

**IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA**

***Reportable***

CASE NO: 18998/2010

In the matter between:

**ALEXANDER ANATOLE THEODORE  
METTENHEIMER**

First Applicant

**ZONQUASDRIF ESTATES LIMITED**

Second Applicant

And

**ZONQUASDRIF VINEYARDS CC**

First Respondent

**REGISTRAR OF CLOSE CORPORATIONS**

Second Respondent

And

In the Counter Application between:

**ZONQUASDRIF VINEYARDS CC**

Applicant in the Counter Application

and

**ALEXANDER ANATOLE THEODOR  
METTENHEIMER**

First Respondent in the Counter Application

**ALMETT PROPERTIES (PTY) LTD**

Second Respondent in the Counter Application

**REGISTRAR OF TRADE MARKS**

Third Respondent in the Counter Application

**CORAM: D M DAVIS J**

**JUDGMENT BY: DAVIS J**

**FOR THE APPLICANTS: ADV G E MORLEY SC**

**INSTRUCTED BY: ADAMS & ADAMS**

**FOR THE RESPONDENTS: ADV A SHOLTO-DOUGLAS SC**

**INSTRUCTED BY: MACROBERT INC**

**DATE OF HEARINGS : 10 MAY 2012**

**DATE OF JUDGMENT: 13 JUNE 2012**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

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**JUDGMENT: 13 June 2012**

**DAVIS J**

**Introduction**

[1] Applicants have sought an interdict restraining the first respondent from infringing a trade mark no 2005/05743 ZONQUASDRIFT class 33 in respect of alcoholic beverages (except beer).

They have also sought an order in terms of s 20(2) (b) of the Close Corporations Act 69 of 1984

which declares that first respondent's close corporation, namely Zonquasdrif Vineyards CC, is undesirable and/or calculated to cause damage to the applicants.

[2] First respondent has launched a counter application in which it seeks an order removing the first respondent's trade mark from the register of trade marks on the basis that (a) it refers to a geographical area; and/or (b) it is incapable of distinguishing the applicant's goods in respect of which the mark is registered from the goods and services of another person; and/or (c) the application therefore was made *mala fide* within the meaning of s 10(7) of the Trade Marks Act 194 of 1993.

[3] It appeared to be common cause between the parties that the issues that arise for consideration can be summarised thus:

1. Whether the first respondent infringed the first applicant's trade mark;
2. Whether the first respondent's name is objectionable in terms of s 20 (2) of the Close Corporations Act;
3. Whether the first respondent's mark offends against the provisions of s 10(2) (a) and/or 10 (2)(b) of the Trade Mark Act and/or whether the first applicant acted *mala fide* in terms of s 10 (7) of the Trade Mark Act and whether the trade mark should accordingly be removed from the register.

### **The Factual Matrix**

[4] First applicant is a registered proprietor of the trade mark Zonquasdrift, the scope of which is set out above. The second applicant is a private company owned by the first applicant and his wife. It is the owner of a wine producing farm which the applicants call Zonquasdrift. First respondent is a close corporation which conducts the business of farming vineyards. It runs its business from a farm in the Zonquasdrift area approximately one kilometre from the second applicant's farm. Its registered and trading name is Zonquasdrif Vineyards CC.

[5] It is important to emphasise that the first applicant's trade mark covers only alcoholic beverages, including wine. By contrast, the first respondent uses its registered trading name to farm and sell grapes. The first applicant has not registered Zonquasdrift as a trade mark in class 31 (in respect of grapes) or class 44 (in respect of farming) nor does it appear from the papers that it has applied for such a registration. By contrast, the second applicant does not itself sell its wine under the mark Zonquasdrift in South Africa although it exports and sells its wine in Germany and thus, to that extent, uses the first applicant's trade mark in South Africa.

#### **The significance of Zonquasdrift**

[6] First respondent contends that the name Zonquasdrift relates to a geographical place name which dates back as far as 1660. It represents the border between the upper and lower Berg River and has historically been the most natural crossing over the river. First respondent contends that vineyards for the various farmers surrounding the drift including first respondent's farm for at least 35 years have used as geographical indicators as part of their names. Applicants in their reply, deposed to by the first applicant, contend that:

*"It is not the Applicant's case that 'Zonquasdrift' lacks any geographical meaning whatsoever. It is known as crossing point on the Berg River and is often used as a point of reference along the river. It is naturally useful to refer to clear demarcations when referring to a point on a riverbank as long as the Berg is. Accordingly, it comes as no surprise that the Mr Walter's and Mr Badenhorst were able to locate references on the internet to Zonquasdrift which is also a stopover point in the Berg River Canoe Marathon event. I do not claim exclusivity in the name Zonquasdrift in respect of all and any goods and services. In the present instance I rely on a registered trade mark for Zonquasdrift for goods inclusive of wine and these are the goods in respect of which I assert rights."*

[7] The relevance of the name 'Zonquasdrift' will be canvassed presently. However as Mr Sholto-Douglas, who appeared on behalf of respondents, submitted, given that there was both an application and a counter application, which formed the basis of these proceedings, the appropriate step would be to commence the analysis by way of an examination of the application, in particular the scope of s 34(1) (b) of the Trade Mark Act and where it protected the applicants' goods, being wine. Hence, it is to this section that his Court must direct its initial analysis.

**Infringement of applicants trade mark?**

[8] Section 34 (1 )(b) provides thus:

The rights acquired by registration of a trade mark shall be infringed by –

.....

(b) the unauthorised use of a mark which is identical or similar to the trade mark registered, in the course of trade in relating to goods or services which are so similar to the goods and services in respect of which the trade mark is registered that in such use there exists the likelihood of deception or confusion. Accordingly, in order to establish an infringement in terms of this subsection, it is necessary for the applicant to show

(a) unauthorised use

(b) of a registered trademark

(c) in the course of trade in respect of goods or services which are so similar to the goods or services in respect of which applicant's trademark is registered

(d) that in such use, there exist a likelihood of deception or confusion.

[9] In seeking to contend that this section is inapplicable to respondent's business, Mr Sholto-Douglas referred, in particular, to first respondent's replying affidavit in the counter application in which Mr Walters says:

*"The first respondent does not sell wine or any other alcoholic product and therefore does not use its mark ZONQUASDRIF VINEYARDS in relation to any of the goods referred to in class 33. Absent this application, therefore, the first respondent would ordinarily not have an interest in the registration of the first applicants' mark or of his use thereof in trade.*

*It is only by virtue of the fact that the first applicant seeks, by using his make registered in class 33, to prevent the first respondent from using its mark, ZONQUASDRIF VINEYARDS, in relation to goods and services that are covered not by class 33, but by classes 31 (which covers grapes) or 44 (which covers agricultural services)."*

[10] By contrast, Mr Morley, who appeared on behalf of the applicants, referred to the founding affidavit in which first applicant sets out applicants case as follows:

*"I am advised and verily believe, that the goods and services of the First Respondent (namely grapes and the farming thereof) are so similar to the goods for which I have registered my ZONQUASDRIFT trade mark that, in such use, deception or confusion is likely to arise for the following reasons:*

- 1. It is trite and hardly bears mention that wine (for which my ZONQUASDRIFT trade mark is registered, along with other goods) is made from grapes. The First Respondent's goods are accordingly the raw materials from which my goods are produced, and its services, concerned with farming vineyards, are services ancillary to the production of wine.*
- 2. Accordingly, the purpose or uses of the First Respondent's goods and services namely, grapes and grape production bear a direct relationship to wine, for which my*

*trade mark is registered, forming the end product of the goods and services of the First Respondent.*

*3. It is commonly known in the wine industry that certain wine farms both grow grapes and make their own wines; whilst other farms either produce grapes for resale to wineries, or make their own wines using grapes purchased from other farms (sometimes in combinations with their own grapes). In certain instances, wine farms also sell wine as a finished product to each other, often for use in blends.*

*4. In the circumstances, there are no clear delineations between farms producing and selling grapes; or selling grapes and wine; or selling wine alone. I, for instance, sell both ZONQUASDRIFT grapes to Riebeek Cellars, and export ZONQUASDRIFT wine."*

[11] Of further significance is the following passage from first applicant's affidavit:

*"Furthermore, in the wine industry, the reputation of a wine label bears a close correlation with the quality of wine sold under a particular trade mark during the latest release. The grapes from my designated single vineyard have been sold to Riebeek Cellars and they have produced a high quality and Limited Release Chenin Blanc, noting on their label that the origin of their grapes from ZONQUASDRIFT.*

*My ZONQUASDRIFT trade mark accordingly has a good and hard earned reputation within the wine industry. However, due to the nature of my produce, such reputation is always tenuous and is inherently dependant on the next release under the ZONQUASDRIFT name.*

*Should the First Respondent's quality of grapes, or wine produced therefrom fail to meet the standards currently associated with my ZONQUASDRIFT trade mark, the reputation in my mark shall suffer."*

[12] Crisply stated, the dispute in this case turns on the question on whether a trade mark registered to protect alcoholic beverages only, including wine, contains rights enjoyed by applicant which are protected in circumstances where the respondent is in the exclusive business of farming grapes. In other words, the court is required to determine the following question: does the business of farming grapes fall within the phrase *'in the course of trade in relations to goods or services which are so similar to the goods or services in respect of which the trademark is registered that in such use there exist a likelihood of deception or confusion'?*

[13] Manifestly, s 34 (1) (b) broadens the scope of trade mark infringement in that the holder of the trade mark can have an action for infringement against the respondent who employs the mark in respect of similar goods in addition to identical goods.

[14] In the result, both counsel referred to the decision in **Danco Clothing (Pty) Ltd v Nu-Care Marketing Sales and Promotions (Pty) Ltd** 1991 (4) SA 850 (A). This case involved an appellant who registered the mark 'French Connection' in respect of clothing and a respondent who had registered the same mark in respect of cosmetics. As Nienaber JA said at 860 C.

*"The issue is whether such a postulated normal and fair use by the respondent of the trade mark 'French Connection' in relation to a range of cosmetics would be likely to cause confusion or deception when compared with the notional use by the appellant of the trade mark 'French Connection' in connection with items of clothing."* He then set out the test at 860 D as follows:

*"[w]hether an applicable substantial number of ordinary members of the buying public in October 1985 would either have believed that, or in any rate would have been uncertain and bewildered as to whether, the respective goods derived from or were connected in the course of trade with the same supplier."*

[15] It was accepted by the Court in **Danco** that there was no evidence of actual deception or confusion. However, according to Nienaber JA, at 860 J the evidence of *'several prominent and knowledgeable persons in the trade'* supported the argument that customers who would shop in large departmental and clothing stores would *"as a matter of course associate a mark on*



*cosmetics with the identical mark on well-known and popular brands of clothing; the appellant's mark was indeed well-known and popular on clothing in 1985."*

[16] In short, the evidence placed before the Court, which was neither contradicted nor qualified, was that the public would associate a particular brand of cosmetics, perfumery, toiletries or suntan preparations with clothing bearing the same name. Accordingly, the Court held that the likelihood of deception or confusion among a substantial number of persons had, on the probabilities, been established.

[17] The South African authorities appear to have amplified upon this approach by reading this judgment together with that of a judgment of the English Courts in **British Sugar PLC v James Robertson & Sons Ltd** 1996 RPC 281 where Jacob J stated at 296 - 297:

*"I think the sort of consideration the courts must have in mind are similar to those arising under the old Act in relation to goods of the same description. I do not say this because I believe there is any intention to take over that conception directly. There plainly is not. The purpose of the conception in the old Act was to prevent marks from conflicting not only for their respective actual goods but for a penumbra also (sic). And the purpose of similar goods in the Directive and Act is to provide protection and separation for a similar sort of penumbra. Thus, I think the following factors must be relevant in considering whether there is or is not similarity:*

- (a) the respective uses of the respective goods or services;*
- (b) the respective users of the respective goods or services;*
- (c) the physical nature of the goods or acts of service;*
- (d) the respective trade channels through which the goods or services reach the market;*
- (e) in the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;*
- (f) the extent to which the respective goods or services are competitive. This inquiry may*

*take into account how those in trade classify goods for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors."*

See Webster and Page *South African Law of Trade Marks* at para 12.23

[18] From this judgment in *British Sugar*, the authors of LAWSA Volume 29 at

para 222 postulate the mandated test as follows:

*"Do the goods or services in respect of which the defendant's mark is used so resemble or are they so functionally related that the goods or services for which the plaintiff's mark is registered that there exists the likelihood that deception or confusion will arise in use, having regard to the identical nature or similarity between the two marks?"*

[19] To apply this test, it is necessary to determine the standard by which a court concludes that the goods or services, in respect of which the respondent's mark is used, resembles or so functionally relates to the goods or services for which applicant's mark is registered that the likelihood of deception or confusion can arise.

[20] In this connection, guidance is to be found in the test adopted by Corbett JA (as he then was) in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)**

**Ltd** 1984 (3) SA 623 (A) at 640 G - 641 B.

*"The determination of these questions involves essentially a comparison between the mark used by the defendant and the registered mark and, having regard to the similarities and differences in the two marks, an assessment of the impact which the defendant's mark would make upon the average type of customer who would be likely to purchase the kind of goods to which the marks are applied. This notional customer must be conceived of as a person of average intelligence, having proper eyesight and buying with ordinary caution.*

*The comparison must be made with reference to the sense, sound and appearance of the marks. The marks must be viewed as they would be encountered in the market place and against the background of relevant surrounding circumstances. The marks must not only be considered side by side, but also separately. It must be borne in mind that the ordinary purchaser may encounter goods, bearing the defendant's mark, with an imperfect recollection of the registered mark and due allowance must be made for this. If each of the marks contains a main or dominant feature or idea the likely impact made by this on the mind of the customer must be taken into account. As it has been put, marks are remembered rather by general impressions or by some significant or striking feature than by a photographic recollection of the whole. And finally consideration must be given to the manner in which the marks are likely to be employed as, for example, the use of name marks in conjunction with a generic description of the goods."*

[21] This approach has been followed by Harms DP in **Century City Apartments v Century City Property** 2010 (3) SA 1 (SCA), although in this case, the authority relied on by the learned Deputy President in order to come to the same conclusion as that arrived at by Corbett JA was located in **Compass Publishing BV v Compass Logistics Ltd** [2004] EWHC 520 (Ch). See paras 13 - 15 of the **Century City Apartments** case, *supra*.

[22] I agree with Mr Sholto-Douglas that, flowing from this approach as set out in the case law, the appropriate test is that the applicants are required to establish that the degree of resemblance between the marks and the goods in respect of which the first applicant is registered (wine) and the goods and services in respect of which the first respondent engages in trade (grapes) must be such that their combined effect will be to produce a likelihood of deception or confusion when the first respondent uses its mark on its goods.

[23] If regard is had to the factors which are set out in the **British Sugar** case, the following considerations must be taken into account:

1. Second applicant's product, being wine is drunk whereas first respondent's grapes are

used by wine maker's cooperative cellars to make wine.

2. Second applicant's wine is purchased by members of the public or by end users whereas first respondent's grapes are purchased by co-operative cellars.

3. The physical nature of the goods differ substantially, both in substance and in appearance.

4. Second applicant sells its wine in Germany whereas the first respondent sells its grapes to cooperatives on the local market.

5. Second applicant's wine could be sold in supermarkets and liquor stores whereas first respondent does not sell its grapes to end users but only to cooperative cellars. The fact is that, even if the second applicant sold its wine in South Africa, consumers would not find first respondent's grapes in supermarkets and liquor stores.

6. Second applicant and first respondent do not compete by virtue of the fact that first respondent does not make or sell wine, the very goods for which first applicant has registered a trade mark.

[24] On this basis, Mr Sholto-Douglas submitted that there was no justification for the contention that there was a likelihood of confusion on the part of second applicant's customers in relation to its product being wine and for which its mark was registered and first respondent's customers in relation to its products, namely grapes. There was no basis for the suggestion that the consumer of wine and the consumer of wine grapes would be so confused or likely to be deceived between the wine and the wine grapes, particularly since the latter were not sold to the general public.

[25] By contrast, Mr Morley submitted that second applicant produces wine grapes, sells these to a co-operative cellar which then uses part of the production of these grapes to produce wine which, in turn, is sold for export under first applicant's registered trade mark Zonquasdrift.

Accordingly, he submitted that there was a close association between first respondent's farming activities and the production and sale of wine grapes and wine itself. In short, he contended that first respondent's grapes are the raw materials from which wine is produced and therefore respondent's farming activities, constitute services in respect of farming vineyards which can be considered to be services which are ancillary to the production of wine. It followed, on this line of argument, that the nature and use of first respondent's goods and services, namely grapes and grape production, bear a direct relationship to wine.

[26] Mr Morley also contended that in the wine industry certain wine farms grow grapes and make their own wines; other farms either produce grapes for resale to wineries or make their own wines using grapes purchased from other farms. In certain cases, wine farms sell wine as a finished product to each other, often for the use in blends. In his view, there were no clear delineation between farms producing and selling grapes or selling grapes and wine or selling wine exclusively. This inextricable link, in his view, supported the argument in favour of a likelihood of confusion or deception.

[27] In the present case, the applicants sell both Zonquasdrift grapes to Riebeek Cellars and export Zonquasdrift wine which is deemed to constitute the use of the trade mark in South Africa. Mr Morley contended that sight should not be lost of the fact that the applicants are entitled, in terms of their trade mark, to sell Zonquasdrift wine in South Africa and therefore this notional use had to be included within the assessment of the present case.

[28] Mr Morley's submissions were grounded further in the affidavits deposed to by first applicant, in particular the founding affidavit. In this affidavit Mr Mettenheimer states as follows:

*"The second applicant has sold wine producing grapes from the registered (47 year old) single block of vines on Zonquasdrift to Riebeek Cellars Limited for approximately nine*

years. An extract from [www.wine.co.za](http://www.wine.co.za) confirms that Riebeek Cellars produced a 2009 Limited Release Chenin Blanc from grapes grown in my designated single vineyard block on Zonquasdrift.

In addition, I have been selling my ZONQUASDRIFT wine since 2006. This wine is produced and bottled in South Africa, with the geographical indication, "Wine of Origin Swartland", and exported for sale to Germany. I am advised, and believe, that the export of my wine bearing my ZONQUASDRIFT trade mark constitutes use of my trade mark in terms of the Trade Marks Act."

[29] The extract from the web page to which Mr Mettenheimer refers states:

*"New Riebeek Cellars Chenin Blanc captures a provenance of an historic Chenin Blanc vineyard... this Limited Release wine is made from grapes from a designated block of vines in a forty seven year old single vineyard on the farm Zonquasdrift in the Swartland."*

On the basis of this evidence, the applicant's case can be summarised thus: the use of the name Zonquasdrif Vineyards by first respondent in relation to farming vineyards, viticulture and grapes is likely to cause deception and confusion with regard to the registered trade mark Zonquasdrift, inter alia, its wine and therefore constitutes an infringement in terms s 34 (1) (b) of the Trade Marks Act.

### **Evaluation**

[30] An assessment of these arguments compels a return to the **Danco** judgment where the court decided that because the mark 'French Connection' was employed to characterise cosmetics, perfumery and clothing, the evidence indicated that both the use thereof and the trade channels through which these goods could notionally be retailed *'the likelihood of deception and confusion amongst a substantial number of persons has ... been established on the probabilities'*, at 861 E

[31] In the present case there is little evidence, as set out in the papers placed before this Court,

which establishes the kind of likelihood which proved decisive in the **Danco** case. The only evidence which is provided concerns the alleged confusion of an Eskom administrative clerk, who was not identified, and who contacted one of second applicant's employees and allegedly mistook applicants farm for first respondent's farm. There was a further query about 'one of the attendants' of Kaap AGRI (also unidentified) as to whether applicants farm had opened a new business under first respondent's name. These vague averments can hardly be equated to the kind of expert evidence relied upon by Nienaber JA in **Danco**, *supra*.

[32] In the present case, arguably the more relevant question which arises is whether the association between applicant's trade mark and first respondent selling its grapes under the name Zonquasdrif Vineyards CC constituted an association *'between the marks (which) causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings'* in which case there would be a likelihood of confusion. **Century City Apartments** at para 13. This would appear in the final analysis, to be the core of the argument upon which applicants relied.

[33] For applicants to succeed, they would have to show, in my view, that the wine which is produced under the registered trade mark is such that the grapes are so economically linked to the production of wine that a consumer is likely to confuse Zonquasdrif wine with respondent's grapes. Manifestly, the purchase of grapes cannot be confused with the purchase of wine. The issue however is whether the consumer would be confused that the wine which is produced and then purchased ultimately comes from first respondents' grapes and therefore there is a likelihood of confusion between the applicants' product and the product of first respondent.

[34] Although I have not yet dealt with the debate between counsel as to whether Zonquasdrif consist exclusively of a designation of a geographical origin of services to which I referred earlier, as it is an enquiry more appropriately to be dealt with in terms of s 10(2) (b) of the Trade

Mark Act, the question of the geography is not irrelevant to the issue under immediate determination, namely the likelihood of confusion. I thus need to return to this debate. If Zonquasdrift constitutes a well-known historical and geographical name place, then an association, which the public in general may form with first respondents trade name, would be with a particular geographical place and not with any of the other activities which may take place in the vicinity. This issue is relevant because the applicants contend that a mark, which they suggest is distinctive for wine, should then be sufficient in scope to prevent the use of any similar mark in relation to the farming and sale of grapes.

[35] In his answering affidavit Mr Walters avers:

*"In the Riebeek Valley Zonquasdrift is commonly known as a geographical area where grapes are produced. The extensive vineyards on the farm Klein Zonquasdrift on the opposite bank Berg River from second applicant's vineyards and the first respondent's vineyards including its thirty five year old Chinin Blanc evidence is as fact."*

In his reply, first applicant denies that:

*"Zonquasdrift is a known wine production area in the Riebeek Valley, no evidence of this has been produced. In fact the first respondent has not been able to point to a single example of wine besides my own emanating from the area around Zonquasdrift."*

Significantly however, other than suggesting that he has 'no knowledge of the age of the vineyards of the first respondent's farm' he does not, in any way, place in issue that a considerable amount of grape farming does take place within the area known as Zonquasdrift. If so, it is difficult to see how grapes from this known geographical area could cause the kind of confusion to consumers suggested by Morley, namely that applicants wine comes from respondent's grapes.



[36] The suggestion that second applicant sells wine producing grapes from the registered single block of vineyards on its farm to Riebeek Cellars does not necessarily take applicant's case any further. Significantly in the website annexure to which I have already made reference, mention is made of '*grapes from a designated block of vineyards... on the farm Zonquasdriфт*'. To the extent therefore that Zonquasdriфт does connote a geographical location, as respondents aver, variations of this name have been used by members of the farming community in the vicinity. Other farmers are surely entitled to inform consumers that their grapes come from the Zonquasdriфт area.

[37] This, in my view, strengthens the argument that, judged through the eyes of the notional average consumer of the goods or services in question, (**Plascon-Evans** at 640) and based upon the evidence as set out in the papers, there is an insufficient justification to conclude that the use by first respondent of the name Zonquasdriфт Vineyards will create the existence of a likelihood of deception or confusion between its grapes and applicant's wine.

### **Counter application**

[38] On the basis of this finding therefore, applicants' have failed to establish an infringement by the first respondent to first applicant's trade mark. There is, in my view, no need to engage further with the counter application, to the effect that the trade mark falls to be expunged. From what I understood from Mr Sholto-Douglas' argument, the counter application was brought as a form of defence against the application. In this connection, Mr Sholto-Douglas referred me to paragraph 12.6.2 (10) of Webster and Page's work where the submission is made that, in cases of this kind, counter applications of this nature are brought as a form of a defence:

*"While it seems that a court might consider the invalidity of a trade mark as a defence as between immediate parties, on condition that the Registrar of Trade Marks has been joined, the safer course of action would always be to make application to expunge the mark from the Register. It must be noted that in terms of the definition of "court" in section 1(1) it is clear that any court hearing and infringement action has jurisdiction*

*to hear a counter-claim for expungement"*

The counter application stands to be dismissed as it was only being pursued as a defence.

However, I do not consider that there is merit in Mr Morley's argument that first respondent should pay the costs of the counter application, given that, in the form of a defence, it was not pursued, in the light of the findings to which I have arrived with regard to s 34 (1)(b) of the Trade Marks Act.

[39] For these reasons therefore,

- (1) The application is dismissed with costs;
- (2) The counter application is dismissed.

**DAVIS J**