REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: ***3rd August 2023*** Signature:

DATE: 3RD AUGUST 2023

(1) CASE NO: 16949/2021

In the matter between:

BOUSAADA (PTY) LIMITED	First Applicant
MINA FOUNDATION NPC	Second Applicant

And

FCB AFRICA (PTY) LIMITED	First Respondent
GLOBAL ENVIRONMENT & TECHNOLOGY FOUNDATION	Second Respondent

(2) CASE NO: 29891/2021

In the matter between:

FCB AFRICA (PTY) LIMITED	Applicant

And

BOUSAADA (PTY) LIMITED	First Respondent
REGISTRAR OF TRADE MARKS	Second Respondent

Neutral Citation: *Bousaada and Another v FCB Africa and Another; FCB Africa v Bousaada and Another (16949/2021 & 29891/2021)* **[2023] ZAGPJHC ---** (03 August 2023)

Coram: Adams J

Heard on: 03 August 2023 – the 'virtual hearing' of these matters was conducted as a videoconference on *Microsoft Teams*.

Delivered: 03 August 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 13:30 on 03 August 2023.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal refused.

ORDER

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(1) Under Case number: 16949/2021, the following order is granted: -

(a) The application for leave to appeal of the first respondent (FCB Africa (Pty) Limited) is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel, one being Senior Counsel (where so employed).

(2) Under Case number: 29891/2021, I make the following order: -

(a) The application or leave to appeal of the applicant (FCB Africa (Pty) Limited) is dismissed with costs, which costs shall include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed).

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original two applications, the first one having been an application by the first and the second applicants for interdictory relief against the first respondent based on the provisions of the Trade Marks Act, Act 194 of 1993, unlawful competition and passing-off. The first respondent (FCB Africa (Pty) Limited) is the applicant in this application for leave to appeal and the first applicant (Bousaada (Pty) Limited) and the second applicant (Mina Foundation NPC) are the first and the second respondents herein. The second application was by the applicant (FCB Africa), which is the applicant in the second application for leave to appeal, against the first respondent (Bousaada) for an order for the expungement of certain of the first respondent's trade marks.

[2]. FCB Africa applies, in the first application for leave to appeal, for leave to appeal against the judgment and the order, as well as the reasons therefor, which I granted on 14 June 2023, in terms of which I had granted the first and second applicants the interdictory relief claimed by them against the first respondent. I also granted a costs order against the first respondent. In the second application for leave to appeal, FCB Africa, applies for leave to appeal against the judgment and the order, as well as the reasons therefor, which was also granted by me on 14 June 2023 and in terms of which I had dismissed, with costs, the applicant's expungement application.

[3]. The applications for leave to appeal is against my factual findings and legal conclusions, which resulted in the relief granted by me. So, for example, FCB Africa contends that I erred in finding that the applicants had proven that FCB Africa intentionally aided and abetted the delict that may have been committed by second respondent. FCB Africa also contends that the court *a quo* erred in finding that FCB deliberately embarked on a path which would lead to it making use of a trade mark, which, it knew, had established a reputation for

itself in the fields in which Bousaada and the Mina Foundation were operating. There was insufficient evidence before me, so the contention on behalf of FCB Africa goes, to reach the aforementioned finding. The Court erred in failing to appreciate that ‘MINA’ is a descriptive word and an ordinary word in everyday use. The fact that MINA is a descriptive word means that it cannot be monopolised by any organisation or person to the exclusion of others. The law relating to trade marks does not provide monopoly rights in respect of descriptive words. More especially if such words are used in respect of entirely different goods or services, which is the case *in casu*, so the argument is concluded.

[4]. It was furthermore contended by FCB Africa that I had erred in my finding that ‘MINA’ is an invented word in relation to public health awareness and should therefore be afforded greater protection. There are a number of other grounds on which the first respondent applies for leave to appeal in the two applications. I do not deem it necessary to detail those grounds in this judgment. One such further ground does however require mention, that being the contention that the Court *a quo* erred in finding that FCB Africa passed off its services as those of Bousaada. There was a paucity of evidence relating to the reputation of the mark 'MINA', so the contention goes, and Bousaada and the MINA Foundation provided no supporting evidence of the use of 'MINA' on its own and/or apart from the words ‘menstrual cups' or outside of the context of the tag line ‘Happy. Period’.

[5]. As regards the expungement application, FCB Africa submits that I erred in finding that Bousaada's trademarks are not vulnerable to partial expungement on the basis that Bousaada and the Mina Foundation had proven use of its registered trademarks upon a subset of a category expressly protected in the specification, in relation to the relevant classes, and that they were not required to do more.

[6]. Nothing new has been raised by FCB Africa in these applications for leave to appeal. In my original judgment, I have dealt with most, if not all of the

issues raised by them in these applications and it is not necessary for me to repeat those in full.

[7]. Suffice to restate what I said in my judgment, namely that FCB Africa's conduct satisfies every single integer of trade mark infringement as contemplated in the Trade Marks Act. It has infringed Bousaada's trade marks and the applicants' apprehension that it will continue to do so remains. The fact that, at some point FCB Africa was the applicant in trade mark applications relating to 'MINA.FOR MEN, FOR HEALTH', is significant. An applicant must, in order to be entitled to registration of a trade mark, use or intend to use the trade mark sought to be registered. The simple point is that there can be little doubt that FCB Africa was either using the 'MINA. FOR MEN. FOR HEALTH' trade mark(s) in respect of the services for which it sought registration or had the intention to do so in the future.

[8]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned are of the opinion that 'the appeal would have a reasonable prospect of success'.

[9]. In *Ramakatsa and Others v African National Congress and Another*[1], the SCA held that the test of reasonable prospects of success postulates a dispassionate decision, based on the facts and the law that a court of appeal 'could' reasonably arrive at a conclusion different to that of the trial court. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

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1 *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

[10]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[11]. In *Mont Chevaux Trust v Tina Goosen*[2], the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*[3]. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*[4].

[12]. I am not persuaded that the issues raised by FCB Africa in its applications for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are no reasonable prospects of another court making factual

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2 *Mont Chevaux Trust v Tina Goosen,* LCC 14R/2014 (unreported).

3 *Notshokovu v S,* case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

4 *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The appeals therefore, in my view, do not have reasonable prospects of success.

[13]. Leave to appeal in both cases should therefore be refused.

Order

[14]. In the circumstances, the following order is made:

(1) Under Case number: 16949/2021, the following order is granted: -

(a) The application for leave to appeal of the first respondent (FCB Africa (Pty) Limited) is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel, one being Senior Counsel (where so employed).

(2) Under Case number: 29891/2021, I make the following order: -

(a) The application or leave to appeal of the applicant (FCB Africa (Pty) Limited) is dismissed with costs, which costs shall include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed).

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L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	3rd August 2023 – in a 'virtual hearing' as a videoconference on *Microsoft Teams.*
JUDGMENT DATE:	3rd August 2023 – judgment handed down electronically
FOR BOUSAADA & THE MINA FOUNDATION NPC:	Advocate R Michau SC, together with Advocate L Harilal
INSTRUCTED BY:	Kisch IP, Sandton
FOR FCB AFRICA:	Advocate Mawande Seti-Baza
INSTRUCTED BY:	Marais Attorneys, Sandown, Sandton
FOR GETF:	No appearance
INSTRUCTED BY:	No appearance