IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 12130/2021

DELETE WHICHEVER IS NOT APPLICABLE

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

18 April 2022
DATE

SIGNATURE

Heard on: 29 March 2022
Delivered on: 18 April 2022

In the matter between:

SIQALO FOODS (PTY) LTD **Applicant**

and

CLOVER SA (PTY) LTD **Respondent**

In re

CLOVER SA (PTY) LTD **Applicant**

and

SIQALO FOODS (PTY) LTD **Respondent**

JUDGMENT

VUMA, AJ

[1] Siqalo Foods (Pty) Ltd ("the applicant") seeks leave to appeal to the Full bench of the Gauteng Division, Pretoria, *alternatively* the Supreme Court of Appeal against the whole judgment and order delivered by me on 12 November 2021, on the grounds that I erred both in fact and in law and in one or more of the respects to appear below-herein.

[2] The applicant contends that the appeal would have a reasonable prospect of success as contemplated by section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 ("the Act"). The applicant further contends that there are other compelling reasons why the appeal should be heard as contemplated by section 17(1)(a)(ii) of the Act.

[3] It is trite that an application for leave to appeal a decision from a single Judge of the High Court is regulated by Rule 49 of the Uniform Rules of Court. The substantive law pertaining to application for leave to appeal is dealt with in section 17 of the Superior Courts Act 10 of 2013.

[4] The grounds of appeal are found in the applicant's Notice of Application for Leave to Appeal.

[5] Of note the applicant argues, *inter alia*, the following points:

5.1 That the Court erred by granting the relief not sought by the respondent;

5.2. That the Court erred in rejecting the ordinary meaning of "trade name" and ultimately finding that "STORK BUTTER SPREAD" does not constitute a trade name for purpose of Regulation 26(7)(a), more particularly in circumstances where the Court failed to make a finding on what the meaning or definition of "trade name" is;

5.3. That the Court erred in relying on ***Discovery Holdings Ltd v Sanlam Ltd and Others 2014 BIP 210 (WCC) at par 67*** since that decision does not deal with the regulations that find application in this matter and is not authority for the proposition that a trade name as envisaged in Regulation 26(7)(a) must be vested with a reputation before reliance can be placed on that Regulation;

5.4 That the Court erred in its factual finding in paragraph 4.3 of the judgment that it is common cause "*that stork butter spread or butter is not a trade name of the respondent, although the respondent has alleged in its supplementary answering affidavit that it is currently in the process of having it registered as trade name*";

5.5. That the Court erred in finding that the "*overamplified word 'butter'*" creates or is likely to create a false or misleading impression that STORK BUTTER SPREAD is "*pure butter or butter*";

5.6. That the Court erred in rejecting the applicant's market survey absent any cogent reasons and absent any critique in its methodology, credibility or findings;

5.7. That the Court erred in rejecting the alternate remedy available to the respondent and granting it interdictory relief.

[6] In regard to the argument why leave should be granted to appeal to the Supreme court of Appeal, the applicant submits the following reasons:

6.1. There is no other case (other than the present) that has interpreted the Sections and Regulations of the Act that are the subject of the dispute;

6.2. There is no other case (other than the present) that has assessed the compliance of the Sections of the Act and Regulations that are the subject of the dispute;

6.3. This application involves novel issues of the law that should be considered and pronounced upon by the Supreme Court of Appeal.

[7] The respondent opposes the application, arguing that the applicant's leave to appeal should refused for, *inter alia*, the following reasons:

7.1 That the applicant has failed to point out that the bar for these applications have been raised in that, now, the use of the word "<u>would</u>" indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against;

7.2 There is nothing untoward about the court granting its order in terms of sections 3 and 6 of the APSA, as read with Regulations 3, 17 and 27 given that the impugned Order clearly gives effect to the court's true intention when regard is had to the judgment holistically which does not by any means alter the sense and substance of the order given that the Judge sought to contextualise her order within the matrix of the Regulations as a whole;

7.3 In regard to the "trade name argument", the respondent argues, inter alia, that the court did make a finding on the meaning of the term "trade name".

7.4 It is clear from the applicant's answering affidavit and supplementary affidavit that it itself approbated and reprobated on whether STORK BUTTER CPREAD constituted a trade name or trade mark, arguing further that the applicant also admits in par 22.2 of its Heads of argument that that a "trade name" is "in truth", a synonym for "trade mark" and even refers to the definition in the Trade Marks Act.

[8] The principles governing the question whether leave to appeal should be granted are well established in our law. Such principles have their origin in the common law and they entail a determination as to whether reasonable prospects of success exist that another

court, considering the same facts and the law, may arrive to a different conclusion to that of the court whose judgment is being impugned. The principles now find expression in section 17 of the Superior Court Act 10 of 2013

[9] It has also been generally accepted that the use of the word "would" in section 17 of the Act added a further consideration that the bar for the test had been raised with regard to the merits of the proposed leave to appeal before relief can be granted. The Act widened the scope in which leave to appeal may be granted to include a determination of whether "there is some compelling reason why the appeal should be heard."

[10] In my view, considering both parties' arguments and the impugned judgment and the order, the applicant has succeeded to make out a case for leave to appeal. I am of the further view that there are compelling reasons why leave to appeal should be granted to the Supreme Court of Appeal.

[11] In the premises I make the following order:

ORDER:

1. Leave to appeal is granted.
2. Leave is granted to appeal to the Supreme court of Appeal.
3. The costs of this application are costs in the appeal.

Livhuwani Vuma
Acting Judge
Gauteng Division, Pretoria

ALA Heard on: 29 March 2022

ALA Judgment handed down on: 18 April 2022

Appearances

For Applicant: Adv. R Michau SC

Assisted by: Adv. L. Harilal

Instructed by: Kisch Africa Inc.

For Respondent: Adv. P. Eilers

Instructed by: Hahn and Hahn Attorneys