




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 42160/21

(1)	REPORTABLE: Yes / No	
(2)	OF INTEREST TO OTHER JUDGES: Yes / No	
(3)	REVISED: NO	
	<u>26/01/2024</u>	
	DATE	SIGNATURE

In the matter between:

FIRSTRAND LIMITED

First Applicant

FIRSTRAND BANK LIMITED

Second Applicant

And

NATIONAL BANK OF ABU DHABI PJSC (PTY) LTD

Respondent

JUDGMENT

MBONGWE J:

INTRODUCTION

- [1] The applicants seek leave to appeal the whole of the judgments and orders of this court handed down on 30 June 2023. The hearing of the appeal is sought to be directed to the Supreme Court of Appeal on the contention that it is the forum that will ultimately have to pronounce on this matter, irrespective of the outcome of the present hearing or, alternatively, to the Full Court of this division.

- [2] At the heart of this application for leave to appeal are the findings and orders in the judgment of this court in terms of which the opposition by the applicants to the respondent's application to the Registrar of Trade Marks for the registration of the respondent's FAB and GROW STRONGER FIRST ABU DHABI BANK was dismissed with costs. It is specifically the respondent's intended use of the shortened version of the trade mark FAB that the applicants are opposed to.

- [3] The applicants' opposition is buttressed on two grounds, namely, the contention that the respondent had no intention, at the time of the submission of its application, to use the proposed trade mark either for itself or through someone else and the submission that the respondent has, consequently, failed to satisfy the provisions of section 10(4) of the Act. The applicants' second ground was that the respondent's proposed trade mark FAB is similar or is so closely similar to their registered trade mark FNB registered in class 36 that it is likely to deceive or cause confusion in the market space. The applicants submitted on this basis that the respondent mark, if granted, will contravene the provisions of section 10(14) of the Trade Marks Act 194 of 1993 ("the Act").

- [4] In the judgment sought to be appealed against, this court concluded that, based on the evidence presented and settled legal principles, the respondent had reasonably demonstrated its intention to carry out its resolved to use the proposed trade marks when trading in class 36 in South Africa and, secondly, that there were no similarities or close similarities between the respondent's proposed trade mark, FAB, viewed as a whole, as described in detail at para 44 of the judgment, and as the mark will appear in the market place. It was inevitable, in the circumstances, to conclude that no confusion of the parties' respective trade marks was likely to arise as a consequence of the respondent's use of the trade mark FAB which counsel for the respondent, ably argued, in my view, that the mark is very much likely to be pronounced as in 'fabulous' as opposed to '*f....a....b*'.
- [5] The applicants' opposition remains buttressed on sheer speculation and aspersions - the applicants admitted to barely knowing the respondent. In contrast, the respondent has additionally proffered uncontested evidence of its footprint in various countries in the world where it trades in the financial sector and business akin to the business in class 36.

GRANTING OF LEAVE TO APPEAL

- [6] Section 17 of the Superior Courts Act 10 of 2013 sets out the requirements to be met by the applicant for leave to appeal being that:

6.1 the court may grant leave to appeal it is convinced that:

- (a) the appeal would have a reasonable prospect of success; or

- (b) there is some other compelling reason why the appeal should be heard, including the existence of conflicting decision on the matter under consideration; or
- (c) the decision on appeal will still have practical effect; and
- (d) where the decision appealed against does not dispose of all the issues in the case, and the appeal would lead to a just and prompt resolution of all the issues between the parties.

[7] In *Zuma v Democratic Alliance* [2021] ZASCA 39 (13 April 2021) the court held that the success of an application for leave to appeal depends on the prospect of the eventual success of the appeal itself.

[8] In *The Mont Chevaux Trust v Tina Goosen and Others* 2014 JDR 2325 LCC the court held that section 17(1)(a)(i) requires that there be a measure of certainty that another court will come to a different conclusion from that of the court whose judgment is sought to be appealed against before leave to appeal is granted.

"An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal." - See: *MEC For Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016).

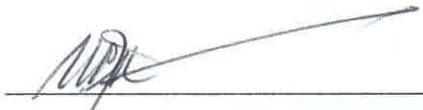
CONCLUSION

[9] The applicants' case does not fall within any of the categories of matters envisioned in the provisions of section 17 and leave to appeal must, consequently, be refused. Furthermore, it became apparent at the hearing of this application that the applicants merely seek an opportunity to present nothing, but arguments at the appeal stage. The court is constrained from granting leave to appeal solely for the presentation of argument that is devoid of factual grounding.

ORDER

[10] Resulting from the conclusion in this judgment, the following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the costs on the opposed scale and which shall include the costs of senior counsel.



MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES' LEGAL REPRESENTETIVES AND UPLOADED ONTO CASELINES ON 26 JANUARY 2024.

APPEARANCES

For the Applicant	Advocate P Ginsberg SC Advocate G Marriot Advocate T Mpulo-Merafe
Instructed by	Adams & Adams Attorneys
For the Respondent	Advocate R Michau SC
Instructed by	Kirsch IP