinary members of the public, or a substantial number thereof, may be confused or deceived into believing that the merchandise of the alleged wrongdoer is that of the aggrieved party or is connected therewith. The rights infringed by passing-off are the applicant's rights in an existing goodwill. Before the likelihood or otherwise of deception or confusion between the two competing products is considered it is necessary for the applicant to establish as a pre-requisite a reputation in the get-up on which it relies. The Board and Uthingo in this case had satisfied the above test, showing as they had, that the Lotto trade mark had become distinctive. The Court accordingly granted the interdict sought.

(ii) The expungement application

The Court held that in considering of the expungement application it would have regard to material contained in the interdict application. The issue in the expungement application boiled down to whether the Lotto trade mark was sufficiently distinctive to warrant registration as an exclusive use mark. The Court found that it was and dismissed the application.

Notes

For Intellectual Property (Trade Marks) see:

- *LAWSA* First Reissue (Vol 29, paras 1-306)

Cases referred to in judgment

Bata Limited v Face Fashions CC and another 2001 (1) SA 844 (SCA)	627
Beecham Group plc and another v Triomed (Pty) Ltd [2002] 4 All SA 193 (2003 (3) SA 639) (SCA)	635
Brian Boswell Circus (Pty) Ltd and another v Boswell Wilkie Circus (Pty) Ltd 1985 (4) SA 466 (A)	629
Caterham Car Sales and Coachworks Ltd v Birkin Cars (Pty) Ltd [1998] 3 All SA 175 (1998 (3) SA 938) (SCA)	630
Danco Clothing (Pty) Ltd v Nu-Care Marketing Sales and Promotions (Pty) Ltd and another 1991 (4) SA 850 (A)	627
Hoechst Pharmaceutical (Pty) Ltd v The Beauty Box (Pty) Ltd (in liquidation) and Another 1987 (2) SA 600 (A)	629
Kellog Co and another v Bokomo Co-operative Ltd 1997 (2) SA 725 (C)	628

Klisser's Farmhouse Bakeries Ltd v Harvest Bakeries Ltd 1989 RPC 27	630
Lorimar Productions and others v Sterling Clothing Manufacturers (Pty) Ltd 1981 (3) SA 1129 (T)	629
Ngqumba en andere v Die Staatspresident en andere 1988 (4) SA 224 (A)	626
Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)	626
Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son 1993 (2) SA 307 (A)	628
Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)	626
Sabel BV v Puma AG, Rudolf Dassler Sport [1998] RPC 199	628
South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and another 2003 (3) SA 313 (SCA)	634

Judgment

MOTATA J:

There are two applications before this Court namely an application under case number 15574/04 and 21917/04. National Lotteries Board and Uthingo Management (Pty) Ltd are the applicants in the first case seeking an interdict against Online Lottery Services (Pty) Ltd as respondent. The second application is by Online Lottery Services (Pty) Ltd as applicant against National Lotteries Board, Uthingo Management (Pty) Ltd and the Registrar of Trade Marks as respondents directing the third respondent to rectify the register of trade marks by the expungement thereof of the registration of a trade mark by the first and second respondents. In this judgment the applications shall be referred to as the interdict and expungement applications respectively.

In the first application the first applicant, namely the National Lotteries Board was established in terms of the Lotteries Act 57 of 1997 ("the Lotteries Act"). The functions of the first applicant are *inter alia* to ensure that the National Lottery provided for in the Lotteries Act is conducted with due propriety and to ensure that the interest of every participant in the National Lottery is adequately protected.

The first applicant is a registered proprietor of the trade mark LOTTO in class 36 (in respect of services for and in connection with financial transactions), trade mark registration number 91/027/02/01, and in class 41 (services for and in connection with Lotteries), trade mark number 91/020701 (the LOTTO trade mark).

In terms of a notice published in the patent journal of May 1997 certain amendments were effected to the specification of goods and services. Lottery services had previously fallen into class 36 but were, in terms of the abovementioned notice reclassified into class 41. The first applicant applied for an amendment to the specification of services, the effect of which was that the existing trade mark under number 91/02702 was amended to reflect the

trade mark registration number 91/02702 in class 41 and trade mark registration number 91/02702/01 in class 36, for the specification of services for which the marks are presently registered.

Certificates under the hand of the Registrar of Trade Marks reflecting the details of the registrations of the LOTTO trade mark with which the application

is contained were on 23 March 2004. The first certificate is 1991/02702/1 and the second 1991/02702 and annexed to the papers before court.

The second applicant is Uthingo Management (Pty) Ltd. The second applicant was, in August 1999, granted the sole licence, in accordance with the Lotteries Act, to conduct the National Lottery. This licence will endure until 31 March 2007. The second applicant acquired the trade mark registration number 1991/02702 in class 36 by assignment from the then proprietor of the mark with effect from 9 September 1999.

The first applicant acquired the trade mark registration number 1991/02702 by assignment from the second applicant with effect from 11 February 2000 from which date the second applicant became a permitted user thereof.

The second applicant was recorded as a registered user of the LOTTO trade mark as registered under number 1991/02702 for all the services to which that registration applied on 10 January 2003 and such recording of the second applicant as a registered user persists.

The respondent is Online Lottery Services (Pty) Ltd. The respondent trades as LottoFun.

At the commencement of the hearing there were two applications to strike out by the first and second applicants as applicants in the present matter and by the first and second respondents in the second application. The import of the striking-out were that certain paragraphs in the answering affidavit of Jason Marc Schmulian constituted hearsay evidence and that as such were inadmissible as evidence and on the ground that it was in any event irrelevant and similarly on the second application by the first and second respondents on the founding affidavit filed on behalf of the applicant being Online Lotteries Services (Pty) Ltd were either hearsay and/or irrelevant to the issues to be determined in these applications. The documents which were sought to be struck out consisted of approximately 600-700 pages.

After listening to both sets of counsel the applications were granted with costs consequent upon the employment of two counsel and that reasons would be in the main judgment.

Counsel for the applicants in both applications argued that most of the matters which are raised in the answering affidavit are matters which arose after the replying affidavit and as such, such matters cannot be considered by this Court. Secondly that the matters are irrelevant meaning that the allegations do not apply to the matter in hand or which do not contribute one way or another to a decision of such matter.

Although the court has a general discretion concerning striking out, this procedure is governed by rule 6(12) of the Uniform Rules of Court. And the court should in the circumstances be satisfied that such matter is irrelevant and or would be prejudicial if not granted.

The striking-out applications are based on the grounds that the matter is hearsay, that it is irrelevant; or that it is not proper material for reply.

The respondent contends that the Court must have a bird's eye view of the circumstances leading to the furnishing of this evidence in order to assist the court in having a reception of facts that of what is relevant in the issue before this Court. In essence the argument is that the LOTTO mark is loosely used by many countries irrespective of whether the applicants are members or not.

I cannot agree with this argument. One has to look at the ordinary meaning of the word in the Oxford Dictionary. What the Oxford English Dictionary describes as irrelevant matter that is allegations which do not apply to the matter in hand or which do not contribute one way or another to a decision of such matter. In my view these matters which have been described as hearsay or inadmissible or irrelevant do not contribute one way or another to a decision of such a matter and as such it would be even prejudicial in a sense that it was raised in reply and would afford the applicant's considerable analysis to weigh their option whether to controvert it or not. In those circumstances I made the order as alluded to above.

I now deal with the interdict application. The second applicant has at all times used the registered trade marks strictly under the directions and control of the first applicant. The respondent without the authority of the first or second applicants conducted the business which enabled members of the public to order and purchase tickets for the LOTTO game, which forms part of the National Lottery, via internet and via the small message service (sms service) provided by mobile telephone networks, and that in the conduct of its business the respondent is infringing the registered trade marks: is passing off its business and services as being those of the first applicant or as being connected in the course of trade with the first applicant: is contravening certain of the provisions of the Lotteries Act and is competing unlawfully with the first and second applicants.

The first applicant brings this application in order to fulfil its obligations in terms of the Lotteries Act to ensure that the interests of every participant in the National Lottery are adequately protected.

A brief detail relating to the respondent are that on 24 February 2000 a company was registered as Equistock Holdings 169 (Pty) Ltd. In terms of a special resolution registered on 19 September 2000 Equistock Holdings 169 (Pty) Ltd underwent a change of name to LottoFun (Pty) Ltd. At the time the directors of LottoFun (Pty) Ltd were David Sean Ockner and Andrè Benjamin de Beer. The main object of the company was stated to be "Online Lotto Services". As at 2000 the directors are now Messrs Bloom, Robinson and Schmulian, and the main object of a company is now "electronic and commerce and related services".

In September 2001 the first applicant lodged a written complaint in terms of section 45 of the Companies Act 61 of 1973 objecting to the use of the name LottoFun (Pty) Ltd, on the grounds that the first applicant is the registered proprietor of various trade marks for the name and trade mark LOTTO which exists in certain classes. The respondent's companies' name suggested that there was an association with the National Lottery and that the name and the main object of the respondent falls within the ambit of the specification of goods and services which the applicant trades in and this respondent's name will likely cause deception and confusion in the trade and market place into believing that there is some connection in the course of trade between the applicant and the respondent whereas such connection did not exist.

Pursuant to this complaint in terms of section 45 of the Companies Act the respondent changed its name from what was "LottoFun (Pty) Ltd" to its present "Online Lottery Services (Pty) Ltd".

There were, however, certain exchanges which took place between the parties between the period March 2000 to May 2001 and thereafter. The applicants

maintain that "no business relationship between the respondent and the second applicant was ever concluded and that the respondent has not been granted any authority to sell the tickets for the LOTTO game fun via the internet or at all".

The LOTTO game forms part of the National Lottery. It is operated by the second applicant. Subsequent to the licence being granted to it, and pursuant to section 14(2)(*g*) of the Lotteries Act, the second applicant devised the LOTTO game rules (the rules which are the rules that applied to the LOTTO game). The LOTTO game is played by persons from all walks of life ranging through the full spectrum of the South African population. The second applicant sells the LOTTO game ticket countrywide via a network of authorised retailers and retail outlets. The relationship between the second applicant and the retailer is governed by a written agreement. A detailed probity check is conducted in respect of all applicants who applied to become retailers. The second applicant authorises as retailers only those applicants whom it can trust to ensure transparency, integrity and fairness in the entire process.

During March 2004 a written agreement was concluded between Newbucks Operation (Pty) Ltd (Newbucks) and the second applicant in terms of which the second applicant, as it was entitled to do, appointed Newbucks to provide mail subscriptions to the e-bucks shop for a period enduring until 31 March 2007. In terms of this agreement Newbucks is entitled to sell tickets for the LOTTO game via its website operating under the name and style of "play LOTTO with your e-bucks". This LOTTO game is played by subscription to stringent conditions as provided for in rule 10 of its rules. Consequently tickets for the LOTTO game are available for sale over the internet and from two different entities one of which is authorised and entitled to so sell them and one of which is not. The applicant contends that the likelihood of deception and confusion between the activities of the respondent and those of the first applicant on the one hand and its authorised licensee, the second applicant, on the other hand, is increased as a consequence thereof.

The respondent, however, denies that it sells Lottery tickets and further denies that there is any likelihood of deception or confusion between Newbucks or the two applicants and the respondent and denies that "this likelihood of confusion or deception is increased as a result of the arrival of Newbucks or the ongoing activities of the respondent".

The respondent conducts business of providing "Online Lotto Services" which can be found on its website wherein it is stated that "LottoFun specialises in the South African National Lottery and Online Lottery tickets" and that "LottoFun is an independent operator and has no direct affiliation with the South African National Lottery, the National Lotteries Board and/or Uthingo Management (Pty) Ltd" and further that "LottoFun is owned by Online Lottery Services (Pty) Ltd, a limited liability company incorporated in the Republic of South Africa".

That any member of the public who wishes to order the LOTTO game tickets via the internet or sms, can register with the respondent online by completing the registration form. The individual having registered must then deposit funds into the LottoFun banking account and those funds will be utilised for the purchase of the LOTTO game tickets. Any such monies may be held by the respondent or anyone or more unidentified third parties, without prior notice of this being given to the respondents' customers. Having

registered and deposited the funds, an individual can then order the Lotto game tickets online by submitting his numbers to the respondent via e-mail so that the tickets can be issued.

On the respondent's terms and conditions as contained in the website the respondent expressly states that its terms and conditions are not governed by the provisions of the Banks Act 94 of 1990 or the Deposits-taking Institutions Amendment Act 9 of 1993. That monies advanced are accordingly not held pursuant to those acts. It further states that in terms of the respondent's terms and conditions the respondent has no liability whatsoever for any breach of conditions including its obligations due to courses beyond its control including server operation

interruption, telecommunications interruptions, interruptions of power and the like.

However, what is significant is that in terms of its clauses the respondents' terms to customers are that

"LottoFun.com makes no warranty that:

1. The service will meet your requirements;
2. The service will be interrupted, timely, secure;
3. The results that may be obtained from the use of the service will be accurate or reliable;
4. The quality of any products, services, information or other material purchased or obtained by you through the service will meet your expectation; and
5. Any errors in the software or website will be corrected."

Whilst the respondent makes the statement in that part of its website entitled "about LottoFun" that it purchases and holds tickets as an "agent", and whilst the respondent states in its terms and conditions that it does not sell Lottery tickets but acts merely as an agent, a consideration of all the facts would appear to establish that, as the applicants contend, that it sells tickets to members of the public. Many of its terms and conditions are simply a stratagem in an attempt to avoid infringing various sections of the Lotteries Act. The respondents' intention and the impression it wishes to convey to the public are clearly set out on his website.

The statement "Online Lottery Services is an independent company and is not associated with the South African National Lottery in any way whatsoever" appears at the end of each document and it is given no prominence in the sense that it is in any way highlighted for the particular attention of any reader. The applicants contend that it is unlikely to be seen by any internet user visiting the site for purposes of purchasing tickets for the LOTTO game online.

In this regard the applicants contend that the use by the respondent of LottoFun, either as one word or as two words, the one above the other, whether as part of the domain name or as part of that which is displayed when the domain is accessed:

1. Is use in the course of trade;
2. In relation to goods or services in respect of which the Lotto trade marks are registered or similar services;
3. Of an identical mark, or of a mark so nearly resembling the registered trade marks as to be likely to deceive or cause confusion.

For the above reasons the applicants contend that the use by the respondent of LottoFun is unauthorised and in the circumstances the use by the respondent of

LottoFun is an infringement of the registered trade marks in terms of section 34(1)(*a*) of the Trade Marks Act 194 of 1993.

The relief sought by the applicants as found in the notice of motion can be dealt with under two headings; on the one hand the relief is relating to trade mark infringement and passing-off and thirdly that the relief sought is based on the provisions of the Lotteries Act. In that regard the applicant seeks an order that the respondent should be interdicted from infringing and passing off its business by using the mark LottoFun.

(a) Infringing the Lotto trade mark and passing off its business and services as being those or as being connected with the first applicant.

(b) The applicants also seek an order directing the respondent to erase the LottoFun mark from all material in its business.

Arising from the provisions of the Lotteries Act, the applicant seeks interdict restraining the respondent from contravening each of sections 57(2)(*c*), 57(2)(*f*)(i), 57(2)(*f*)(iii) and 57(2)(*g*) of the Lotteries Act by, *inter alia*, selling tickets for the national Lottery at a price higher than that printed on the tickets, competing unlawfully with the second applicant by acting in contravention of the Lottery Act and conducting its business and rendering its services in terms of its own terms and conditions which are *contra bonos mores*.

The respondent raises the defences that firstly stay-off proceedings in that the word "Lotto" is unregistrable as a trade mark in terms of the Trade Mark Act. That the respondent had brought a separate application for expungement.

The second defence that the applicants were not candid to the court that the respondent had lodged formal objections to certain trade mark applications which are pending at the offices of the trade marks and that the word "Lotto" is synonymous with the word "Lottery" and is therefore generic and descriptive and therefore does not qualify as a trade mark. The third defence is that the applicant has no right to exclusivity in the word "Lotto" and that this is a word used worldwide. Thirdly the defence of acquiescence that the respondents' use of the mark LottoFun neither infringes nor passes-off. That the respondent has used LottoFun in its business through the four years as he traded and relied basically on the correspondence which was conducted as I indicted above between the periods March 2000 and March 2001 and as such the applicants were aware that the respondent is in business and there was no objection thereto.

A further defence was that of lack of candour and possible unclean hands namely that for the past four years the respondent has been trading and it has been known by the applicants who have supported it and has benefited to the tune of several millions of rands. The second applicant has facilitated the respondent's *motu operandi* in that it

has installed a further terminal to facilitate its business. The applicants are attempting to prevent the respondent from using an everyday English language and their wording is not dissimilar to this. This came to the fore when in one instance there was a win of an amount of five million rands by a subscriber of the respondent who bought a ticket and after the reluctance to honour the ticket the second applicant relented and paid out but it contended that there was a dispute between itself and the respondent. But this precipitated that the applicants walked into the respondent premises and disconnected its services and contending further that the respondent was not to use this facility.

In order to grant substantive relief which is sought by the applicants there are requisites for the grant of a final interdict namely:

1. A clear ride;
2. An injury actually committed or reasonably apprehended; and
3. The absence of similar protection by any other remedy.

In motion proceedings in which a final relief is sought and there are disputes of fact in the affidavits filed on behalf of the applicants and the respondent that are relevant to the determination of the issues, the correct approach is as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. This rule has been referred to several times by our courts. It is correct that where in proceedings of this nature disputes of facts have arisen on the affidavits, a final order whether it be an interdict or some form of relief, may be granted if those facts averred in the applicant's affidavit have been admitted by the respondents, together with the facts alleged by applicant, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact, see in this regard *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5.

In accordance with this approach the Court should take into account the facts averred in the applicant's affidavit which have been admitted by the respondent: the facts alleged by the respondent; such factual averments by the applicant, the denials of which the respondent do not raise real, genuine or bona fide dispute of fact, and in respect of which the Court is satisfied as to their inherent credibility. The court should not take into account allegations or denials of the respondent which are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. See *Ngqumba en andere v Die Staatspresident en andere* 1988 (4) SA 224 (A) at 260H-261E.

Insofar as the infringement application is concerned there is no dispute of fact on any material issue of the kind such as would disentitle this honourable court in finding in favour of the applicants. The respondent's quarrel with the applicants' case is found that in large part on comment which are unhelpful.

To succeed in an application based on section 34(1)(*a*) of the Trade Marks Act the application for relief must established:

1. The unauthorised use;
2. In the course of trade;
3. In relation to goods or services in respect of which the trade mark is registered; and
4. Of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion.

For purposes of section 34(1)(*b*) of the Trade Marks Act the applicant for the relief must establish:

1. The unauthorised use of a mark;
2. Which is identical or similar to the trade mark registered;
3. In the course of trade; and

4. In relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion.

The respondent has not in any way contradicted the applicants' contention that the respondent's use of the LottoFun mark in the course of trade and was not authorised by the first applicant. The respondent has not in any way contradicted the applicant's contention that the respondents' use of LottoFun is in relation to services in respect of which the trade marks are registered or that the services which are rendered by the respondent are certainly services which are "so similar" to the services in respect of which the trade marks are registered.

The only issue between the parties is whether:

1. For purposes of section 34(1)(*a*) the use by the respondent of the LottoFun is use "of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion"; and
2. For purposes of section 34(1)(*b*) the use by the respondent of the LottoFun is use "of a mark which is identical or similar to the trade mark registered . . . that in such use there exists the likelihood of deception or confusion".

The issue, therefore, is limited to the likelihood of deception or confusion.

General trade marks principles

The court has had regard to the following general principles of trade mark law in determining the issue in the present case:

1. The 1993 Trade Marks Act came into force on 1 May 1995. This Act repealed the 62 of 1963 Trade Marks Act, save for certain transitional provisions. The infringement provisions of the 1963 Act were contained in section 54 and required an infringer to have used a deceptively or confusingly similar mark to a registered mark in relation to the specific goods or services for which the proprietor's mark was registered. Section 34(1) of the 1993 Act provides for wider protection against infringement than the 1963 Act. Section 34(1)(a) provides for the same protection afforded by section 44(1) of the 1963 Act, namely in relation to the goods or services for which the mark is registered. Section 34(1)(*b*) provides for the protection against infringement in respect of goods or services that are similar to the goods or services for which the mark is registered. Section 34(1)(*c*) provides for protection for well-known registered trade marks against those persons who would take unfair advantage of the distinctive character or reputation of the well-known trade mark in relation to any goods or services.
2. In the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 640G-641E Corbett, JA, as he then was, gave an authoritative summary of the legal principles applicable in a trade mark infringement matter under the 1963 Act. These principles have been held to apply equally to an infringement in terms of section 34(1)(*a*) of the 1993 Act. See *Danco Clothing (Pty) Ltd v Nu-Care Marketing Sales and Promotions (Pty) Ltd and another* 1991 (4) SA 850 (A) at 861F-G.
3. In adjudicating whether or not two marks are deceptively or confusingly similar the Court had regard to the following principle enunciated in *Bata Limited v Face Fashions CC and another* 2001 (1) SA 844 (SCA) paragraph 9

where Melunsky JA citing with approval the decision of the European Court of Justice in *Sabel BV v Puma AG, Rudolf Dassler Sport* [1998] RPC 199 where he stated:

> "Global appreciation of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind in particular, their distinctive and dominant components."

This principle was further enunciated in *Bata* (*supra*) at paragraph 8 in the context of section 34(1)(*a*) which is equally applicable in the case of an infringement in terms of section 34(1)(*b*) as both sections deal with deception or confusion as to origin as follows:

> "The only question that has to be decided in respect of the alleged infringements under section 34(1)(*a*) is whether the appellant has established that a substantial number of persons will probably be deceived into believing or confused as to whether there is a material connection in the course of trade between the respondent's clothing and the appellant's trade-mark (see *Plascon-Evans* at 640G-I)."

The applicants have been called upon to show that there is a probability that a substantial number of people who purchase tickets for the National Lottery and who are aware of the trade mark Lotto as used in connection with that lottery will be confused as to whether the respondent's business conducted under the name LottoFun is that of the second applicant or as to the existence or non-existence of a material connection between the LottoFun business and the first and second applicants as the body with overall responsibility for the conduct of the National Lottery and the company operating the National Lottery respectively.

In *Kellogg Co and another v Bokomo Co-operative Ltd* 1997 (2) SA 725 (C) at 734C, citing *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at 315F Van Reenen J said:

> "(b) The class of persons who are likely to be purchasers of the goods in question must be taken into account to determine whether there is a likelihood of confusion or deception."

From the above it is clear that section 34(1)(*b*) of the Trade Marks Act is similar to section 34(1)(*a*), except that it is not limited to the goods or services in respect of which the trade mark is registered, but covers use in relation to similar goods or services. The introduction of section 34(1)(*b*) is in keeping with the common law which as established that a common field of activity is not a prerequisite for success in passing-off proceedings. The respondent further raised the defences of unclean hands, acquiescence and estoppel. It is not clear how the respondent invokes firstly the defence of "unclean hands" preventing the applicants from obtaining the relief sought on the basis of the respondent's infringement of the first applicant's Lotto Trade Mark. This defence, however, does not avail the respondent.

As regards the defences of acquiescence and estoppel the respondent has not drawn a distinction between these defences. The respondent's evidence in support of these defences is made out of two sets of circumstances, first, "an exchange of correspondence between a Mr Nick Hodgman, at the time in a senior position with the second applicant, and Mr Andre de Beer" and secondly, "to the installation of a lottery terminal "for the respondent's use".

Strictly speaking this was not raised in the answering affidavit but in the founding affidavit which the applicants relied on and an answer to that was that by the deponent of the applicants' affidavit where he states:

> "No business relationship between the respondent and the second applicant was ever concluded pursuant to any of the discussions held or communications which passed between them, and the respondent has not been granted any authority to sell the lotto game tickets *via* the internet or at all."

In answer to this response the deponent to the respondent's affidavit says:

> "I deny that there was 'no business relationship' between Lottofun and Uthingo. The rest of the evidence in this matter clearly indicates there to have been one, although I accept that what is a 'relationship' is capable of varying degrees of interpretation. My point is that there was not no relationship."

Whatever interpretation is given the clear meaning is that there was no business relationship.

The second circumstance, that of the installation of the lottery terminal, is equally of no assistance to the respondent. The respondent's case is that in order to facilitate the respondent's *modus operandi* the second applicant itself installed an ordinary lottery terminal for the exclusive use of the respondent, at an ordinary retail outlet which already had other lottery terminals.

It is clear from all the evidence, that there was no question of the second applicant approving the installation of the second terminal at the premises of Wingate Computers for the exclusive use of the respondent, or to facilitate the respondent's *modus operandi*. No one at the second applicant was even aware that the respondent intended to use the second terminal installed at Wingate Computers to operate its business. The second terminal was in fact installed at Wingate Computers in the ordinary course of business of Wingate Computers and pursuant to a request made on its behalf that the second terminal be so installed.

Passing off is a species of the broader delict of "unlawful competition". See *Hoechst Pharmaceutical (Pty) Ltd v The Beauty Box (Pty) Ltd (in liquidation) and another* 1987 (2) SA 600 (A) and the cases cited there particularly at 613D-614E.

The chief distinguishing characteristic of a "passing-off" is that it consists of a misrepresentation of a particular kind. See *Brian Boswell Circus (Pty) Ltd and another v Boswell Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (A) at 478J. A passing-off is unlawful because it results, or is calculated to result, in the improper filching of another's trade and an improper infringement of his goodwill and/or because it may cause injury to that other's trade or reputation. The representation which is necessary to found a passing-off claim may be expressed or implied. Whether it be an express representation or an implied representation, the test is still whether, in all the circumstances, the resemblance between the competing products is such that there is a reasonable likelihood that ordinary members of the public, or a substantial number thereof, may be confused or deceived into believing that the merchandise of the alleged wrongdoer is that of the aggrieved party or is connected therewith. See *Brian Boswell Circus (Pty) Ltd and another v Boswell Wilkie Circus (Pty) Ltd* (*supra*) at 478G-H.

The rights infringed by "passing-off" are the applicant's rights in an existing goodwill. Goodwill has been defined as "the attractive force which brings in custom". See *Lorimar Productions and others v Sterling Clothing Manufacturers (Pty) Ltd* 1981 (3) SA 1129 (T) 1133H.

In general, the applicant must establish the following two essentials in order to succeed in a "passing-off" action/application:

1. That the plaintiff's name, mark, sign or get-up has become distinctive, that is, that in the eyes of the public it has acquired a significance or meaning as indicating a particular origin of the goods in respect of which that feature is used; and
2. That the use of the feature concerned was likely, or calculated, to deceive and thus cause confusion or injury, actual or probable, to the goodwill of the applicant's business, as, for example, by depriving him of the profit that he might have had by selling the goods which the purchaser intended to buy.

Harms JA in the *Caterham Car Sales and Coachworks Ltd v Birkin Cars (Pty) Ltd*[1] 1998 (3) SA 938 (SCA) at 947A-B speaks of the "classical trinity" of "reputation (or goodwill), misrepresentation and damage".

Before the likelihood or otherwise of deception or confusion between the two competing products is considered it is necessary for the applicant to establish as a pre-requisite a reputation in the "get-up" on which it relies. As Harms JA said in the *Caterham Car Sales* (*supra*) at 950E-H paragraph 21:

> "[21] The nature of the reputation that a plaintiff has to establish was well stated by Lord Oliver in a judgment referred to at the outset of this judgment, namely *Reckitt & Colman Products Ltd v Borden Inc and others* [1990] RPC 341 (HL) ([1990] 1 All ER 873) and 880*g-h* (All ER):
>
>> 'First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying "get-up" (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as a distinctive specifically of the plaintiff's goods or services.'"

The enquiry in passing-off actions concerns the likelihood that the similarity of another's get-up may mislead the public. The whole get-up of the plaintiff on the one hand and the defendant on the other must be compared. In order to determine whether there is a likelihood of a "passing off" occurring the court must notionally transport itself from the courtroom to the particular market- place and stand in the shoes or sit in the chairs of those who might be expected to buy the competitors' products.

In determining whether or not there is a likelihood of there being a "passing-off" by the respondent of its goods as those of the applicant or as being connected in the course of trade with those of the applicant:

> "The opinions of trade and other witnesses as to what would be likely may be helpful, but in the end it is the judge, applying the right principles, who has to answer the question."

Per Cooke J in *Klisser's Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* 1989 RPC 27 at 29.

The first draw in the Lotto game took place on 11 March 2000. The Lotto game was launched on 2 March 2000, and extensively advertised and promoted by the second applicant on behalf of the first applicant from 20 February 2000. The advertising and provision which took place was on a very extensive scale. The advent of the Lotto game was advertised on television, in the press and

other print media, on radio stations broadcasting locally and nationally and by way of publicity materials which were handed out. Prior to the draw for the first Lotto game there was intensive interest amongst virtually all of the members of the public in the Republic of South Africa, in the Lotto game and the manner in which it was to be conducted. Consequently even before the first draw a considerable reputation and goodwill vested in the trade mark Lotto enured to the benefit of the first applicant.

The extent of the promotion of the Lotto game is not in dispute. The challenge, such as it is, to the "goodwill" which vests in the first applicant in it, is based on an attack of the inherent distinctiveness of the word "Lotto" it being alleged that "the descriptive nature of the word "lotto" not only militates against the finding of an essential requirement for an action of passing off, namely that it is indicative of a single source or provenance . . . (but also postulates a finding that confusion anyway is not likely)".

The applicants have amply shown that the trade mark LOTTO has become distinctive as indicating that the particular lottery game in connection with which that trade mark is used has a particular origin and that the use of the mark LottoFun by the respondent is likely to deceive and thus cause confusion or injury, actual or probable, to the goodwill of the applicant's business.

The respondent is knowingly selling or in any other way disposing of document or paying pertaining to the national lottery in contravention of section 57(2)(*c*) of the Lotteries Act: his selling the lotto game tickets at a price higher than that which is printed on the tickets, in contravention of section 57(2)(*f*)(i) of the Lotteries Act: his selling the lotto game tickets on conditions not provided for in the rules of the lottery concerned, in contravention of section 57(2)(*f*)(i) of the Lotteries Act: and is conducting, organising, promoting, devising or managing any scheme, plan, competition, arrangement, system, game or device which directly or indirectly provides for betting, wagering, gambling or any other game of risk on the outcome of the national lottery without authority by or under the Act or any other law in contravention of section 57(2)(*g*) of the Lotteries Act.

In the circumstances the applicant succeeds and an order is granted in terms of prayers (1)-(6) of the notice of motion.

The expungement application

The applicant is On-Line Lottery Services (Pty) Ltd. The applicant trades as LottoFun.

The first respondent is the National Lotteries Board established in terms of section 2 of the Lotteries Act 57 of 1997 (the Lotteries Act). The second respondent is Uthingo Management (Pty) Ltd. The second respondent is the sole and exclusive licensee authorised by the first respondent to conduct the national lottery. The third respondent is the registrar of trade marks.

The first respondent is the registered proprietor of the trade mark LOTTO in class 36 (in respect of services for and in connection with financial transactions).

The applicant seeks the rectification of the register of trade marks by the expungement therefrom of the LOTTO trade mark.

The second respondent is joined in the application in that it may have an interest in the relief sought. No relief is sought against the second respondent save for costs in the event of opposition.

The third respondent is cited in view of the relief sought in the application and given the provisions of section 56 of the Trade Marks Act. (Section 56 of the Trade Marks Act provides that "in any legal proceeding in which the relief sought includes alteration or rectification of the register, the registrar shall have the right to appear and be heard . . .".) Costs are not sought against the third respondent. The third respondent has not intervened in the application.

The applicant's business provides a service which enables orders to be placed for tickets in the South African National Lottery using the medium of the internet or the short message service ("SMS") on a cellphone. The applicant's business also, *inter alia*, provides generic lottery services.

The first and second respondents brought an application against the applicant for, *inter alia*, the infringement of the LOTTO trade mark and passing off. The applicant seeks the expungement of the LOTTO trade mark *inter alia* as a defence to the interdict application but chose, instead of bringing a counter-application in the interdict application brought the present application separately.

In bringing the expungement application the applicant sought to stay the interdict application and also the consolidation of the expungement with the interdict application. The applicant relies on evidence in the interdict application for the purposes of the expungement application.

In consideration of the expungement application the court will have regard to material contained in the interdict application.

By way of background to the disputes between the parties the following is relevant. The functions of the first respondent are *inter alia* to ensure that the National Lottery provided for in the Lotteries Act is conducted with due propriety and to ensure that the interests of every participant in the National Lottery are adequately protected. The second respondent was, in August 1999, granted the sole licence, in accordance with the Lotteries Act, to conduct the National Lottery. The licence will endure until 31 March 2007.

The second respondent has since not later than 20 February 2000 been conducting a game as part of the National Lottery, in terms of the licence issued to it by the Minister of Trade and Industry, using the LOTTO trade mark, as a permitted user thereof. Subsequent to the licence being granted to it, the second respondent devised the Lotto game rules which are the rules that apply to the Lotto game. The Lotto game is played by persons from all walks of life ranging through the full spectrum of the South African population. The second respondent sells the Lotto game tickets countrywide via a network of authorised retailers and retail outlets. The relationship between the second respondent and the retailer is governed by a written agreement. A detailed probity check is conducted in respect of all applicants who apply to become retailers. The second respondent authorises as retailers only those applicants whom it can trust to ensure transparency, integrity and fairness in the entire process.

The second respondent was recorded as a registered user of the LOTTO trade mark as registered under number 1991/02702 for all the services to which that registration applied on 10 January 2003 and such recording of the second applicant as a registered user persists. The second respondent has at all times

used the LOTTO trade mark strictly under the direction and control of the first respondent.

The LOTTO trade mark with which this application's concerned was originally registered only under number 1991/02702. In terms of a notice published in the *Patent Journa*l of May 1997 certain amendments were effected to the specification of goods and services. Lottery Services had previously fallen into class 36 but were, in terms of the abovementioned notice reclassified into class 41. The first respondent applied for, and was granted, an amendment to the specification of services, the effect of which was that the existing trade mark under number 1991/02702 was amended to reflect trade mark registration in class 41 for the specification of services for which the marks are presently registered.

In the interdict application it was the respondents' case that without the authority of the respondent, the applicant, trading as LottoFun, conducts a business which enables members of the public to order and purchase tickets for the Lotto game, which forms part of the National Lottery, via the Internet and via sms service provided by cellular telephone networks, and that in the conduct of its business the applicant is infringing the LOTTO trade mark; is passing off its business and services as being those of the first respondent or as being connected in the course of trade with the first respondent; is contravening certain of the provisions of the Lotteries Act and is competing unfairly with the respondents. The first respondent is also bringing the interdict application in order to fulfil its obligations in terms of Lotteries Act to ensure that the interests of every participant in the National Lottery are adequately protected.

Pursuant to a written objection by the first respondent to the applicant's original name "Lottofun (Pty) Ltd", the applicant changed its name to its present one in about March 2002. The applicant has always traded as "Lottofun" "On-Line Lottery Services (Pty) Ltd".

The applicant seeks the expungement of the LOTTO trade mark from the register of trade marks under two separate provisions of the Trade Marks Act; section 24(1) and section 27(1)(*b*). Fundamentally in terms of section 24(1) the applicant's case is that the entries of the LOTTO trade mark on the register "wrongly remain" on the register within the meaning of that section. Section 24 of the Trade Marks Act reads as follows:

"24. General power to rectify entries in register

(1) In the event . . . of any entry . . . wrongly remaining on the register . . ., any interested person may apply to the court . . . for the desired relief, and thereupon the court . . . may make such order for . . . removing . . . the entry as it . . . may deem fit.

(2) The court . . . 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."

Section 27(1)(*b*) of the Trade Marks Act provides as follows:

"27. Removal from register on ground of non-use

(1) Subject to the provision of section 70(2), a registered trade mark may, on application to the court, or, at the option of the applicant and subject to the provisions of section 59 and in the prescribed manner, to the registrar by any interested person, be removed from the register in respect of any of the goods or services in respect of which it is registered, on the ground either -

(*a*) . . .;

(*b*) that up to the date three months before the date of the application, a continuous period of five years or longer has elapsed from the date of issue of the certificate of registration during which the trade mark was registered and during which there was no bona fide use thereof in relation to those goods or

services by any proprietor thereof or any person permitted to use the trade mark as contemplated in section 38 during the period concerned;

(*c*) . . ."

Schmulian the deponent of the applicant's affidavit alleges that the applicant is an interested person within the meaning of section 24 and section 27 of the Trade Marks Act, which is denied by the deponent of the respondents' affidavit, Dr Monamodi. The points made by the respondents are found in the interdict application that the applicant cannot have a lawful interest in the LOTTO trade mark. The applicant argues that a trade mark proprietor may not seek to prevent the use of its registered trade mark by an entity that is conducting its business unlawfully in other respects in addition to the infringement of the trade mark. On the other hand the respondents argue that for a person to be "an interested person" for the purposes of the Act the relevant "interest" must be a lawful one. See *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and another* 2003 (3) SA 313 (SCA) paragraph 8, at 230G-231A.

In seeking the expungement of the LOTTO trade mark on the basis that the entries of that trade mark in the register of trade marks are entries "wrongly remaining" on the register in terms of section 24(1), the applicant requires that section to be read with "section 9 and/or section 10(1) and/or section 10(2)(a) and/or section 10(2)(*b*) and/or section 10(2)(*c*) and/or section 10(4)". However, there is no reference in the applicant's affidavits to sections 10(2)(*a*)-(*c*).

Section 9 of the Trade Marks Act and the parts of section 10 of the Act relied on by the applicant reads as follows:

"9. Registrable trade marks

(1) In order to be registrable, a trade mark shall be capable of distinguishing the goods or services of a person in respect of which it is registered . . . from the goods or services of another person . . .

(2) A mark shall be considered to be capable of distinguishing within the meaning of subsection (1) if, at the date of application for registration, it is inherently capable of so distinguishing or it is capable of distinguishing by reason of prior use thereof.

10. Unregistrable trade marks

The following marks . . ., if registered, shall . . . be liable to be removed from the register:

(1) A mark which does not constitute a trade mark;

(2) A mark which -

(*a*) is not capable of distinguishing within the meaning of section 9; or

(*b*) consists exclusively of a sign or an indication which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services; or

(*c*) consists exclusively of a sign or an indication which has become customary in the current language or in the bona fide and established practices of the trade;

(3) . . .;

(4) a mark in relation to which the applicant for registration has no bona fide intention of using it as a trade mark, either himself or through any person permitted or to be permitted by him to use the mark as contemplated by section 38;

. . .

Provided that a mark . . . shall not be liable to be removed from the register by virtue of [the provisions of paragraph (2)] . . . if . . . at the date of an application for removal from the register . . . it has in fact become capable of distinguishing within the meaning of section 9 as a result of use made of the mark."

Section 10(2)(*a*) is simply a restatement of the requirements of section 9 that for a trade mark to be registrable it must be capable of distinguishing the goods or services of a person in respect of which it is registered from the goods or services of another person and that the proviso to section 10 simply makes it clear that a trade mark may become capable of distinguishing through use.

Section 10(2)(*b*) and (*c*) describe two specific instances where marks are in effect deemed to be not capable of distinguishing within the meaning of section 9. The proviso to section 10 makes it clear that even such marks may become capable of distinguishing, and may thus be unobjectionable, through use.

The applicant's case is that the entries of the LOTTO mark on the register are entries wrongly remaining on the register for the purposes of section 24(1) of the Trade Marks Act in that that mark does not constitute a trade mark as required by section 10(1) and is therefore liable to be removed.

The Supreme Court of Appeal, dealing with an objection to a mark in terms of section 10(1) of the Trade Marks Act in *Beecham Group plc and another v Triomed (Pty) Ltd*[2] 2003 (3) SA 639 (SCA), held that:

> "In essence, the test is whether *Beecham* used or proposed to use the shape of the tablet [that is the mark in question] 'for the purpose of distinguishing' it from tablets sold by others or whether the function of the shape is to distinguish these tablets from other tablets." (At 646C, paragraph 9.)

The court went on to hold, in this context, that:

> "Whether such a mark is distinctive is another matter because, conceptually, the question whether a mark is capable of

distinguishing within the meaning of section 9 is an issue different, though not always separate, from the one now under consideration." (At 647A-C, paragraph 11.)

The deponent to the applicant's affidavit holds out that the LOTTO mark is not a trade mark within the Trade Mark Act, and is therefore not registrable at all in relation to Lotteries within the meaning of section 9 of the Trade Marks Act.

The first respondent has used the LOTTO trade mark for the purposes of distinguishing services in relation to which the mark is used or proposed to be used from the same kind of services connected in the course of trade with any

other person. The issue of whether is capable of distinguishing for the purposes of sections 9 and 10(2) of the Trade Marks Act is a question of fact. In *Beecham Group plc and another v Triomed (Pty) Ltd* (*supra*) at 649I-650A, paragraph 20 the relevant inquiry was described as follows:

> "The factual inquiry under section 9 read with the proviso to section 10 is done in two stages. The first is whether the mark, at the date of application for registration, was inherently capable of distinguishing the goods of *Beecham* from those of another person. If the answer is no, the next inquiry is whether the mark is presently so capable of distinguishing by reason of its use to date."

In determining whether the mark is capable of distinguishing regard should be had to the market in South Africa. The applicant's case on whether or not the mark LOTTO is capable of distinguishing rests on the dictionary definitions of the word "lotto". A simple reading of these definitions shows that for the most part the word "lotto" does not mean "a lottery at all". The primary meaning ascribed to the word "lotto" in all of the dictionaries refer to a game similar to bingo. The *Oxford English Dictionary* in a very similar definition appears in the *Shorter Oxford English Dictionary* (1962ed):

> "A game played with cards divided into numbered and blank squares and numbered discs to be drawn on the principle of a lottery. Each player has one or more cards before him; one of the discs is drawn from a bag, and its number called; a counter is placed on the square that has the same number, the player who first gets one row covered being the winner."

The Universal English Dictionary:

> "Game of chance played with cards bearing five numbers in a line, and numbered balls drawn from a bag, the object being to cover all the numbers in a line or as many as possible. The right to cover a number on a card is determined by the same number being drawn from the bag."

The New Shorter Oxford English Dictionary (1993):

> "A game of chance resembling bingo, in which numbers drawn as in a lottery are to be matched with numbers on a card, the winner being the first to have a card with a row of numbers all of which have been drawn."

The New Oxford Dictionary of English (1998):

> "a children's game similar to bingo in which numbered or illustrated counters or cards are drawn by the players."

The New Penguin English Dictionary (2000):

> "a children's game similar to bingo."

Webster's *Third New International Dictionary*:

> "A game played by drawing numbered disks from a bag or the like and covering corresponding numbers on cards, the winner being the first player to fill a row."

According to the dictionary definitions primarily and in general the word "lotto" does not mean a lottery but rather means a game similar to bingo and prior to the introduction of the National Lottery in South Africa the word "lotto" was an obscure word which was for all intents and purposes meaningless in this country. Because of its obscurity and its previous meaninglessness for most South Africans, the word "lotto" could be used as a trade mark in South Africa when the South African Lottery was launched and it could function to distinguish that lottery from any other lotteries in this country.

The 1994 edition of *The South African Pocket Oxford Dictionary of Current English* defines lotto as "a game of chance like bingo, but with the numbers drawn

by players instead of called". "Bingo" is defined as a "gambling game in which each player has a card with numbers to be marked off as they are called".

To a large extent the applicant does not respond to the evidence of the respondents as to the non-descriptiveness of the word "lotto" in South Africa. Likewise the applicant's argument failed to deal in any substantive way with the evidence of the respondents as to the distinctiveness in South Africa of the LOTTO trade mark. LOTTO was by no means a common word in South Africa until the respondent began using it as a trade mark in connection with the National Lottery. The word LOTTO was not, at least in South Africa at the time of the National Lottery was launched, the name of a lottery or appropriate to describe some attribute of a lottery.

I am accordingly of the view that the LOTTO trade mark is capable of distinguishing services for and in connection with lotteries of a person in respect of which that word is registered as a trade mark from the services for and in connection with the lotteries of another person. The conducting or operating a lottery clearly falls within the scope

of the services provided for in class 41. I accordingly make the following order:

1. The applicants in the interdict application are granted the order as prayed for in the notice of motion under prayers 1-6.
2. The application in the expungement application is dismissed.
3. The respondent in the interdict application and applicant in the expungement application to pay the cost to include the costs of the employment of two counsel.

For the applicant:

O Salmon and *P Seleka* instructed by *Spoor & Fisher*, Pretoria

For the respondent:

L Bowman SC and *B du Plessis* instructed by *Friedland Hart Incorporated*, Pretoria

Footnotes

1 Also reported at [1998] 3 All SA 175 (A) - Ed.

2 Also reported at [2002] 4 All SA 193 (SCA) - Ed.