



THE REPUBLIC OF SOUTH AFRICA

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 16231 / 2008

In the matter between:

SWARTLAND WINERY LIMITED

Applicant

and

GROUP LFE (SA) (PTY) LIMITED

First Respondent

ROBERT CHRISTIAAN COPPOOLSE

Second Respondent

And in the counter-application between:

GROUP LFE (SA) (PTY) LIMITED

Applicant

and

SWARTLAND WINERY LIMITED

First Respondent

THE REGISTRAR OF TRADE MARKS

Second Respondent

JUDGMENT : 25 MAY 2009

BOZALEK J:

1. This matter concerns a dispute between a winery and an exporter of wine over use of the name "SWARTLAND" to describe their respective wines. The dispute is complicated by the fact that not only does the name also signify a geographic area, often referred to as "the Swartland", but that area has also been statutorily proclaimed as an area for the production of wines of origin.

INTRODUCTION

2. Applicant in the main application is a winery with its principal place of business at Malmesbury where it has operated since 1948 when it was founded as a co-operative. In 2006 it converted from a co-operative into a public company. Since its inception the applicant has continuously carried on business as a winery and currently produces approximately 2 million 9 litre cases of wine per annum from farms in the Swartland region. Some of the applicant's wine is produced and marketed under the "Swartland" name or range and part thereof is exported to Europe including the Netherlands. In December 2004 the applicant obtained registration as a trade mark of the word "Swartland" alone in class 33, and that registration remains valid. Class 33 encompasses wines, spirits and liqueurs, brandy, cognac and alcoholic beverages.

3. First respondent is a company registered in South Africa which exports and markets South African wines overseas and whose principal place of business is in Somerset West. Second respondent is first respondent's managing director and describes himself as an active participant in the wine industry since 1991. It would appear that the principal focus of the respondents' activities is the export of South African wines to the Netherlands.
4. On 22 October 2008 the applicant obtained an interim interdict against the respondents from infringing its registered trade mark by using that mark on the labels of wine being produced and exported by the respondents. The relief granted was in the form of a *rule nisi* incorporating also an order for the removal of the infringing mark from all materials, alternatively that the offending material be delivered up to the applicant, as well as further ancillary relief. In the main application the applicant now seeks confirmation of the *rule nisi* and thus inter alia a final interdict.
5. The respondents opposed both the granting of the interim interdict and the granting of final relief. In addition first respondent has brought a substantive counter-application for the expungement of the applicant's trade mark and an application to strike out certain passages in the affidavits filed on behalf of the applicant. I shall refer to the parties by their descriptions in the main application. The Registrar of Trade

Marks is cited as a respondent in the counter application and abides by the decision of the court.

6. The applicant urgently sought interdictory relief when it came to its attention that first respondent was exporting, for sale in retail outlets in the Netherlands, bottles of wine prominently labelled as the "Swartland Private Bin" range. Above the name "Swartland", on the main label, appear the words "wyn van oorsprong" in much smaller font size. This format is reproduced on the back label which also states, in two different formats, that the wine is a wine of origin from the Swartland. The name "Swartland" stands alone on the bottles' neck labels. The applicant contends that the respondents' unauthorised use of the "Swartland" mark was a trade mark infringement under section 34(1)(a) of the Trade Marks Act, 194 of 1993 ("the Trade Marks Act") and that there was a concerted scheme, by first respondent and its Dutch affiliate and distributor, to confuse the wine buying public in that country into thinking that the wines in question emanated from the applicant.
7. Respondents opposed the relief sought on a number of grounds, some of which had become academic by the time of the return date. However, it persists in its main ground of opposition, namely the denial of any trade mark infringement on the ground that its labelling did nothing more than identify the place of origin of its wine and, secondly, that the mark, by reason of it being a mere description of the geographical origin of the goods, was not registrable as a trade mark.

This defence led to the counter-application for the expungement of the trade mark.

THE ISSUES

8. There are thus two principal issues to be determined: in the first place, whether the applicant's trade mark falls to be expunged from the register and, secondly, in the light of that decision, whether the applicant is entitled to confirmation of the *rule nisi* and thus an order interdicting the respondents from labelling their product in the manner of which the applicant complains.

9. The main application is founded upon the infringement of a registered trade mark and it is appropriate, therefore, to deal first with the counter application since, if that is successful, the applicant will be unable to prove a "clear right" in the main application.

THE COUNTER APPLICATION

10. In its counter-application first respondent seeks an order directing the Registrar to expunge the relevant registration in terms of section 10(1); 10(2)(b) and 10(12) of the Trade Marks Act. Section 10(1) provides that a mark which does not constitute a trade mark is liable to be removed from the register whilst section 10(2)(b) provides the same for a mark which "...consists exclusively of a sign or an indication which may serve, in trade, to designate the ...geographical origin or other characteristics of the good or services,...". First respondent's case in this regard is that the mark "Swartland" denotes

a geographical area and is, therefore, to use the words of section 9 of the Act, incapable "... of distinguishing the goods or services of a person in respect of which it is registered... from the goods or services of another person either generally or, where the trade mark is registered ... subject to limitations, in relation to use within those limitations" and as such liable to be expunged from the register.

11. The second ground relied upon by first respondent for expungement of the trade mark finds its origin in section 10(12) of the Act which lists as an unregistrable trade mark a mark which is "contrary to law". In this regard the first respondent relies upon the provisions of section 11 of the Liquor Products Act, 60 of 1989 ("the LPA") which commenced on 1 July 1990 and which provides, in subsection 11(3)(a)(i), that "(u)nless authorised thereto in terms of a scheme, no person shall use in connection with the sale of wine – ... the name under which an area ... is defined ... in a scheme in terms of section 15(i)(d) or deemed in terms of section 15(2)(a) to have been defined."
12. It is common cause that a defined area, known as "the Swartland" was demarcated as a production area by virtue of the provisions of the LPA and its predecessor statute from as early as 1975, thereby triggering the prohibition created by section 11(3)(a)(i) cited above.
13. In order to meet first respondent's case that the applicant's trade mark was liable to be expunged by reason of being no more than an indication of geographical origin, the applicant sought to rely on the proviso to section 10 in the Act which provides that a mark shall not be expungable by virtue of the relevant provisions 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”.

14. The applicant relied upon its 60 year existence as a winery and its use, in the marketing of its wine, of the mark either standing alone, or in conjunction with the word “winery”. In substantiation of its case the applicant claimed that, quite apart from the volume of its wine production, it had become an award-winning wine estate with a considerable reputation, a claim not disputed by the respondents. The applicant asserted further that its trade mark had become associated with its products, this association being enhanced by the fact that no other winery or wine estate used the word “Swartland” in its name and, until the litigation in question, neither had any other winery or wine producer used or incorporated the mark “Swartland” in the name of any of its wines. Again the respondents were not able to deny these claims. In similar vein the applicant asserted in its answering affidavit in the counter-application that wine producers, distributors, retailers and consumers in South Africa and countries such as the Netherlands, where the applicant’s products had been sold on a large scale for 13 years, had come to associate the mark “Swartland” with the applicant’s wines, while also recognising that there is a “wine of origin” region of the same name. Although this was the subject of a bare denial by first respondent, the application of the Plascon-Evans rule in the counter-application favours this version in as much as the applicant is the respondent in the counter-application.

15. The applicant's case with regard to the above, was substantiated as regards the period prior to 1990 by photographs of wine bottles bearing the trade mark "Swartland", without any further words of equal prominence, apparently produced as long ago as 1969 and 1972. The use of the "Swartland" trade mark in the Netherlands over the 13 years prior to the commencement of the litigation was established by an affidavit from Melis, the managing director of the applicant's distributor in the Netherlands.
16. For its part first respondent contends that the proviso to section 10 does not assist the applicant, firstly, because the mark which it uses is "Swartland Winery" and, secondly, because, in any event, the "Swartland" mark, in relation to wines, is of such a nature as to be one which can never distinguish the product. The applicant does not dispute that it also markets and labels wines under the name "Swartland Winery" but contends that this is a legitimate use of its trade mark and, furthermore, that it also uses the trade mark alone on occasion.
17. There is evidence of the applicant also using the mark "Swartland" on its own with examples being produced of bottles so labelled in 1969, 1972 and 1996. Furthermore, to the extent that the applicant adds the word "Winery" to its registered trade mark, this combination of words would tend, if anything, to dilute or obscure the geographical connection thereby strengthening the mark's capability to distinguish. However, bearing in mind the terms of its registration, the applicant must justify

same on the basis of its trade mark standing alone. Faced with a similar situation in *United Bank Limited v Standard Bank of South Africa Limited*¹, the court applied the “arresting features tests” contained in an earlier case² and found that the addition of a particular word did not substantially effect the identity of a mark. In my view the addition of the words “winery” or “co-op” to the mark “Swartland” do not substantially affect the identity of the original mark and the greatest challenge to its continued use is whether, notwithstanding the geographical nature of the mark, it nevertheless qualifies to remain on the register.

18. As far as the applicant’s name is concerned, it is unquestionably so that geographical terms are admitted to the register only in limited circumstances. The rationale for this approach was stated by Page J in *Cambridge Plan AG & another v Moore & others*³ as follows: “The reason that geographical names are difficult to register and, if registered, are normally registered subject to a disclaimer, is because their presence on the Register might otherwise embarrass or inconvenience traders wishing to refer to a particular geographical locality”. Thus it is stated in Webster G C et al Webster & Page “South African Law of Trade Marks, Unlawful Competition, Company names and Trading Styles” 4th edition (Lexis Nexis Durban 1997) that it is: “highly unlikely that a geographical term used in a geographical connotation will be factually inherently capable of distinguishing and evidence of use leading to such capability will have to be lead”.⁴ That said, however, the proviso allowing for registration of a mark upon

¹ 1991(4) SA 810 at 815 E - I

² Bernstein Manufacturing Company (1961)(Pvt)Ltd v Shepherdson 1968 (4) SA 386 (T) at 389 H.

³ 1987(4) SA 821 (D) at 844 F.

⁴ See generally in this regard Beecham Group plc v Triomed (Pty) Ltd 2003 SA 639 (SCA). See also Webster & Page at para 3.44 page 3-49.

proof that it has in fact become capable of distinguishing within the meaning of section 9 as a result of use made of the mark, exists and must be given effect to. In this regard the authors of Webster & Page state:⁵ “However unfit or unsuitable a mark may appear to be as a trade mark, if it is shown through use (which must self-evidently be used as a trade mark) prior to the date of application for registration that it is capable of performing the distinguishing function of a trade mark, it will be registrable. There is no requirement that a mark must have any particular trademark characteristics in order to become distinguishable through use but such characteristics could be an important element in determining whether a particular mark has become capable of distinguishing through use”.

19. In the present matter taking into account the applicant’s unchallenged use of the trade mark in relation to its wine products over a period of 60 years, the scale of its production and sale of wine and the fact that no other winery or wine estate has used the word “Swartland” in its name until the events to which this application relate, and that neither has any other winery or wine producer incorporated the trade mark in the name of any of its wines, I consider that the applicant has established that the mark has in fact become capable of distinguishing within the meaning of section 9 as a result of use made of the mark.
20. In reaching this conclusion, I should add, I furthermore attach some significance to the fact that, on a proper analysis of events, first respondent, through the manner in which it has labelled and marketed its wine, has indirectly acknowledged that the applicant’s trade mark,

⁵ Webster & Page para 3.40.2 at page 3-48(7).

notwithstanding its geographical nature and origin, has in fact become capable of being distinguished from its parallel meaning as a geographical area.

21. In the result I conclude that the application for the expungement of the applicant's trade mark must fail.

THE MAIN APPLICATION

22. In response to the main application first respondent raised two defences. The first is the alleged non-distinctiveness of the word or mark "Swartland", the submission being that it is the antithesis of a trade mark and has no distinctiveness. This argument has been dealt with and rejected in considering the counter-application. The second defence raised by first respondent is the manner in which the mark is being used by it. The argument in this regard, as I understand it, is that the reasonable customer, upon reading the labelling on first respondent's contested range of products, will appreciate that he is purchasing no more than a bottle of wine whose origin is the Swartland wine growing region and, therefore, there is no reasonable possibility of confusion or deception. It was contended by Mr Sholto-Douglas SC, who appeared with Mr Farlam on behalf of the applicant that, inasmuch as the applicant relies on a trade mark infringement in terms of Section 34 (1)(a) of the Trade Marks Act, the question of deception or confusion does not arise. Whilst this may normally be the correct

approach, it must be altered somewhat in the present matter, since it is common cause that the details of the wine of origin scheme enacted for the Swartland region in terms of the LPA require this information to appear on bottles in appropriate circumstances. I shall assume, in favour of first respondent, that the scheme's details require that the products labelled, exported and marketed by first respondent require there to be an indication on such labelling that the origin of the wine is the "Swartland" region.

23. A consideration of the labelling on the disputed bottles of wine (Annexures SW 10A and SW10B) reveals that the simple word "Swartland", although preceded by the words "Wyn van Oorsprong", features far and away most prominently on the label. It would be fair to say, furthermore, that the word "Swartland" appears in a typeface and in a position on the label where the customer would normally expect to find the name of the wine producer. In addition, notwithstanding the fact that "Swartland" is preceded, albeit in much smaller and a less prominent typeface, by the words "Wyn van Oorsprong" where one would ordinarily expect to see the producer's name, the same information appears at least twice in a different form on the back label. This casts considerable doubt on first respondent's justification for the prominent use of the word "Swartland", in large white capital letters in shadow font near the top of the front and back wine labels, as simply intending to convey, together with the words preceding it, nothing more than the region from which the wine originates.

24. There are further indications that first respondent's explanation for the manner of its use of the trade mark is, at best, disingenuous. The wine of origin description is normally given relatively little prominence on wine labels and is unlikely to appear more than once on a bottle's labelling. By contrast, on first respondent's wine labels there are frequent references to "Swartland", in several instances in much more eye-catching and arresting colour (white on black) than the words "Wyn van Oorsprong" on the line above the main use of the word "Swartland". The word "Swartland" also appears on its own on the neck of the bottle, without any "Wine of Origin" qualifier. There are, furthermore, frequent references to "Swartland" on the wine labels, in fact judging by the photographs furnished, it appears at least seven times on each bottle. The back labels also indicate that the wines were purportedly "produced by Swartland Vignerons" when there appears to be no legal entity of that name and no other indication that first respondent, which operates from Somerset West, outside the Swartland region, actually trades under that name. Finally when, in laudatory text, the labelling proclaims the virtues of the wine, it is referred to as "Swartland Private Bin", eschewing the words "Wyn van Oorsprong".

25. Section 34(1)(a) of the Trade Marks Act states that:

"(t)he rights acquired by registration of a trade mark shall be infringed by – (a) the 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 exception to these provisions sought to be utilised by first respondent is provided for in section 34(2)(b) which qualifies section 34(1)(a) by stating that "*(a) registered trade mark is not infringed by... the use by any person of any bona fide description or indication of the kind, quality, quantity, intended purpose, value, geographical origin or other characteristic of his goods or services, or the mode or time of production of the goods or the rendering of the services; ...Provided further that the use contemplated in para... (b)... is consistent with fair practice*".

26. It is incumbent upon first respondent, therefore, to prove that its use of the mark as a description of the geographical origin of its wine is both *bona fide* and consistent with fair practice. On behalf of first respondent, Mr Salmon contended that "fair practice" must be the practice in the Netherlands or Europe and that the applicant had produced no evidence at all in this regard and must therefore be held to have failed to discharge the onus it carried in this respect. In the first place I do not consider the applicant bore any onus in this regard, it rather being a case of first respondent, as the potential beneficiary of the exception, bearing an evidentiary onus of proving that its use of the trade mark was both *bona fide* and in accordance with fair practice⁶. Even if I am wrong in this respect, in my view, on a proper analysis of the facts, the applicant has discharged any onus *inter alia* through the evidence of Melis regarding the confusion which had arisen in the Netherlands over the provenance of first respondent's wines.

⁶ See in this regard *Minister of Law and Order v Monti* 1995 (1) SA 35 (A) at 39 G – J.

27. Nor is there any convincing evidence that “fair practice” in the Netherlands differs from that standard in this country. The only evidence in this regard emanated from first respondent which attached copies of wine labels allegedly used in Europe to substantiate its claim that it is common practice to present the area of origin of wine, such as Bordeaux, Chablis and Chianti, as the primary description of the product on bottle labels. I find the examples unconvincing. Only one clearly shows the bottle’s label and, although the word “Bordeaux” is prominently featured, of almost equal prominence is the name of the producer. The same applies to the label of wine emanating from Chablis, whilst the label for the bottle of Chianti, although indistinct, appeared also to feature the name of the producer above that word.
28. In my view sufficient evidence has been placed before the court to determine whether first respondent can escape the provisions of its apparent trade mark transgression by showing that it used the mark in a *bona fide* manner to denote the geographical origin of its wine product and that this was, moreover, in accordance with fair practice.
29. It is appropriate at this point to consider first respondent’s striking out application. In its first manifestation it was confined to those paragraphs of the founding affidavit of first applicant’s managing director, Vermeulen, based upon what was ostensibly conveyed to him by Melis, applicant’s agent in the Netherlands. By the time of the hearing, however, the hearsay contents of these paragraphs were

rendered admissible, by the filing of Melis's confirmatory affidavit, properly commissioned. As such, the application to strike out these paragraphs must fail. In its heads of argument, however, first respondent expanded the striking out application to include a range of further paragraphs and sentences contained in Vermeulen's affidavit. I have difficulty in dealing with this application since, although not abandoning it, first respondent's counsel made only very general submissions in support thereof. He contented himself with contending in the heads that the passages objected to were inadmissible as being hearsay, otherwise irrelevant or that Vermeulen was not able "competently" to depose thereto.

30. For the most part, the material objected to consists of Vermeulen's views and submissions relating to standard wine-labelling practice. Much of this is Vermeulen's opinion, based on his experience of what consumers expect to see on a label and how they might be misled. From this he draws conclusions and makes submissions as to the propriety of first respondent's labelling practices. Although the drawing of such conclusions is properly the province of this Court, the balance of Vermeulen's evidence, given his experience in the wine industry, is in my view an admissible expert opinion. For these reasons alone I am not disposed to grant the extended striking out order.
31. In any event, apart from its merits, the application is procedurally irregular inasmuch as it was not brought on notice in terms of Rule

6(11)⁷. More fundamentally, in its answering affidavit, first respondent dealt with the contents of the disputed sentences or paragraphs without complaining thereof or specifying the grounds upon which it objected to each paragraph or sentence making it difficult to properly consider first respondent's complaints. In short, not only has the extended application to strike out been presented in an irregular manner⁸ but I am unpersuaded, ultimately, that first respondent will suffer any prejudice if the paragraphs and sentences additionally complained of are not struck out.

32. In the initial proceedings first respondent raised a number of other defences which, save in one instance, are either not persisted with or have become moot. The exception is respondents' contention that second respondent should not have been cited. The applicant implicitly concedes that it has made out no independent case against second respondent and no longer seeks any relief against him. In the circumstances the *rule nisi* must be discharged as against second respondent and the relief granted to the applicant must be suitably amended.
33. At this stage of the proceedings in order to obtain confirmation of the initial order, the applicant must prove a clear right, an injury actually committed or reasonably apprehended and the absence of an appropriate alternative remedy. For the reasons set out above I

⁷ *Wiese v Joubert en Andere* 1983 (4) SA 182 (O) at 197 D.

⁸ See *Securefin Ltd v KNA Insurance and Investment Brokers* 2001 (3) All SA 15 (T) at 30 A – J.

consider that the applicant has proved its clear right. Similarly, the evidence is clear that should the first respondent be allowed to continue marketing its wine in the manner complained of, applicant will suffer substantial damage in the form of loss of sales and the diminution of its brand integrity, goodwill and reputation in the Netherlands wine market. It appears that first respondent does not dispute that the applicant has no other satisfactory remedy other than the interdictory relief which it seeks. Not only will a damages claim be difficult to compute, but without an interdict of first respondent's trade mark infringement, the applicant's status and reputation as a supplier of wine to the Netherlands is likely to be severely harmed if not destroyed for the foreseeable future.⁹

FORM OF THE RELIEF

34. In addition to the interdictory relief the applicant has also sought, in paras 2.4 and 2.5 of the notice of motion, orders directing first respondent to remove the offending trade mark from all material or, where this is not possible, delivering the material up to the applicant for destruction. It also initially sought an order directing the holding of an enquiry for the purposes of determining the amount of any damages or royalty to which it is entitled as a result of the unlawful infringement of its trade mark. That relief is contemplated by section 34(3)(b), (c) and

⁹ As was pointed out by Page J in *Cambridge Plan AG v Moore* 1987 (4) SA 821 (N) at 847 I - 848 A. "It is for this reason that the courts lean... towards granting interim relief as soon as possible in order to preserve those rights undamaged pending the decision of the action. An award of damages will almost certainly be a poor substitute for such an order. Damages resulting from loss of sales by reason of use of the offending marks and names are notoriously difficult to prove, whilst those resulting from dilution of the distinctiveness of the applicant's marks and names will be well-nigh be impossible to establish ..."

(d) and section 34(4) of the Trade Marks Act and is relief which can accompany orders restraining the infringement of a mark.¹⁰ In its original form, the orders made no mention of when or by whom the enquiry would be held nor stipulated the appropriate “procedures” which should be followed therein. After requesting further submissions from counsel on this aspect, the Court was advised on behalf of the applicant that it did not persist in seeking relief relating to the holding of such an enquiry.

35. Applicant asked also that the existing order be expanded to include a new range of wine bearing the infringing trade mark as shown on Annexure SW 15, a range apparently launched by first respondent in the Netherlands after the inception of the initial application. Yet a further addition sought to the order was an amendment making it clear that the labelling includes first respondent's neck labels which also bear the infringing mark. Such further relief is to my mind justified.

COSTS

36. The order generally made in proceedings such as these is that the unsuccessful respondent(s) must pay the costs and I can see no reason to depart therefrom. As regards the costs incurred by the

¹⁰ See Webster and Page *op cit* at para 12.56 and *Smith and Nephew Ltd v Mediplast Pharmaceutical Sales CC* 1999 (2) SA 646(D & CLD (at 653 G – j.)

second respondent, applicant's counsel urged me to make no order since the time taken up in arguing this point was minimal, and since little if any additional costs would have been incurred by the citing of second respondent given that he would have been actively involved in the matter in any event in his capacity as the first respondent's managing director. This submission is borne out by the fact, although argument in this matter lasted two days, I doubt whether the issue of the second respondent's joinder accounted for much more than ten minutes worth of argument. Similarly, the matter enjoyed very limited attention in the papers. In the circumstances, in the exercise of my discretion I do not consider it appropriate to make any award of costs against applicant in this regard.

ORDER

1. In the result the *rule nisi* issued by this court on 22 October 2008, appropriately amended, is confirmed. For the sake of completeness and clarity the order is as follows:

- 1.1 First respondent is interdicted and restrained from infringing the applicant's registered trade mark "Swartland" in relation to wines and other alcoholic beverages, through the use or manufacture of the wine labels, including the neck labelling, shown on the photographs appended to the founding affidavit as "SW 10 (A)" and "SW 10 (B)" and to the replying affidavit as "SW 15", or any other wine labels, including the neck labels, similar thereto;

- 1.2 First respondent is interdicted and restrained from manufacturing, marketing, selling or exporting wine using the wine labels, including the neck labels, shown on the photographs to founding affidavit as “SW 10 A” and “SW 10 B” and to the replying affidavit as “SW 15”; or any other wine labels including the neck labels similar thereto;
- 1.3 First respondent is interdicted and restrained from manufacturing, marketing, selling or exporting any wine incorporating the mark “Swartland”, or any other confusingly similar marks, on wine labels, except insofar as the use of the trade mark is purely to indicate the region from which the wine originates and that use is *bona fide* and consistent with fair practice;
- 1.4 First respondent is, subject to the qualification contained in para 1.3 above, directed to remove the offending trade mark from all goods, labels, containers, packaging, advertising matter and other material of whatsoever sort, alternatively, where the offending mark is inseparable or incapable of being removed from the above-mentioned material, directing the first respondent to deliver up for destruction all such material to the applicant.
2. The costs in this application are to be paid by first respondent, such costs to include those consequent upon the employment of two counsel;
3. First respondent’s counter-application and striking out application are dismissed with costs, including the costs consequent upon the employment of two counsel.

4. The *rule nisi* made against second respondent is discharged and the application against him is dismissed with no order being made as to costs.



LJ BOŽALEK, J