

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED. <i>yes</i>
<i>29/7/16</i>	
DATE	<i>C. M. Mabie</i>
	SIGNATURE

29/7/16

Case no. 56526/2012

In the matter between:

UNION-SWISS (PTY)LTD

APPLICANT

and

BIO-CREAM COSMETICS CC

RESPONDENT

In the matter between:

Case no.: 2521/13

UNION-SWISS (PTY)LTD

APPLICANT

and

BIO-LOTION COSMETICS CC

RESPONDENT

In the matter between:

Case no.: 54314/13

UNION-SWISS (PTY)LTD

APPLICANT

and

BIO-CREAM COSMETICS CC

RESPONDENT

JUDGEMENT

RABIE J

1. The three respondents in the matters mentioned in the head note above applied for leave to appeal the order handed down by me on 17 July 2015 in respect of all three applications. The first two applications were based on passing off and the third application sought expungement of a trademark registered in the name of the first respondent. Apart from opposing the aforesaid application for leave to appeal the applicant at the same time applied for an order that, in the event of leave to appeal being granted, such leave shall be conditional upon the furnishing by the respondents of security for the costs of the appeal in the amount of R500 000,00 , which security shall be furnished on or before the date on which the record of the appeal is filed in the court of appeal, together with ancillary relief.
2. The respondents based their application on a number of grounds set out in a Notice for Application for Leave to Appeal. In my view, and mainly as a result of the decision I have arrived at, it is not necessary or even proper for me to discuss each of these grounds and the merits thereof. Some of the main issues I had to decide

depend on a subjective view of the particular facts and circumstances and after careful consideration of the submissions made to me I concluded that there is a reasonable prospect that another Court might come to different findings and that the appeal would have a reasonable prospect of success. In my view the issues are such that leave to appeal should be granted to the full bench of this division.

3. Since I have determined that leave to appeal should be granted to the respondents, it is necessary to consider the application of the applicant relating to security for costs of the appeal.
4. Regarding the applicant's application it was submitted that it is implicit in section 17(5) of the Superior Courts Act, Act 10 of 2013, that a court may elect to require the "softer option" of furnishing security for costs of the appeal instead of ordering the applicant to whom leave to appeal had been granted, to pay the costs of the appeal as provided for in section 17(5). I agree with this submission.
5. It was noted by the applicant that the respondents who had both formally been close corporations, have both since been incorporated as private companies. Any order made against the respondent's would thus be against the respondent as private companies.
6. The applicant also noted that the respondent, Bio-Cream Cosmetics Pty Ltd is in the process of being deregistered.
7. According to the applicant it has monitored the sales of the respondents' infringing Bio-Lotion product since the commencement of these proceedings. The sales remained low and in the applicant's view, the respondent's business was unlikely to remain viable in future. The applicant stated that it was concerned that it was going

to the expense of an appeal in circumstances where there was no prospect of it recovering the costs of that appeal. It therefore instructed its attorney's to demand security for costs in the event of leave to appeal being granted. The demand was made in a letter dated 25 September 2015.

8. In response the attorneys representing the respondents stated that they would respond once they had obtained their client's instructions. In the absence of any substantive response, a reminder was sent to the respondents' attorneys on 14 October 2015. The attorneys again indicated that they were awaiting their client's instructions. No substantive response to the applicant's demand has been received by the applicant.
9. The applicant consequently instructed its attorneys to investigate the matter and to prepare the present application. In order to obtain further evidence in this regard an investigator was mandated to determine the financial position of the respondents. The investigator's report was attached to the founding affidavit.
10. The report speaks for itself and I shall only refer to certain salient features. It appears that the respondents are at present in a very precarious financial position. The investigators were unable to find the respondents' product at the retail outlets they visited, including Spar and Dischem. Smaller retail outlets were also visited but the product was not to be found in any of these stores.
11. It was also found that the two premises from which the respondents previously operated the businesses, have been vacated and the telephone lines for the business have been disconnected. It was reported that the landlord of these

premises is also looking for the respondents and their controlling member/shareholder as they have failed to pay the rent for the property.

12. The applicant's own market information also shows a steady decline in the respondents' sales since 2014. This is depicted by a graph copied in the founding affidavit. According to the applicant just under 80% of the respondents' sales in the last quarter were made by Shoprite Checkers. It is not clear whether Shoprite Checkers still purchases the applicants' product but the applicant submitted that if it does, the sales are of old stock purchased before the respondents' ceased to trade.
13. The applicant submitted that even if the respondents are continuing to supply products from new undisclosed premises, the sales are at such low levels that it is nowhere near sufficient to sustain a business such as that of the respondents. Based on its calculations the applicant submitted that the revenue generated by the respondents during August 2015 would not have been more than R185 000,00. Subsequent sales were even less.
14. The applicant consequently submitted that the only reasonable inference to draw from the aforesaid investigations is that the respondents, if they are trading and solvent at all, are in dire financial straits and very likely to be technically insolvent. The applicant invited the respondents to put up their financial statements in answer to this application.
15. The applicant consequently submitted that there is no prospect of the applicant recovering the costs of the appeal if it were to be dismissed. The costs recoverable in this appeal was calculated at between R400 000,00 and R500 000,00.

16. The applicant also referred to the respondents' delay in bringing the application for leave to appeal to finality. It was submitted that the respondents appear content to delay the proceedings indefinitely, having achieved the suspension of the orders through the filing of the application for leave to appeal. It was submitted that it seems that the respondents are using the filing of the application for leave to appeal as an opportunity to exhaust existing stock and to allow the respondents time to continue to generate revenue unlawfully.
17. The respondents belatedly filed a short answering affidavit. It was denied that the respondents lack commercial viability or that they are in precarious financial straits or are insolvent or on the verge of insolvency. To show that the respondents' businesses are active certain tax invoices, purchase orders and delivery notes were attached to the affidavit.
18. The respondents did not attach any financial statements which would have been an indication of their profitability. The documents attached give some indication of turnover but most of them relate to the period prior to August 2015. The value is surprisingly low. Then there appears to be a gap of seven months which reflects no sales at all. Two relatively large sales are reflected for February and May 2016 but for the rest there appears little of any significance or at all.
19. Based on the aforesaid I am not convinced that the respondents are viable businesses or that they would be able to pay the costs of any appeal.
20. The respondents also stated in the answering affidavit that they are operating companies which operate from Innovation Hub and that they have done so since August 2015. It was stated that the lease expired at the previous address which is


presumably the premises that the applicant's investigator visited. I have serious difficulty in accepting these statements by the respondents. All the delivery notes and the tax invoices attached to the answering affidavit, even those dated during May 2016, reflect the address of the respondents as being at a different address than the one mentioned in the answering affidavit and in fact the same one as visited by the investigators of the applicant. This conundrum for the respondents could not be resolved during the hearing of the application.

21. Based on the aforesaid I am satisfied that the applicant has made out a case for the relief claimed in its application. As far as costs are concerned it was submitted on behalf of the applicant that costs of this application should follow the event. In my view the costs should follow the outcome of the appeal.

22. In the result the following order is made:

1. The respondents are granted leave to appeal to the Full Bench of this division against the whole of the judgement and the orders of this court in case numbers 2012/56526, 2013/2521 and 2013/54314.
2. The order in paragraph 1 is made conditional upon the furnishing by the respondents of security for the costs of the appeal in an amount to be determined by the Registrar of this Court which amount shall be determined within 20 days of date of this order.
3. In the event that the Registrar does not determine the form of the security to be provided by the respondents, and the parties are unable to agree as to such form, the parties may approach the court on the papers already filed, duly supplemented, for an order in this regard.

4. The costs of the application for leave to appeal as well as the costs of the application for security are to be costs in the appeal.

A handwritten signature in black ink, appearing to read 'C.P. Rabie', written over a horizontal line.

C.P. RABIE

JUDGE OF THE HIGH COURT