IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN

Case no: D153/2024

In the matter between:

AFRICAN NATIONAL CONGRESS **APPLICANT**

and

UMKHONTO WESIZWE PARTY **FIRST RESPONDENT**

ELECTORAL COMMISSION OF SOUTH AFRICA **SECOND RESPONDENT**

ORDER

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1. Leave to appeal against the whole of the order and judgment of this Court is granted to the Supreme Court of Appeal.
2. The costs of the application for leave to appeal shall be the costs in the appeal.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by publication on *SAFLII*. The date and time for hand-down is deemed to be 09h00 on 08 August 2024.

JUDGMENT

Chetty J:

[1] This is a judgment in an application for leave to appeal brought by the African National Congress (ANC) against my judgment and order issued on 22 April 2024, dismissing with costs the ANC's urgent application against the first respondent, the uMkhonto weSizwe Party (MK Party), which was based on two alternative causes of action.

[2] In broad terms, the ANC sought final interdictory relief against the MK Party to prevent it from using a trade mark registered under number 2014/22089, in terms of the Trade Marks Act 194 of 1993 (Trade Marks Act). The ANC contended that the use by the MK Party, a duly registered political party, of a logo identical or similar to that inextricably associated with the ANC's historical struggle against the apartheid regime, was likely to cause voter confusion. The grounds of infringement relied upon are located in s 34(1)(a) and (c) of the Trade Marks Act. The practical relief sought by the ANC at the time – leading up to the May 2024 elections – was that the MK Party remove the confusing mark from any and all material in its possession. This would typically have included election posters and campaign paraphernalia in its possession.

[3] In addition, the ANC contended that the MK Party has, through the use of the name 'uMkhonto weSizwe' and its registered mark, engaged in conduct amounting to passing off under common law. It was submitted that the use of the ANC's mark was deliberate and was aimed at deceiving the public into believing that there is a close association between the two parties – reference being made to the MK Party being a 'room in the ANC's house'.

[4] At the core of my judgment is the question of whether this court had jurisdiction to hear the matter. As I have already pointed out in my judgment, the urgency in launching the application was, in my view, self-created. Upon an application of the

principles set out in *Gcaba v Minister of Safety and Security and other*[1] and *Kham and others v Electoral Commission of South Africa and another*,[2] I concluded that the dispute as framed by the ANC ought to have been adjudicated by the Electoral Court rather than the High Court.

[5] As I explained in my judgment, the principal difference is as to when the proprietary interests in the identifying mark were assigned. At the time of the MK Party's application to the Electoral Commission for registration as a political party, the ANC had not been assigned proprietary interests in the identifying mark, which remained vested in a third party, Legacy Projects. I concluded that prior to any assignment of the mark from Legacy Projects to the ANC, the Electoral Commission had already conferred electoral rights on the MKP pursuant to the provisions of s19 of the Constitution. These rights, as I found in my judgment, have not been set aside by a court and accordingly remain extant.

[6] Counsel for the ANC now contends that irrespective of any decision by the IEC to register the MK Party as a political party, this did not entail that it also could deprive the ANC of the protection afforded to its intellectual property and to the protection of its trade mark with the party. On this score alone, it is argued that another court may reasonably conclude that I erred in finding that the IEC's decision resulted in a 'vesting of rights' in the MK Party.

[7] Despite my finding that the matter lacked urgency, that the ANC was vested with certain electoral and political rights, and that the High Court was the incorrect forum to challenge alleged trade mark infringement, I proceeded for reasons fully set out in my judgment, to deal with the merits of the trade mark infringement. In this respect, counsel for the ANC contended that if one accepts (as I appeared to) that the High Court is the proper court to determine disputes in terms of the Trade Marks Act, then it must follow that the Electoral Court for that reason could not have determined the trade mark dispute between the parties. Counsel accepted however that if another

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[1] *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).
[2] *Kham and Others v Electoral Commission and Another* [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC).

court found that the Electoral Court would have jurisdiction in the matter, the remaining issues raised by the ANC would fall away.

[8] Put differently the ANC asserts that the dispute concerning the name and logo is a trade mark dispute and not one falling within the ambit of protection of a political party's right to free and fair elections. Accordingly, it was submitted that I erred in characterising or framing the issue for determination. Counsel for the MK Party, on the other hand, submitted that the ANC framed the dispute based on what is set out in their founding papers and that the arguments now advanced are an ex post facto attempt to reframe the dispute. The MK Party further contended that the attacks against the lack of urgency, *locus standi*, and jurisdiction are 'hopeless' and that another court should not be detained by having to revisit my decision on trade mark infringement, particularly as the judgment compared the marks as they would appear to a voter in the elections of May 2024 and found no basis for the infringement complained of.

[9] It was further argued by the MK Party that as the May 2024 elections are now behind us, any attempt to appeal the matter should be dismissed on grounds of mootness. The ANC, however, takes a different approach, submitting that the allegations pertaining to trade mark infringement were not 'time-based' to the May 2024 elections and that they would continue to suffer the risk of reputational erosion as a political party for as long as the debate regarding the use of the name 'uMkhonto weSizwe' remained unresolved. The harm, as I understood this argument, was ongoing.

[10] I posed to counsel for the MK Party whether it was open to the ANC, if it believed that its reputation was being infringed by the continued use of the name and identifying mark by the MK Party, to take future steps to protect its interests? Counsel submitted that the ANC could institute a new application in respect of any risk that it might suffer. The ANC, however, contends that my judgment is final and binding on the parties insofar as the trade mark infringement is concerned, and any new application instituted would be met with a plea of *res judicata.*

[11] In light of these arguments and those set out in their grounds of appeal, the ANC contends another court may reasonably come to a different conclusion. I now turn to deal with the principles applicable to the question of leave to appeal. It is well settled, although worth repeating in the context of this case, that in considering leave under s17(1)(a) of the Superior Courts Act, the question is not whether the case is arguable or another court may come to a different conclusion.[3]
As the Supreme Court of Appeal (SCA) put it in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*[4]:

'. . . an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal.' A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive.'

[12] s17(1) of the Superior Courts Act 10 of 2013 provides that:
'(1) Leave to appeal may only 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;
. . . '

[13] The ANC relied on both facets of s 17(1)(a) in arguing that leave to appeal should be granted to the SCA in light of the significant public interest in this matter and the novel issues involved. In *Ramakatsa and Others v African National Congress and Another* [5] the following principle was expressed:
'Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is

[3] *R v Nxumalo* 1939 AD 580 at 588.
[4] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA) at para 2.
[5] *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 at para 10.

unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'

[14] With these principles in mind and having heard argument from counsel, I am satisfied that the appeal would have reasonable prospect of success as another Court could differ from the view that I have reached, including those relating to jurisdiction, *locus standi* as well as the merits of the trade mark infringement in respect of which the applicant submits that my conclusion differs from that of the Supreme Court of Appeal in *Adcock Ingram Intellectual Property (Pty) Ltd and another v Cipla Medpro (Pty) Ltd and another*[6]. The matter will have implications for the parties concerned and their members at a national level. I am therefor of the view that leave to appeal should be granted to the Supreme Court of Appeal.

Order

[17] In the result, I make the following order:

1. Leave to appeal against the whole of the order and judgment of this Court is granted to the Supreme Court of Appeal.
2. The costs of the application for leave to appeal shall be the costs in the appeal.

CHETTY J

[6] *Adcock Ingram Intellectual Property (Pty) Ltd and another v Cipla Medpro (Pty) Ltd and another* [2012] ZASCA 39; 2012 (4) SA 238 (SCA).

Appearances

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Date of hearing:	1 August 2024
Date of Judgment:	8 August 2024