IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

DATE: 18 AUGUST 2025

SIGNATURE:.....[redacted]

Case No. 017055/2025

In the matter between:

ASPEN PHARMACARE HOLDINGS GROUP	**FIRST APPLICANT**
PHARMACARE LIMITED	**SECOND APPLICANT**
And	
ADCOCK INGRAM HEALTHCARE (PTY) LTD	**FIRST RESPONDENT**
ADCOCK INGRAM INTELLECTUAL (PTY) LTD	**SECOND RESPONDENT**
THE REGISTRAR OF TRADE MARKS	**THIRD RESPONDENT**

Coram: Millar J

Heard on: 13 August 2025

Delivered: 18 August 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 09H00 on 18 August 2025.

JUDGMENT

MILLAR J

Introduction

[1] On 13 August 2025, I heard an application for leave to appeal against a judgment and order handed down on 12 May 2025 together with an application in terms of section 18(3) of the Superior Courts Act[1] (the Act).

[2] At the conclusion of the hearing, I indicated that separate judgments would be handed down in respect of each. On 14 August 2025, I handed down judgment in the application for leave to appeal brought by the respondents in the present application and that application was dismissed with costs. This judgment is in respect of the application in terms of section 18(3).

[1] 10 of 2013.

[3] The order granted on 12 May 2025 was as follows:

> *"[59.1] The first respondent is interdicted and restrained, in terms of section 34(1)(a) of the Trade Marks Act 194 of 1993 ("the Trade Marks Act"), from infringing the first applicant's rights acquired through trademark registration no. 2004/20795 MYBUCOD (hereinafter referred to as the "MYBUCOD trademark") in class 05 by using any trade mark confusingly similar thereto, and in particular from using the "LENBUCOD" mark in respect of any of the goods to which the first applicant's mark apply.*
>
> *[59.2] The first respondent is ordered to deliver up for destruction to the first applicant's attorneys within seven (7) days of the granting of this Order any packaging, catalogues, advertising, promotional material or other materials bearing or incorporating a trademark which is either identical or confusingly like the first applicant's MYBUCOD trademark.*
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> *[59.3] The respondents are ordered to pay the costs of this application, including the costs consequent upon the employment of two counsel, where so employed, one of whom is a senior counsel, both on Scale C"*

Present application

[4] In the present application brought in terms of section 18(3)[2], the applicants are required to demonstrate firstly, exceptional circumstances which justify the

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[2] "***18 Suspension of decision pending appeal***

(1) *Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*

execution of the order pending any appeal, secondly that they will suffer irreparable harm if it is not executed, and thirdly that the respondents will not be irreparably harmed if the order is executed.[3]

[5] The consideration of these three factors is through the lens of the prospects of success of the prospective pending appeal.[4] Furthermore, in considering each of the factors, these are not to be considered in isolation but holistically having regard to the entirety of the case.[5]

Are there exceptional circumstances?

[6] The first stage of the enquiry, whether "exceptional circumstances" are present depends on the peculiar facts of each case.[6] The exceptional circumstances must be derived from the actual predicaments in which the litigants find themselves.

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(2) *Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.*

(3) *A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.*

(4) *If a court orders otherwise, as contemplated in subsection (1)*

(i) the court must immediately record its reasons for doing so

(ii) *the aggrieved party has an automatic right of appeal to the next highest court*

(iii) *the court hearing such an appeal must deal with it as a matter of extreme urgency and(iv) such order will be automatically suspended, pending the outcome of such appeal.*

For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

3 *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) at para [16].

4 See *Democratic Alliance and Others v Premier for the Province of Gauteng and Others* (18577/20) [2020] ZAGPPHC 330 (10 June 2020) paragraphs [11] – [13].

5 *Tyte Security Services CC v Western Cape Provincial Government and Others* 2024 (6) SA 175 (SCA) at paras [10] and [14].

6 *University of the Free State v Afriforum* 2018 (3) SA 428 (SCA).

[7] Since this matter is concerned with a trademark, for the lifespan of which the protection and benefits are available to the holder of that trademark, the time for which the suspension of the order is likely to occur is of necessity a factor to be considered.[7]

[8] It was argued that no appeal would likely be heard and disposed of before the end of 2026 and that in consequence if the order is not enforced, the applicant's registration of its trademark and the purpose of section 34(1)(a) of the Trade Marks Act[8] would be rendered nugatory. After all, the section is couched in prescriptive terms – "*The rights acquired by registration of a trade mark **shall** be infringed.*" [My emphasis].

[9] In *Incubeta Holdings (Pty) Ltd v Ellis,*[9] it was stated that:

> *"[27] In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances.'*
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> *[28] The plight of the victor alone is probably all that is required to pass muster. Nonetheless, I am not unconscious of the undesirable outcome that relief granted by the court becomes a vacuous gesture. A court order ought not be to be lightly allowed to evaporate, a fate, which seems to me, would tend to undermine the role of courts in the ordering of social relations."*

[10] The applicants have a registered trademark. The applicants have a judgment in their favour for the protection of that trademark. If the judgment is not put into

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7 *Car Find (Pty) Ltd v Car Trader (Pty) Ltd* 2016 JDR 0314 (GJ).
8 194 of 1993.
9 *Incubeta* supra at paras [27] - [28].

operation, then it will be nothing more than the *"vacuous gesture"* posited in *Incubeta.*

[11] For the reasons set out above, I find that there are exceptional circumstances.

Is there irreparable harm to the applicants?

[12] The second stage of the enquiry is regarding whether there is irreparable harm to the applicants. In this regard, the applicants pointed to the conduct of the respondents over the last six months.

[13] Bearing in mind that the applicants immediately objected to the respondents' use of LENBUCOD, when it first became aware of it, it was argued that to allow them to continue marketing and selling the product, pending the outcome of any appeal brought by them would cause irreparable harm to the applicants.

[14] The applicants pointed to the assertion made on behalf of the respondents that *"Adcock has already made use of the LENBUCOD mark for a period of almost six months and, to date, has sold products under the LENBUCOD mark to the value of R8, 400, 000 (eight million four hundred thousand rand)* and argued, that given the short period of time, the sales were staggering in their number. The argument went further for the applicants, that given such a staggering number of sales in such a short period of time, it ought to be accepted that the respondents would persist with the same marketing and sales and that this would have the consequence of *"flooding the market with the LENBUCOD product whilst the parties wait for its appeal to be heard."*

[15] The applicants have sought to enforce the protection of their trademark. If by operation of law, the respondent is permitted to continue infringing upon the trademark and in so doing, creating a situation where even if ultimately the applicants succeed, the commercial value of their trademark will have been

decimated. This, to my mind establishes unequivocally that the harm which will be suffered by the applicants is irreparable.[10]

[16] It was argued for the respondents that insofar as the applicants' trademark was concerned, that the product to which it was attached was *"an insignificant product with no protectable reputation"*. I am not persuaded that this argument has any merit. Once registered, the holder of a trademark has the right to have that trademark protected. Whether the trademark is used or not or of significant commercial value in its use or not, is beside the point. What is being protected is the right that has been registered.[11]

[17] If this were not so, then no trademark registration would be of any value if a competitor with the means was able to demonstrate in consequence of their infringement, either a commercial value where the owner had not used the trademark or a significantly higher commercial value to themselves than the owner who had.

[18] It does not behoove the respondent to argue that it is better able to commercially exploit the infringed trademark and for that reason, the holder of the trademark has not suffered harm or will not suffer irreparable harm should it be permitted to use the law to enable it to continue to do so.

[19] I am for the reasons set out above, persuaded that the applicants have established that they would suffer irreparable harm.

Is there irreparable harm to the respondents?

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[10] *LA Group (Pty) Ltd v United States Polo Association and* Others (2023/118082) a judgment of the full court hearing a section 18(4) appeal delivered on 4 March 2024 at para [56].

[11] This instance is distinguishable from the situation in *Road Accident Fund v New Net Properties (Pty) Ltd* 2023 (5) SA 289 (GP) at para [21] because it matters not whether the holder of a trademark uses it for commercial exploitation or not. They have a right which they are entitled to protect.

[20] The third stage of the enquiry is whether there is irreparable harm to the respondents if the order granted on 12 May 2025 is implemented. The harm must arise out of the implementation of the order.[12]

[21] On this score, the applicants have undertaken to compensate the respondents for any damages which they may suffer in consequence of the granting the order sought in terms of section 18(3). This undertaking is subject to the respondents being successful with any appeal.

[22] It is not in issue that the respondents knew that the applicants had registered MYBUCOD as a trademark or that issue was taken immediately with their registration and intention to use the LENBUCOD mark. This is not a case of innocent competition.

[23] From the outset, the respondents have been aware of the attitude of the applicants. The main application was served on them on 12 February 2025, a few weeks after they launched their product, and they have been aware from then that their use of the LENBUCOD mark was in issue.

[24] The respondents have chosen to conduct themselves in the way that they have and to the degree that they have insofar as the marketing and sales of LENBUCOD are concerned well knowing that their right to do so had been placed in issue.

[25] The fact that they have made what the applicants characterize as *"a staggering number of sales"* and may well have derived a concomitant benefit from doing so,

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[12] *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) at para [28].

does not in and of itself equate to their suffering irreparable harm if the order sought is granted.

[26] Similarly, it does not follow that even if the appeal is upheld that the respondents would not be able to return to the LENBUCOD mark. The scale of the success achieved in the relatively short period their product has been on the market belies their claim of irreparable prejudice or that they will not be able to return.

[27] There is no reason to believe that they would not be able to re-enter the market in the event of the success of their appeal with the same impact as they already have and armed with the undertaking given by the applicants, would then be able to claim any loss they are able to prove they suffered.

[28] For the reasons set above, I am not persuaded that the respondents would suffer irreparable harm.

[29] I find that the applicants have established exceptional circumstances and that they would suffer irreparable harm if the order sought in terms of section 18(3) is not granted. I also find that the respondents have failed to establish that they will suffer irreparable harm if the order is granted. For these reasons, I intend to grant the order below.

Costs

[30] Costs will follow the result. Both parties engaged two counsel and were *ad idem* that if costs were to be awarded in respect of counsels' costs, these were to be on scale C.

Order

[31] In the circumstances, it is ordered:

[31.1] The interdict set out in paragraph 59.1 of the judgment granted by this Court under the present case number on 12 May 2025 shall continue to operate against the first and second respondents pending the outcome of any application for leave to appeal against such interdict and for any appeal for which leave may be given.

[31.2] The first and second respondents are ordered to pay the costs of this application which costs include the costs consequent upon the engagement of two counsel, one senior and one junior, both on scale C.

[redacted]

A MILLAR

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 13 AUGUST 2025

JUDGMENT DELIVERED ON: 18 AUGUST 2025

IN THE APPLICATION IN TERMS OF S18(3)

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