15/11/2017

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 24784/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

15/11/2017 ....

DATE SIGNATURE

In the matter between:

HONDA GIKEN KOGYO KABUSHIKI T/A HONDA MOTORS CO LTD	APPLICANT
and	
BIG BOY SCOOTERS	RESPONDENT

Coram: HUGHES J

REASONS

HUGHES J

[1] This is an application for leave to appeal against the whole of my judgment and cross-appeal against certain portions of the judgment and order handed down on 25 August 2017. The parties are cited as per the main application.

[2] The respondent has launched this application for leave to appeal on the premise that I erred in finding that the respondent contravened section 34(1)(a) of the Trade Marks Act 194 of 1993 in respect of the trademarks CGL125 and CFR and the granting of an interdict for such trademarks; that the respondent contravened section 34(1)(c) in respect of trademark CRF; and finally for granting the section 34(4) enquiry to determine the royalties payable by the respondent and costs payable by respondent.

[3] The applicant seeks to cross-appeal on the basis that I erred in not finding that the respondent's use of the trademark CCL encroached on the applicant's trademark and infringed upon the applicant's trademark CGL125; that if an infringement were to be found the applicant had a monopoly over the alphabet; that I erred in finding that the provisions of section 34(3)(b) of the Trade Mark Act was in conflict with section 25 of the Constitution and should have granted the relief sought by the applicant under section 34(3)(b).

[4] Section 17 (1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) is the provision which deals with the grounds upon which leave to appeal may be granted. Of relevance in this application and the cross-appeal is section 17 (1) (a) and for easy reference I set out section 17 (1) below:

"Section 17(1)

(1) *Leave to appeal may <u>only</u> be given where the judge or judges concerned are of the opinion that-*

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

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a);and

(c) *where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."* [My emphasis]

[5] The test which was applied previously in applications of this nature was whether there were reasonable prospects that another court may come to a different conclusion. See **Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at 890B.** What emerges from section 17 (1) is that the threshold to grant a party leave to appeal has been elevated. It is now only granted in the circumstances set out above in section 17(1) and is inferred from the words '*only*' which is used in the said section. See **The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para [6]**, Bertelsmann J held as follow:
"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see ***Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H.*** *The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."* [My emphasis].

[6] The grounds for leave to appeal are to a large extent factual asserting that this court's reasoning was erroneous and that I failed to take into consideration or give sufficient weight to other factors. What I do not propose to do is to set out the exhaustive grounds of appeal again or repeat that which is set out in my judgment, in as much as that which was relevant was dealt with in the judgment. I am mindful of the fact that an appeal is solely aimed at an order of a court and not its reasoning.

[7] Both the respondent and the applicant argue that in terms of section 17 (1) (a) they should be granted leave to appeal and cross-appeal on the grounds set out in their notice for leave to appeal and cross-appeal, respectively, as they would have reasonable prospect of success in another court.

[8] In **S v Smith 2012 (1) SACR 567 (SCA) 570 at para [7]** Plasket AJA had the opportunity to consider what constitutes reasonable prospects of success and he held as follows:

"[7] What the test of reasonable prospects of success postulates is 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. 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." [My emphasis]

[9] I have before me in this leave to appeal and cross-appeal, in my view, submissions and contentions made of what I should have found, should have considered critically, should have considered certain probabilities and erred in not considering factors and erred in not taking certain factors into account.

[10] The crux of the applicant argument regarding the respondent's grounds advance for the grant of leave to appeal are moot. The applicant argues that the respondent on its own submissions advanced states that they desisted from using the trademarks of the applicant complained of and as such there was no need to grant the respondent leave to appeal on a moot point. The applicant further argues that the granting of the interdict was correct as the respondent had failed to give the necessary undertaking a requested even after it had desisted.

[11] The respondent argues that the section 34(4) enquiry is dependent on the adjudication of both the application for leave to appeal and the cross-appeal and for that reason alone leave ought to be granted.

[12] In terms of section 16(2)(a)(i) of the Superior Courts Act an application for leave to appeal may be dismissed if at the hearing of the appeal the decision sought would have no practical effect. To this end I am mindful of the warning sounded in **Legal Aid v Magidiwana 2015 (2) SA 568 SCA at 579D-F para [22]** where it was held that if the

lis between the parties no longer existed for adjudication and then there was no discretion to be exercised by the court in terms of section 16(2)(a)(i).

[13] In my view, the conclusion that I have reached from an analysis of the proven facts could only be that which is apparent from my judgment. However, I am of the view that reasonable prospects do exist with regard to my finding made in paragraph [55] and [56]. Thus, the applicant has made out a case that it has prospects of success in the cross-appeal.

[14] In the circumstances, leave to appeal in respect of the respondent application, is granted on the narrow issue to the Supreme Court of Appeal. This is with regards to the holding of an enquiry in terms of section 34(4) of the Trade Marks Act to determine the royalties payable.

[15] As for the cross-appeal, the grounds set out in the notice of cross-appeal, leave to appeal is duly granted to the Supreme Court of Appeal.

[16] Consequently the following order is made:

[16.1] The respondent's application for leave to appeal is granted to the Supreme Court of Appeal on the narrow issue with regards to the holding an enquiry, in terms of section 34(4) of the Trade Marks Act 194 of 1993, in order to determine the royalties payable.

[16.2] In the cross-appeal, leave is duly granted to the applicant to the Supreme Court of Appeal.

[16.3] The costs of the application for leave to appeal and the cross-appeal are to be costs in the appeal.

W. Hughes
Judge of the High Court Gauteng, Pretoria