

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2022-042465

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

4 AUGUST 2025


Judge Dippenaar

In the matter between:

WINGS TRAVEL MANAGEMENT (PTY) LTD

APPLICANT

and

SATGURU TRAVELS (PTY) LTD T/A TRAVELWINGS

RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 14h00 on the 4th of AUGUST 2025.

DIPPENAAR J:

[1] This is an opposed application pertaining to trademarks in which the applicant sought the following relief:¹

1. *'The Respondent is forthwith interdicted and restrained from using the mark "TRAVELWINGS" in relation to the rendering of travel-related services and thereby infringing trade mark registration numbers 2009/10854 in class 43, 1996/06867 in class 39, 2005/05095 in class 39 and 2009/10969 in class 43, in the name of the Applicant in terms of section 34(1)(a) alternatively section 34(1)(b) of the Trade Marks Act 194 of 1993*
2. *Alternatively, the Respondent is forthwith interdicted and restrained from using the mark "TRAVELWINGS" in relation to the rendering of travel-related services, thereby passing off the respondent's travel related services as being those of the Applicant or as being connected in the course of trade with the Applicant;*
3. *The Respondent is forthwith to remove the mark "TRAVELWINGS" from any and all items, materials and media (of any description) and, where the mark is incapable of being removed, to destroy all such items, materials and media in the presence of the Applicant and/or its Attorney of Record, alternatively at the option of the Respondent, to deliver up same to the Applicant;*
4. *An enquiry is to be held, as contemplated by section 34(4) of the trade Marks Act 1993, for the purpose of determining the amount of the damages or reasonable royalty to be so paid to the Applicant;*

¹ In terms of its draft order.

5. *The Registrar of the Court is to fix a date for the enquiry to be held, by way of a High Court trial;*
6. *The Respondent is to pay interest on the amount so determined, at the prescribed rate of interest from date of determination to date of payment;*
7. *The Uniform Rules of Court relating to actions, including subsequent pleadings, discovery, inspection and all other matters of procedure, shall apply to the enquiry;*
8. *The parties are authorised, on notice to the other party and should it be required by one or both of them, to make application to the Court to add to, or vary this Order so as to facilitate the conducting of the enquiry and generally to make application for further directions in regard thereto;*
9. *The Respondent shall pay the costs of this application on the Attorney and client scale, including the costs of two counsel where two counsel were used, on scale C of the High Court Rules.'*

[2] The background facts are mostly uncontentious. The applicant is Wings Travel Management (Pty) Ltd ('WTM'), which operates in the travel industry. Its business includes the rendering of travel arrangement, booking and consulting services, both in the corporate and leisure sectors. Its business was established during 1992 under the name Acropolis Travel CC, which was subsumed by the applicant upon its registration. After various name changes, it changed its name to WTM during 2016. The applicant is one of the entities in the 'Wings Group', illustrated by way of an organogram attached to the founding affidavit.

[3] It was undisputed that since the establishment of the business, the Wings Group has developed into a global enterprise servicing the entire travel industry across five continents with established offices in sixteen countries. In the course of its expansion, numerous enterprises were established both locally and abroad to cater for specific travel

hubs and markets in different travel sectors and international locations. Its global turnover is some £ 250 000 per annum with a global staff compliment of almost 400 employees.

[4] According to the applicant, it prioritises quality of service to its customers and utilises advanced technology to give it a competitive advantage in the market. It boasts a client retention rate of 9/10 and most of its clients have a relationship with the group spanning more than five years. The Wings Group renders comprehensive travel and travel related services to each of its customers, including flight tickets, accommodation bookings, vehicle hire and seven-day support services for travel throughout the world.

[5] The respondent is Satguru Travels (Pty) Ltd t/a Travelwings. It is a subsidy of Satguru Travel and Tourism Holdings Private Limited, Dubai, United Arab Emirates. It also operates in the travel industry. It renders services of booking cheap domestic and international flights within and from South Africa, mostly for vacation. It operates solely on an electronic platform and provides a platform for booking domestic and international flights. In broad terms, both parties render travel arrangement services.

[6] The applicant has various registered trade marks in class 39 and class 43 respectively:

[6.1] Registration no 1996/06867 WINGS & DEVICE (registered on 22 May 1996) in class 39. It covers: *“Travel and tourist agencies including all services connected therewith or pertaining thereto; booking and reservation services booking seats of passage for travel; accommodation bookings; car hire services; hiring and charter of land, air or water crafts or vehicles; arranging tours, sightseeing excursions and safaris; escorting of passengers or travelers; storage and warehousing services; land services, services ancillary and related to the foregoing”*. The mark is stylised and

contains a device.² The registration contains the following disclaimer: '*Registration of this trade mark shall give no right to the exclusive use of wing devices in general but shall grant rights in the particular representation depicted in the mark*'. The mark is:



[6.2] Registration no 2005/05095 WINGS 24& DEVICE (registered on 15 March 2005) in class 39. It covers: "*Travel and tourist agencies including all services connected therewith or pertaining thereto; booking and reservation services booking seats of passengers for travel; accommodation bookings; car hire services; hiring and charter of land, air or water crafts or vehicles; arranging tours, sightseeing excursions and safaris; escorting of passengers or travelers; storage and warehousing services; taxi services, services ancillary and related to the foregoing*". The mark contains a device and WINGS 24 is stylised. The mark is:



[6.3] Registration no 2009/10854 - the word WINGS in unstylised format (*simpliciter*) (registered on 12 June 2009) in class 43 (WINGS *simpliciter*). It covers: '*Reservation*

² The applicant also attached a renewal certificate to its founding affidavit reflecting the applicant's mark as a stylised version of the word WINGS containing a curved, broadening diagonal stripe through the W from the bottom left to the upper right. The applicant's papers did not clarify whether this was an additional mark registered under that registration. The renewal certificate contains the reference 1996/06867. In argument this mark was not expressly referred to and it does not appear that the applicant relied on it.

and booking services for meals, food and drink for consumption and accommodation for tourists; excluding providing for and drink and temporary accommodation'. The mark is:

WINGS

[6.4] Registration no 2009/10969 WINGSNALEDI mark (registered on 17 June 2009) in class 43. It covers: *'Tourist agency services including accommodation services for tourists; provision of temporary accommodation; provision of accommodation for tourists; reservation services for booking meals; restaurant, bar services and other services in providing food and drink for consumption; consultancy, advisory and information services in relation to the forgoing services'*. The mark contains no stylisations or devices. The mark is:

WINGSNALEDI

Save for the WINGS mark under registration no 2009/10854, none of the other marks have any disclaimers.

[7] The respondent trades under the name Travelwings. It uses the mark TRAVELWINGS. No proof was provided that the marks it utilises are registered trade marks. Its mark is:



[8] According to the applicant, the respondent renders identical services to those covered by its WINGS trade marks registered in classes 39 and 43. The respondent conceded that the services offered by the respondent under the mark TRAVELWINGS fall within the scope of the specifications of some of the services covered by the applicant's registered trade marks in class 39.

[9] According to the respondent, the services it renders are not covered by registration number 2009/10854 in class 43, which concerns the provision of restaurant and bar services (i.e. food and drink) and the provision of accommodation (eg. a hotel). The respondent emphasised that this is the only entry in the register for the word WINGS (simpliciter). According to the respondent, it is thus not relevant to the case based on s 34(1)(a) of the Act. It contended that the registrations relevant to this cause of action are 1996/06867 WINGS and WINGS device and 2005/05095 WINGS24 (special form). As the respondent uses neither black nor blue in the latter registration, it leaves only the mark WINGS and Wings device in contention.

[10] It was common cause that the applicant was the owner of the marks and that the respondent did not have its authority to use them.

The issues and the parties' respective cases

[11] The applicant sought interdictory and ancillary relief based on infringement under s 34(1)(a) or s 34(1)(b) of the Act or the delict of passing off under the common law. It contended that the matter turned on a narrow compass.

[12] The primary question requiring determination is whether the respondent's TRAVELWINGS trading name and mark are identical to or so closely resembles the applicant's WINGS trade marks so as to be likely to deceive or confuse.

[13] According to the applicant, the respondent's marks are confusingly similar to its own, causing deception or confusion amongst notional consumers. It submitted that the respondent would be likely to take unfair advantage of the reputation of its WINGS trade marks.

[14] The respondent contended the opposite. Its case was that the applicant fell short of the mark and its case was contrary to well established precedent. It contended that the services rendered by it are directed at a different target market and consumers in the travels services domain. It contended that granting the relief would be tantamount to impermissibly allowing the applicant exclusivity in the word WINGS for travel services. According to the respondent there is no confusion or deception because of the use of the word WINGS as there are differences in the trade marks themselves, differences in the target markets for the respective businesses and the discerning nature of the parties' respective customers.

[15] Prior to dealing with the merits, it is necessary to address certain ancillary issues first. At the hearing, the respondent sought condonation for the late delivery of its answering affidavit. The application was not opposed and the applicant did not contend for any prejudice. It is in the interests of justice that a matter be determined on its full facts. I am persuaded that condonation should be granted as sought. As the application was not opposed, no costs order is appropriate.

[16] In a similar vein, the applicant sought leave to file a supplementary founding affidavit by way of notice dated 11 April 2024, rectifying certain averments made in the founding affidavit pertaining to the incorporation and name changes of the applicant. Those averments were not contentious and the respondent did not object to the introduction of the affidavit or claim any prejudice. I am persuaded that leave should be granted as sought. The applicant also filed a supplementary affidavit explaining a *bona*

fide error in relation to the signature of its replying affidavit. The respondent did not object to that affidavit and it is admitted into evidence. No costs order is appropriate.

[17] The respondent launched an application to strike out certain portions of the applicant's replying affidavit dated 31 October 2023. The grounds advanced in sum relate to the averments constituting argument, being vexatious or constituting hearsay evidence. The offending paragraphs are 10.1 (argument which is irrelevant and inadmissible as material in a replying affidavit); para 10.2 (as it is a lecture on the law); paras 10.3 to 10.5 (constituting argument); portions of paras 24.2.3, 24.2.5, 24.2.8, 24.2.9, 24.2.10, 24.2.11, 24.2.12, 24.2.13, 24.2 14, 24.2 16, 24.2 22, 26.3, 32.3, 34.2 (as constituting argument and vexatious averments); para 35.1 (as being vexatious, constituting hearsay and/or argument); paras 36.2, 38.2, 38.3, 40.2, 41.2, 41.3, 42.1, 43.1, 51.1, 51.2, 54.2, 56.2, 56.3, 59.1, 62.2, 65.2 and 65.3 (as constituting argument).

[18] Considering the relevant principles, I am persuaded that the respondent's submissions have merit and a proper case has been made for the striking out of the offending paragraphs. The offending portions of the replying affidavit fall to be struck from the record and will not be taken into consideration in the determination of the disputes between the parties.

Legal principles and relevant statutory framework

[19] It is apposite to first refer to certain applicable principles. It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence. Equally trite is the principle that an applicant must make out its case in its founding affidavit.

[20] The requisites for the granting of final interdictory relief are equally trite.³ They are (i) a clear right; (ii) an injury actually committed or reasonably apprehended' and (iii) the absence of similar protection by any other remedy.

[21] Section 34(1)(a) pertains to where rights acquired by the applicant through the registration of a trade mark are infringed by unauthorised use in the course of trade, in relation to goods in respect of which the applicant's trade mark is registered, by another person of an identical mark or one so nearly resembling it as to be likely to deceive or cause confusion. The *Smith Hayden* test⁴, used in relation to a similar test under s 10(12) of the Act, was adopted in our law and is applicable.⁵

[22] The test for comparing marks was set out in *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*⁶ and the numerous cases which followed. The requirements are well known and do not require repetition.

[23] A likelihood of confusion must be appreciated globally. Global appreciation of visual, aural or conceptual similarity of the marks in question must be based on the overall impression given by the marks, bearing in mind their distinctive and dominant components.⁷ The question of deception or confusion for purposes of infringement requires a comparison of the allegedly offending mark with the registered mark. Unlike passing-off the get up or trade dress of the goods is irrelevant.⁸ The value judgment is largely a matter of first impression; there should not be an undue peering at the two marks

³ *Setlogelo v Setlogelo* 1914 AD 221 at 227.

⁴ *Smith Hayden & Co Ltd Appn* (1946) 63RPC 97 at 101, In 39. The test is stated thus: 'Having regard to the reputation acquired by the name 'Hovis', is the court satisfied that the mark applied for, if used in a normal and fair manner in connection with any of the goods covered by the registration proposed will not be reasonably likely to cause deception and confusion amongst a substantial number of persons'. (emphasis provided)

⁵ *Oils International (Pty) Ltd v Wm Penn Oils Ltd* 1965 (3) SA 64 (T) at 67F-H; confirmed in *Wm Penn Oils (Pty) Ltd v Oils International (Pty) Ltd* 1966 (1) SA 311 (A) at 317C-E.

⁶ *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 641A-641E.

⁷ *Adidas supra* para 21.

⁸ *Adidas supra* para 23

to find similarities and differences.⁹ As held in *Compass Publishing BV v Compass Logistics Ltd*:¹⁰

'The likelihood of confusion must be appreciated globally, taking account of all relevant factors. It must be judged through the eyes of the average consumer of the goods or services in question. That customer is to be taken to be reasonably well informed and reasonably circumspect and observant, but he may have to rely upon an imperfect picture or recollection of the marks. The court should factor in the recognition that the average consumer normally perceives a mark as a whole and does not analyse its various details. The visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components. Furthermore, if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion.'

[24] There must be a probability that a substantial number of persons will be deceived or confused. This requires a number of persons which are 'not negligible'.¹¹ Confusion or deception exists when someone believes something that is false or incorrect. To confuse is to cause bewilderment, doubt or uncertainty.¹² It is sufficient if there is momentary confusion only for a short time, albeit that such confusion may later be cleared up.¹³ A reasonable likelihood of confusion in any one of the respects of sense, sound and appearance will suffice to give rise to deception or confusion.¹⁴ Actual instances of confusion and deception need not be shown.¹⁵

[25] It is trite that courts are entitled to take a disclaimed feature into account in deciding whether the infringer's mark, as a whole, so nearly resembles the proprietor's mark as to be likely to deceive and cause confusion. The presence of a word or words, which

⁹ *Yuppiechef Holdings (Pty) Ltd v Yuppie Gadgets Holdings (Pty) Ltd* 2016 BIP 269 (SCA), para 26.

¹⁰ *Compass Publishing BV v Compass Logistics Ltd* [2004] EWHC 520 (Ch) at [24] – [25], cited with approval in *Century City Apartments Property Services CC and Another v Century City Property Owners' Association* 2010 (3) SA 1 (SCA) at 7E-J, para [13].

¹¹ *Danco Clothing (Pty) Ltd v Nu-care Marketing Sales and Promotions (Pty) Ltd* 1991 (4) SA 850 A at 861G-H.

¹² *John Craig (Pty) Ltd v Dupa Clothing Industries* 1977 (3) SA 144 (T) at 150 H.

¹³ *Orange Brand Services v Accounting Works Software* 2013 BIP 313 (SCA) at para [13].

¹⁴ *Cavalla Ltd v International Tobacco Co* 1953 (1) SA 461 (T) at 468 G - H.

¹⁵ *Adidas Sportschuhfabriken Adi Dassler KG v Harry Walt & Co (Pty) Ltd* 1976 (1) SA 530 (T) at 540 A.

although disclaimed, are less well known and are less currently used, may result in confusion. In this regard, the nature of the disclaimed feature and plays an important role in the comparison of marks.¹⁶

[26] In *Smithkline Beecham Consumer Brands (Pty) Ltd v Unilever Plc*,¹⁷ in considering the effect of a disclaimer, the Supreme Court of Appeal referred with approval to *American Cigarette*¹⁸ and held:

“This seems to me to have been the basis upon which the Court in that case came to the conclusion that, in comparing the marks as a whole – i.e. having regard to the device together with the disclaimed feature, - there was such a similarity as to be reasonably likely to cause confusion. Although, therefore, the word “Lafayette” was expressly disclaimed it was nevertheless such a dominant feature of both marks, and was, in this country at any rate, so striking and unusual, that if used in both marks deception and confusion would be likely to ensue. Where a disclaimed feature is so dominant or so striking as it was in that case, it may well have the effect of overriding any differences which might be apparent in the devices themselves. The ultimate test is, after all, as I have already indicated, whether on a comparison of the two marks it can properly be said that there is a reasonable likelihood of confusion if both are to be used together in a normal and fair manner, in the ordinary course of business. Where the disclaimed features are common to the trade, or are of such a commonplace and non-distinctive character as the brush and tube device in the present case, then full effect should be given to the disclaimer. Although one would still have regard to the marks as a whole, the disclaimed features will, in such event, be of less account than if they had been more dominant or striking.”

[27] Section 34 of the Act in relevant part provides:

‘34 (1) The rights acquired by registration of a trade mark shall be infringed by –

(a) the unauthorised use in the course of trade in relation to goods or services in respect of which the trade mark is registered of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;

(b) the unauthorised use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar

¹⁶ *Registrar of Trade Marks v American Cigarette Co* 1966 (2) SA 563 (A) (*American Cigarette*).

¹⁷ *Smithkline Beecham Consumer Brands (Pty) Ltd v Unilever Plc* 1995 (2) SA 903 (A).

¹⁸ *Supra* at 574G-H.

to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion;...

(3) Where a trade mark registered in terms of this Act has been infringed, any High Court having jurisdiction may grant the proprietor the following relief, namely—(a) an interdict...

[28] The factual matrix underpinning relief under s 34(1)(a) and s 34(1)(b) is slightly different. It is incumbent on an applicant in each instance to set out the factual basis underpinning the relief sought.

[29] The applicant must establish: (i) its trade mark registrations, (ii) unauthorised use in the course of trade by the respondent of an identical mark or a mark or one so nearly resembling its registered mark as to be likely to deceive or cause confusion; and (iii) in relation to the goods or services in respect of which the mark is registered.¹⁹

[30] In considering whether the use of the applicant's trade mark is likely to deceive or cause confusion, it must be borne in mind that the essential function of the trade mark is to indicate the origin of the goods in connection with which it is used. The decision whether there is a reasonable likelihood of confusion is a value judgment. The ultimate test is...*'whether on a comparison of the two marks it can properly be said that there is a reasonable likelihood of confusion if both are to be used together in a normal and fair manner, in the ordinary course of business'.* The likelihood of confusion must be appreciated globally. Global appreciation of the visual, aural and conceptual similarity of the marks in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components'.²⁰

[31] There is an interdependence between the two legs of enquiry regarding confusing similarity and whether there is a likelihood of deception or confusion. The less the

¹⁹ Ibid para 5.

²⁰ *Cowbell AG v ICS Holdings Ltd* 2001 (3) SA 942 (SCA) para 10.

similarity between the respective goods and services of the parties, the greater will be the degree of resemblance required between their respective marks before it can be said that there is a likelihood of deception or confusion in the use of the allegedly offending mark and *vice versa*.²¹ The more distinctive the trade mark is, or the greater its reputation, the greater the likelihood that there will be deception or confusion where a similar mark is used on a competing product.²²

[32] If the marks contain a main or dominant feature or idea, the impact that this dominant feature is likely to make on the mind of the consumer must be taken into account. The Supreme Court of Appeal in *Pepsico* put it thus:²³

'In testing for deception and confusion, court will usually identify the features, if any, of the respective marks which are dominant. If they share a dominant feature, there is ordinarily a greater likelihood of deception or confusion. As recently affirmed by this court, in the global assessment of the marks, 'the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components'.

[33] The test requires a court to postulate notional use by the applicant of its registered trade marks in respect of some or all of the services covered by the registrations relied on and use in a normal and fair manner in the normal course of business within the ambit of the monopoly created by the terms of the various registrations.²⁴ This falls to be measured against the actual use by the respondent of its mark.

[34] A court must further have regard to the impact which the marks would have on a notional consumer of the services involved. This postulates a person with average

²¹ *New Media Publishing (Pty) Ltd v Eating Out Web Services* CC 2005 (5) SA 388 (C) at 393I, 394 C-F.

²² *Adidas* para 24.

²³ *Pepsico Inc v Atlantic Industries* 2017 BIP 122 (SCA) at para 20.

²⁴ *Orange Brand Services v Account Works Software* 2013 BIP 313 (SCA) paras 6-7.

intelligence, having proper eyesight and buying with ordinary caution and who is likely to engage in the services to which the marks are applied.²⁵ The nature of a notional consumer was explained thus in *Adidas AG and Another v Pepcor Retail Ltd (Adidas)*:²⁶

'When considering whether the public will be confused or deceived by an implied representation the court must postulate neither the very careful nor the very careless buyer, but an average purchaser, who has a good idea in his mind's eye of what he means to get but not an exact and accurate representation of it. The court must also take into account that the purchaser will not necessarily have the advantage of seeing the products side by side and will not be alerted to fine points of distinction or definition. The court must further take into account that the purchaser may not be able to read simple words as there are many people in South Africa that are illiterate.'

*Comparison of the marks to determine similarity and likelihood of confusion or deception under s 34(1)(a) or 34(1)(b) of the Act*²⁷

[35] I shall first consider whether the applicant has established the requirements of s 34(1)(a). It is convenient to commence with the notional customer of the services.

[36] In the present instance, the services offered by the respective parties are sophisticated and involve substantial monetary expense. It is unlikely that the services would be offered to persons who are not literate. A level of sophistication and literacy on the part of the notional user must be accepted. The users of the parties' respective services must further be taken to have a level of discernment and be sufficiently astute to operate online ecommerce facilities and debit or credit card facilities. I agree with the respondent's contention that the use of travel services does not involve an impulsive purchase. Online shoppers *'must necessarily possess a degree of sophistication and*

²⁵ *Plascon Evans* 640G-641E.

²⁶ *Adidas AG and Another v Pepcor Retail Ltd* [2013] ZASCA 3 at para 3, with reference to *Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd* 2001 (3) SA 884 (SCA) para 3.

²⁷ For a side by side comparative analysis, the respective trade marks are set out in a document attached hereto as 'A',

intelligence'.²⁸ Air travel services are not an impulsive purchase and the consumer is 'more likely to take added care to ensure that they purchase the product they know and like'.²⁹ Against this 'notional consumer', the marks must be compared.

[37] The applicant submitted that the dominant identical element common to both marks is the word WINGS. It submitted that the addition of the word TRAVEL to the respondent's mark does not serve to distinguish, as it is a descriptive generic word, which falls to be excluded from the comparison. It further submitted that TRAVEL is a word that the applicant is entitled to notionally use in a fair and normal manner in combination with or as an add-on to its WINGS trade mark. Thus, the argument goes, WINGS and TRAVELWINGS are for all intents and purposes identical on all three levels of comparison, being visually, phonetically and conceptually. Reliance was placed on the principle that matter which is not intrinsic to the mark and which has no trade mark significance must be excluded from the comparison.³⁰ Reliance was also placed on the applicant's registered company name being a combination of the words WINGS and TRAVEL on which basis it was argued there is no need to postulate notional use in the face of the evidence of this actual use.

[38] According to the applicant, as it is the proprietor of the registered WINGS trade mark under registration 2009/10854, it has exclusive trade mark rights in the word WINGS, on its own in respect of the services covered in its class 43 registration. It submitted that those services are identical to those in respect of which the TRAVELWINGS mark is used. According to the applicant, the respondent's submission that the applicant is not entitled to exclusivity to the words WINGS on its own is obviously

²⁸ *Online Lottery Services (Pty) Ltd and Others v National Lotteries Board and Others* 2010 (5) SA 349 (SCA) (Lottofun) para 54.

²⁹ *Pioneer Foods (Pty) Ltd v Bothaville Milling (Pty) Ltd* [2014] ZASCA 6 para 24.

³⁰ *Standard Bank of South Africa Ltd v United Bank Ltd* 1991 (4) SA 780 (T) at 782G-H and 796J-797A

incorrect, given that it is the proprietor of the registered WINGS trade mark under registration number 2009/10854. The respondent submitted the opposite.

[39] The respondent's argument is predicated on the principles set out, *inter alia* in *Bata*³¹ and the proposition that a party cannot have a monopoly on the use of a general word in the English language. It pointed out that the word WINGS is descriptive and used by other third parties in the travel industry. The respondent further contended that the services rendered under the TRAVELWINGS mark is directed to a different target market or consumer in the travel services domain and that it is exclusively an online services which are provided. It distinguishes the specific nature and ambit of the travel arrangement services that it renders from those rendered by the respondent.

[40] Whilst the respondent's actual use of its trademark requires scrutiny, it is not only the applicant's actual use of its trade marks which is relevant. It is also its notional use. I agree with the applicant that this contention does not avail the respondent and that such consideration it is impermissible and irrelevant.³² Notional use by the applicant extends to rendering any of the services in the class in which the various trade marks are registered. That would include online services. However, I take issue with the remainder of the applicant's argument.

[41] In relation to the notional use, I am not persuaded that notional use extends to the addition of other words such as TRAVEL which the applicant argued it is entitled to notionally use in a fair and normal manner in combination with or as an add-on to its WINGS trade mark. The concept of notional use extends to fair and normal use of the specific registered trade mark/s in providing the specific services included in the category it is registered in. The applicant cannot arrogate to itself any rights in relation to other

³¹ *Bata Ltd v Face Fashions CC and Another* 2001 (SA) 884 (SCA).

³² *ICollege (Pty) Ltd v Xpertease Skills Development and Mentoring CC and Another* 2023 JDR 1732 (SCA) at [16].

words, which do not form part of its trade marks as registered. Although the word TRAVEL is included in the applicant's registered name, it does not have trade mark significance in the absence of registration as part of a mark.

[42] TRAVEL is a generic word in everyday use in the English language. It does not form part of any of the applicant's registered trade marks. That does not mean, as submitted by the applicant, that it must be ignored in the comparison of the trade marks. Albeit generic, and not intrinsic to the applicant's trade marks, it is intrinsic to the respondent's mark covering the composite word Travelwings. The word TRAVEL forms no part of its monopoly. In this context, the applicant's reliance on *Standard Bank*³³ does not avail it. That dictum was context specific in excluding reference to the word 'plan', which differs from the facts in the present instance. Here the word TRAVEL, is as distinctive as the word WINGS in the respondent's mark.

[43] The applicant argued that the marks are for all intents and purposes identical on all three levels of comparison, being visually, phonetically and conceptually. In relation to the comparison between the remaining marks it is argued that, for the same reasons, they are so similar as to be likely to deceive and confuse. It was submitted that the WINGS element in the Wings & Device, Wings 24 and device and WINGSNALEDI trade marks retains its identity and is the only distinctive common element in the Travelwings mark. It submitted that the marks are deceptively and confusingly similar, which similarity cannot be diluted by virtue of the services rendered, as they are identical.

[44] The respondent argued that the marks are different. In comparing the marks, there are certain visual differences. They are in different colours, the stylisation and logos look different, the taglines are different and the words WINGS and TRAVEL are different in visual composition in each mark. TRAVELWINGS is depicted as a single word. In the applicant's mark, WINGS is a standalone stylised mark denoted by the use of the

³³ *Standard Bank of South Africa Ltd v United Bank Ltd* 1991 (4) SA 780 (T) at 782H-H and 796J-797A.

registered trade mark device. In the respondent's mark the word TRAVELWINGS is used with wings being part of another word. It is not stylised.

[45] According to the respondent there are also conceptual differences between the marks. The applicant uses travel management, describing the services on offer. The respondent uses the tagline 'get your wings to fly' which according to the respondent refers to a mode of transport. The logo denotes a globe and wings frequently used for airline pilots indicating a global airline service. This is endorsed by the composite red mark TRAVELWINGS.

[46] According to the respondent there are also phonetic differences. The emphasis in the applicant's mark is on the descriptive word WINGS which is a stylised standalone mark. The mark is pronounced wings and travel management is that it does. The word TRAVELWINGS is pronounced differently and what respondent does is different.

[47] It is necessary to consider each of the applicant's trade marks in comparison to that of the respondent individually. The applicant's submissions pertaining to its trade mark under registration 2009/10854 cannot be accepted without analysis. In its papers, the respondent disputed that it renders the services for which that trade mark is registered in class 43. The trade mark is registered for '*Reservation and booking services for meals, food and drink for consumption and accommodation for tourists; excluding providing for food and drink and temporary accommodation*'.

[48] In its terms, this registration does not cover all travel agency services as contended by the applicant. It is limited to restaurant and bar services and accommodation of a permanent nature, given that it excludes temporary accommodation. In applying the so-called *Plascon-Evans* rule in relation to the final relief sought, I must in essence accept the respondent's version, together with the undisputed facts of the applicant, unless it is palpably false or clearly untenable. It is not. According to the respondent, it does not offer

services in class 43. The applicant, save from contending that the respondent provides identical services, put up no meaningful evidence to controvert the respondent's version that it does not provide any of the services covered by registration 2009/10854. In these circumstances, I am not persuaded that the applicant's reliance on that trade mark avails it.

[49] The word WINGS itself is a generic word in general use in the English language. It was however registered in class 43. There was no counter application for expungement on the part of the respondent. A similar generic registration of a generic common word confronted Schutz J in *Standard Bank*.³⁴ He held:

'...eighty two years ago Cozens Hardy MR said in relation to the requirement of distinctiveness in the 1905 English Act: 'Wealthy traders are habitually eager to enclose part of the great common of the English language and to exclude the general public of the present day and of the future from access to the enclosure. In re Joseph Crossfield & Sons Ltd (19100 1 Ch 130 CA at 141). In the same case Farwell LJ said at 150: 'the object of trade mark law, whether before or after the Trade Marks Act, is to protect honest trading; But, in exercising its jurisdiction, the learned judge proceeded; 'The court is careful not to interfere with other person's rights further than necessary for the protection of the claimant, and not to allow any claimant to obtain a monopoly further than is consistent with reason and fair dealing'. There might be raised eyebrows that a word like Access finds itself on the register, but as much as I agree with deference with the two passages quoted, I must, for this part of the case, treat the word as properly persisting thereto'.

[50] It was further held: ³⁵

'The upshot of all of this is that even if there is no absolute right to prevent the use of a registered trade mark by using the whole of it in association with other material making up the

³⁴ Supra

³⁵ Ät 802 B-C

allegedly infringing mark, such use involves sailing close to the wind, and will frequently involve sailing into the wind.”

[51] No disclaimer was required on registration of WINGS *simpliciter*. In trade mark law the effect is that, for purposes of this registration, unless or until that mark is expunged, it must be accepted that WINGS is inherently distinctive and, in the case of registrations after 1994, capable of distinguishing by reason of the prior use thereof. That despite the word wings being in common everyday use.³⁶ That applies to the registration of WINGS *simpliciter* in class 43. However, that does not apply to the applicant’s other registered trade marks.

[52] It must be borne in mind that each case must be determined on its own specific facts. In the present context, the applicant cannot rely on the WINGS *simpliciter* trade mark in relation to any services in class 39, as the registration of the word WINGS *simpliciter*, is not registered in that class. Notional use of this trade mark cannot extend beyond the ambit of class 43. It also cannot rely on the existence of this trade mark to substantiate any monopoly on the use of the word WINGS in general. The registration of the mark WINGS *simpliciter* in class 43 does not avail the applicant in relation to its other trade marks. It cannot simply be accepted that because of that registration, the word WINGS *simpliciter* is dominant in relation to all its other trade marks.

[53] The applicant places undue emphasis on the alleged phonetic and visual similarities of the words. A holistic approach must be taken to consider the whole of the marks. The entirety of the two marks, as they appear in the register must be considered and which enjoys protection.³⁷ An applicant cannot informally extend the ambit of the registered mark. Each allegedly infringing mark must be compared with each registered mark as it is recorded in the register to determine whether deception or confusion is likely.

³⁶ Ibid para 12; *Golden Fried Chicken (Pty) Ltd v Vlachos and Another* [2022] ZASCA para 12.

³⁷ *Adidas* supra para 16.

The applicant's focus on the word 'WINGS' is thus misconceived, given that its registration applies to the composite mark and not to the said words in isolation, specifically in relation to the applicant's trade marks registered in Class 39.

[54] It is trite that the marks must be considered as a whole for similarity. The applicant seems to focus on the word element, whilst ignoring the other features of the registered composite marks. The composite marks of the applicant, when compared to that of the respondent have numerous differences, to which I shall shortly turn. Although the word WINGS is common, it is the composite marks with their stylisation, rather than the words in isolation, which are dominant.

[55] In relation to the applicant's WINGSNALEDI trade mark, which is also registered in class 43, it covers a wider field of services and includes tourist agency services in broad terms. As the respondent admittedly offers services which fall within that category, the similarity of those trade marks and the likelihood of confusion or deception must be considered.

[56] On a visual level, there are substantial differences between the applicant's WINGSNALEDI mark and the respondent's TRAVELWINGS mark. Although both contain the word WINGS, each has a separate component added thereto to form a composite word, which in each instance is different. Naledi is a Sesotho word for star. The applicant's mark is not styled, whereas the respondent's mark is a composite one including styling and a device as already described. Although the word WINGS is common to both, the words NALEDI and TRAVEL cannot be ignored. They are of equal importance as the word WINGS. On an aural level, the words sound different. There are also conceptual differences between the two marks. The applicants' mark denotes a novel concept of 'wingsstar'. It is a made-up word and is striking and unusual. For those who do not understand the word Naledi, it introduces an indigenous South African element, which is

distinctive in the applicant's mark. The respondent's mark denotes the concept of air travel. The global impressions of the two marks are different.

[57] In relation to the applicant's other registered trade marks, the marks must be considered as a whole. Those marks are composite marks, including stylised versions of the word WINGS and the word WINGS together with a device in respect of registration number 1996/06867, which device contains a disclaimer pertaining to wing devices in general.

[58] In relation to the Wings & Device registration under 1996/06867, on a visual comparison, both marks make use of a common element, WINGS. The addition of the device (albeit disclaimed) in the applicant's 1006/06867 registration, is what makes the mark distinctive, rather than the word WINGS. For purposes of this registration, the word WINGS is a normal generic word in the English language. The fact that it is registered in class 43, gives the applicant no rights in relation to class 39.

[59] Although the word WINGS is common to both, it does not form the dominant feature of the mark. The addition of the word TRAVEL is an integral part of the respondent's mark and the two words have been deliberately combined to form a single composite word. The additional element of the respondent's mark cannot simply be disregarded. Both visually and aurally the two marks are different. The concepts conjured up by the two marks are different.³⁸ Even though the word WINGS is common, the addition of the word TRAVEL makes a substantial difference. It determines the different visual cues, tones and senses of the two marks. It is improbable that consumers would be deceived or confused.³⁹

³⁸ *Yuppiechef Holdings (Pty) Ltd v Yuppie Gadgets Holdings (Pty) Ltd* [2016] ZASCA 118 para 27

³⁹ Casadobe para 24.

[60] The same applies to the applicant's Wings24 & device registration under 2005/05095. The stylised version of the word WINGS and the addition of the number 24 is distinctive from a visual perspective. It is not similar to the applicant's mark in appearance. The use of the descriptive word, of a commonplace item WINGS, serves to give greater emphasis to the significance of the postfix 24 in the applicant's mark. It is the number 24 in WINGS24 that is the visual differentiator of the mark. It provides a visual cue based on the word rather than its component parts.⁴⁰ These features of the mark give rise to a clear visual differentiation.

[61] As to an aural comparison, WINGS24 and TRAVELWINGS sound different. Conceptually, WINGS24 imports the notion of a 24 hours service. That is distinct from the notion of air travel invoked by TRAVELWINGS. The applicant's argument substantially disregards consideration of the various marks as a whole. Seen holistically, there is no similarity which would cause deception or confusion.

[62] Both parties sought to place reliance on material attached to their respective affidavits. The material was not confirmed by way of confirmatory affidavit by either party. The applicant relied on a list of alleged instances of confusion, which is in broad terms and constitutes hearsay evidence. As such it is of little probative value. The respondent in turn, relied on voluminous documents attached as annexures C-E to its affidavit. Although there is merit in the applicant's criticism that the relevant portions on which reliance is placed have not been properly identified ⁴¹, the widespread use of the word WINGS, both in relation to company names and trade marks amongst others in the field of travel services, cannot simply be ignored.

⁴⁰ *Swatch AG (Swatch SA) v Apple Inc* [2002] ZASCA 62, quoted in para 21 of *Casadobe Props 60 (Pty) Ltd v Fratelli Martini Secondo Luigi SpA* [2025] ZASCA 14.

⁴¹ *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F-H.

[63] The applicant, relying on *Orange Brand Services*⁴² wherein the trade mark 'Orange' was used, contended that it is irrelevant that there may be other companies on the companies register or reserved domain names having a name incorporating the word 'wings' as this does not undermine the distinctiveness of its trade mark WINGS. The facts are however distinguishable and the applicant's reliance on *Orange Brand Services* does not avail it. There, the use of the word ORANGE (which normally could denote either a colour or a fruit) was used in a novel way in relation to software, which made it distinct. Here, the word WINGS is not used in any novel way.

[64] I agree with the respondent's contention that the applicant's submissions run contrary to the precedent in the Supreme Court of Appeal set in *Bata*.⁴³ There, the Supreme Court of Appeal held that the word POWER was an ordinary word in everyday use, as distinct from an invented or made-up word, and it could not follow that confusion would probably arise if it was used in combination with another word. It further held that if full effect was given to the appellant's argument, namely that the word 'Power' was likely to lead to confusion despite the fact that it was used in conjunction with another word, it would result in the appellant having a virtual monopoly on the word 'Power' on clothing.

[65] A similar approach was followed in *Lucky Star*.⁴⁴ There, the Supreme Court of Appeal focused on the requirements of s 34(1)(a) and whether a substantial number of persons would probably have been deceived into believing or confusion as to whether there was a material connection in the course of trade between the respondent's goods and services and the appellant's trademark. It held not. Whilst each case must be determined on its own facts, the application of these principles is instructive in the present factual context.

⁴² *Orange Brand Services Ltd v Account Works Software (Pty) Ltd* 2013 BIP 313 (SCA) para 12.

⁴³ *Bata Ltd v Face Fashions CC and Another* 2001 (SA) 884 (SCA) para 10.

⁴⁴ *Lucky Star Ltd v Lucky Brands (Pty) Ltd & Others* 2017 (2) SA 588 (SCA)

[66] In my view, the same applies to the word 'WINGS' in the current context, other than the WINGS simpliciter registration in class 43. In the papers, there are numerous examples of the word 'WINGS' being used in relation to products and services. *'A court is careful not to interfere with other person's rights further than is necessary for the protection of the claimant, and not to allow any claimant to obtain a monopoly further than is consistent with reason and fair dealing'*.⁴⁵ If full effect is given to the applicant's argument, it would result in the applicant having a virtual monopoly on the word 'WINGS' in relation to travel services registered in Classes 39 and 43.

[67] The approach in *Bata* was endorsed by Gorven JA in *Golden Fried Chicken (Pty) Ltd v Vlachos and Another*, decided under s 34(1)(a) of the Act.⁴⁶ It was concluded that the marks were not identical.⁴⁷ In *Golden Fried Chicken* it was held:⁴⁸

'A trade mark serves as a badge of origin of the services offered. Persons seeing the mark can rest assured that the appellant is the source of the services offered under it. For that reason, a trademark constitutes a monopoly. Due, no doubt, to a trade mark functioning as a monopoly, it cannot 'be interpreted to give greater protection than that which is necessary for attaining the purpose of a trade mark registration, namely protecting the mark as a badge of origin. The proper approach to this assessment was set out by this court: 'What is, accordingly required is an interpretation of the mark through the eyes of the consumer as used by the alleged infringer. If the use creates the impression of a material link between the product and the owner of the mark there is infringement; otherwise there is not'.

[68] The question remains whether it can be said that, if the respondent used the word WINGS in class 39, would customers view the applicant as the source of the services offered under the mark Travelwings? Does it function as descriptive, absent evidence of widespread knowledge of the word amongst South African purchasers of travel services?

⁴⁵ *Quad Africa Energy (Pty) Ltd v The Sugarless Company (Pty) Ltd & Another* 2020 (6) SA 90 (SCA).

⁴⁶ *Golden Fried Chicken (Pty) Ltd v Vlachos and Another* [2022] ZASCA paras 22-24.

⁴⁷ *Ibid* para 7.

⁴⁸ *Ibid* para 6.

The answer to both these questions must be in the negative. The word WINGS is not used in the marks to describe the services of the applicant. Adopting the approach in *Bata*, it is not possible to ignore the word TRAVEL in the respondent's mark. The word TRAVEL is as significant as the word WINGS and the two words used together as one sufficiently distinguish the respondent's services from those of the applicant. As in *Bata*, *Golden Chicken* and *Lucky Fish* the word WINGS is a common word in everyday use. Travelwings is far more likely to operate as did 'powerhouse' in relation to 'power' and 'lucky fish' in relation to 'lucky star', albeit that the present application concerns services rather than goods.

[69] It is unlikely that the notional travel service consumer would confuse it with services named WINGS. In my view, the mark Travelwings which includes a device sufficiently distinguishes respondent's services from those of applicant. The parties' marks do not have identical devices. A notional consumer looking at the respective marks, even fleetingly would be in a position to tell them apart. The differences in the marks are apparent and would be identified without difficulty, specifically when considered together with the pictorial elements of the marks. Viewed together and side by side the respective marks and devices are not the same. It is unlikely that a significant section of the public which uses the parties' services would consider WINGS as the same as TRAVELWINGS, given their distinguishing features. The words '*contribute nothing to identifying the source of the goods which it prompted*'.⁴⁹ They are common to trade and of a non-distinctive character when viewed in isolation.

[70] As held by the Supreme Court of Appeal in *First National Bank*:⁵⁰

⁴⁹ *On-line Lottery Services (Pty) Ltd v National Lotteries Board and Another* 2010 (5) SA 349 (SCA) para 32.

⁵⁰ *First National Bank of Southern Africa Ltd v Barclays Bank PLC & Another* [2003] 2 All SA para 15; *LA Group (Pty) Ltd v Stable Brands (Pty) Ltd & Another* 2022 (4) SA 448 (SCA) para 108.

‘Because a common laudatory word is naturally capable of application to the goods of any trader that one must be careful before concluding that merely its use, however substantial, has displaced its common meaning and has come to denote the mark of a particular trader. That is all the more so when the mark has been used in conjunction with what is obviously taken as a trade mark’.

[71] The words “WINGS” and “TRAVELWINGS” are similarly of a descriptive nature. In my view, they are inherently incapable of distinguishing one person’s goods from another’s. No amount of use of a purely descriptive term can make it distinctive. As held by Wallis JA in *Yuppiechef Holdings (Pty) Ltd v Yuppie Gadgets Holdings (Pty) Ltd*,⁵¹ *‘It is not the purpose of trademarks or copyright to enable people to secure monopolies on the commons of the English language’.*

[72] It is also trite that registered trade marks do not create monopolies in relation to concepts or ideas.⁵² In the present context, the applicant cannot lay claim to the exclusive use of words having a connotation to flight where the word WINGS does not form a dominant part of its marks and does not have any particularly distinctive character, save in the case of the WINGS simpliciter mark.

[73] The applicant’s contention that there is a reasonable probability that TRAVELWINGS is going to be taken to be WINGS, also disregards the nature of the consumers who utilise the respective parties’ services. I have already dealt with that issue. The question is whether there is a real danger of a substantial number of the average customer of the services in question being deceived or confused.⁵³ A notional customer will consider the marks as a whole, considering their specific designs, shapes, font size and type, style and colours. The designs are as important as the words. It is the composite design and the other stylised components of the applicant’s marks which are distinct, rather than the word WINGS. As held by our courts, marks are remembered

⁵¹ *Yuppiechef Holdings (Pty) Ltd v Yuppie Gadgets Holdings (Pty) Ltd* [2016] ZASCA 118 para 38.

⁵² *Cowbell AG v ICS Holdings Ltd* 2001 (3) SA 941 (SCA) paras 11 and 15.

⁵³ *Ibid* para 13.

rather by general impressions or by some significant or striking feature, than by a photographic recollection of the whole. If anything, focus would be placed on the visual and pictorial appearance of the marks as a whole. Given the sophisticated nature of the notional consumer of the parties' respective services, it is unlikely that they would be confused.

[74] It must be borne in mind that the consideration of the marks is confined to the marks themselves and no regard should be had to other features of the get-up or other indications of origin of the goods as marketed by the respective parties.⁵⁴ In considering an objective global comparison between the applicant's registered marks and the respondent's actual use of its mark, I am not persuaded that the marks are similar or likely to result in confusion or deception, even if the respective parties' services are in certain respects similar. Leaving aside the colour and style differences between the respective marks in considering the notional use to which the applicant may put its mark, the global impression of the marks seen as a whole is in my view substantially different.

[75] In my view, the applicant did not establish that the parties' respective marks resemble each other so closely that there is a likelihood that deception or confusion will occur, considering the dominant features of the marks as well as the general impression and any striking features.⁵⁵ It is difficult to imagine that the notional purchaser would ignore the visual impression of the marks and focus attention only on the word WINGS.

[76] From an overall impression, the marks do not resemble each other closely and the average customer would not be confused or deceived into believing that the respondent's products are in any way associated with the applicant. The marks are sufficiently

⁵⁴ Ibid para 7.

⁵⁵ *Bata Ltd v Face Fashions CV and Another* 2001 (1) SA 843 (SCA).

dissimilar to each other, that no amount of similarity between the respective goods or services of the parties will suffice to bring about an infringement.⁵⁶

[77] I conclude that that the applicant has not established that the respondent's mark is similar, alternatively so similar to its marks that it is likely to cause confusion or deception. That is fatal to the relief sought under s 34(1)(a) of the Act.

[78] Turning to whether there has been infringement under s 34(1)(b) of the Act, the applicant amended its original notice of motion after delivery of its founding affidavit and in reply. The specific set of facts required for reliance on this section were not referred to in the founding affidavit. According to the respondent, it notionally concerns applicant's registrations in class 43 2009/10854 WINGS and 2009/10969 WINGSNALEDI. The respondent concedes that its services fall within the class 39 registrations relied on by applicant and contended that this is the only integer satisfied. The applicant adopted a broader approach.

[79] It is apposite to refer to the requirements set out in *Mettenheimer*.⁵⁷

'Can it be said that, having regard to the sameness of the 2 marks, the similarity between the goods in respect of which the appellants mark is registered (wine) and the goods in which the respondent trades (wine grapes) is such that confusion or deception is the probable result> the deception and confusion we are talking about, of course, must relate to the origin of the respective goods. So, is it likely that the notional purchaser may be confused to think that these goods have the same origin?'

...'Included amongst the considerations proposed in these cases are (a) the uses of the respective goods; (b) the users of the respective goods; (c) the physical nature of the goods;

⁵⁶ *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 (5) SA 388 (C) para 11

⁵⁷ *Mettenheimer and Another v Zonquasdrif Vineyards CC and Others* 2014 (2) SA 204 (SCA)

and (d) the respective trade channels through which the goods reach the market. It is clear that the list of proposed considerations was never intended to be exhaustive. Yet they serve to stimulate and guide the required process of reasoning in the enquiry as to the likelihood of confusion’.

[80] It was incumbent on the applicant to set out the factual evidence in relation to which these considerations must be considered. This court is unable to perform the necessary assessment given the dearth of evidence presented for example regarding the trade channels surrounding circumstances of providing accommodation and/or food on the one hand and on the other online booking of cheap flights and holiday packages. Moreover, I have already concluded that the respondent’s mark TRAVELWINGS is not similar to the applicant’s various WINGS marks as contemplated by the section and even less similar to WINGSNALEDI.

[81] The conclusions already reached are further by and large dispositive of the relief sought. In the result, the applicant has not established infringement as contemplated by s 34(1)(b) of the Act.

Passing off relief

[82] The relevant principles relating to the delict of passing off are stated thus by the Supreme Court of Appeal in *Adidas*:⁵⁸

’28 The principles governing passing off are well established. Passing off occurs in relation to goods or merchandise. When one trader represents to the public that his goods or merchandise are the goods or merchandise of another trader. Where the representation is implied, it will usually be made by the one trader adopting a name, mark or get-up for his goods or merchandise which so resembles that of the other trader that there is a reasonable likelihood that ordinary members of the public, or a substantial section thereof, may be

⁵⁸ Supra. Also see *Jennifer Williams & Associates & Another v Life Line Southern Transvaal* 1996 (3) SA 408 (A) at 418D-G.

confused or deceived into believing that the goods of the former are the goods or merchandise of the latter or are connected therewith. Whether there is such a reasonable likelihood of confusion or deception is a question of fact to be determined in the light of the particular circumstances of the case. In order to succeed in passing off proceedings based upon an implied representation the aggrieved trader must establish, first, that the name, mark or get up used by that trader has become distinctive of the trader's goods or merchandise in that the public associates the name, mark or get-up with the goods or merchandise marketed by that trader and, secondly. That the name, mark or get-up used by the other trader is so used as to cause the public to be confused or deceived in the manner described.

29 The degree of distinctiveness (or the extent of the reputation) is of great importance in passing off proceedings as it affects the issue whether the general public will be confused or deceived into thinking, because of the similarity of the name, mark or get-up, that the goods or merchandise of the second trader are those of the first trader or are connected therewith. It follows that (just as in the case of trademark infringement, the more distinctive the get up is (or the greater the extent of its reputation, the greater the likelihood will be that the public will be confused or deceived.

30 When considering whether the public will be deceived or confused a court must postulate, an average purchaser who has a good idea in his mind's eye of what he means to get but not an exact and accurate representation of it. The court must also take into account that the purchaser will not necessarily have the advantage of seeing the products side by side and will not be alerted to fine points of distinction or definition. The court must further take into account that the purchaser may not be able to read simple words as there are many people in South Africa that are illiterate.

31 Finally, it must be borne in mind that the law of passing off does not confer monopolies on successful get-ups. A trader may, to an extent, copy the successful get-up of a rival. However, the moment he copies it he will be at risk. The trader will only avoid liability for passing off if 'he makes it perfectly clear to the public that the articles which is selling are not the other manufacturer's but his own, so that there is no probability of the ordinary purchaser being deceived.....'

[83] The difference between the test applicable in passing-off matters and trade mark infringement matters was explained thus in *Stellenbosch Farmer's Winery Ltd v Stellenvale Winery (Pty) Ltd*:

'Inasmuch as the registration of a trade mark confers exclusive rights to the use of such trade mark the enquiry whether such rights of exclusive use have been infringed does not necessarily involve an inquiry as to whether the public is likely to be misled. In passing-off cases the complaint is not based upon any property rights in a mark as such; it is based on the likelihood that the similarity of another's get-up may mislead the public (Halsbury, 2nd ed Vol 32 p 614). The result is that in passing-off actions the comparison is between the whole get-up of the Applicant and the whole get-up of the Respondent (Halsbury, 2nd ed p 614), whereas in infringement of trade mark actions the enquiry is confined to a comparison of the registered mark with that portion of the Respondent's get-up which is alleged to infringe the Applicant's registered rights.'

[84] The comparison is between the whole get-up of the applicant and the whole get-up of the respondent.⁵⁹ Insofar as the likelihood of deception or confusion arising is concerned, actual instances of deception and confusion do not need to be shown.⁶⁰ The applicant's evidence relating to alleged actual confusion was based on inadmissible hearsay evidence. Although that is not a requirement, cogent admissible evidence would have assisted the applicant in discharging its onus.⁶¹ If there is a likelihood of confusion or deception, there is usually a likelihood of damage flowing from that.⁶² In considering whether the requisites for passing-off have been established, a court will not have regard to disclaimers.⁶³

[85] The proprietary right which is protected in an application for passing-off is goodwill, which is comprised of a number of components.⁶⁴ The only component of the goodwill of a business that can be damaged by means of passing-off is its reputation.⁶⁵ Reputation is generally proved by providing evidence of extensive use.⁶⁶

⁵⁹ *Stellenbosch Farmer's Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 240.

⁶⁰ *Adidas* supra 1976 (1) SA 530 (T) at 540 A.

⁶¹ *Red Bull GmbH v Rizo Investments (Pty) Ltd* 2002 BIP 319 T at 325H-326A.

⁶² *Pioneer Foods* supra at para [7].

⁶³ *Cochrane Steel Products (Pty) Ltd v M-Systems Group* [2019] JOL 42326 (SCA) [13].

⁶⁴ *Cateram Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* [1998] 3 All SA 174 (A) at 181j.

⁶⁵ *Ibid* 182a-e.

⁶⁶ *Cambridge Plan AG v Moore* 1987 (4) SA 821 (D) at 837 B-E, approved in *Hollywood Curl (Pty) Ltd and Another v Twins Products (Pty) Ltd* (1) 1989 (1) SA 236 (A) at 251 D-E.

[86] The law on passing off gives no monopoly rights of any sort to words, marks or products and does not protect a mark or get-up in itself.⁶⁷ It protects a trader's business against damage caused by a misrepresentation by a rival concerning the trade source, or business connection of the rival's goods or services.⁶⁸

[87] The question is whether the respondent represents, whether or not deliberately or intentionally, that its goods are those of the applicant or are associated therewith.⁶⁹ Such misrepresentation may occur by the respondent adopting the trade name, get-up, mark or shape of the plaintiff or a name, get-up, mark or shape confusingly similar thereto.⁷⁰ The applicant must prove that the respondent's use of the feature itself was calculated to deceive and thus cause confusion and injury, actual or probable to the goodwill of the applicant's business.⁷¹

[88] The applicant submitted that it established that it has the requisite reputation to sustain a cause of action premised on passing-off, given its 30-year history, global footprint and substantial turnover and employee complement. Its submissions were substantially predicated on the respondent's marks being too similar to its own and a significant likelihood of deception or confusion existing amongst consumers. It contended for goodwill in the brand and trademark WINGS of the Wings Group. It averred that the respondent was taking unfair advantage of the repute of the WINGS trade mark, was leaning on its trademarks, dilution of the trade marks, exploitation thereof and passing off in its founding affidavit. potential of damages. These issues were dealt with in the broadest of terms in the applicant's founding affidavit.

⁶⁷ *Caterham Car Sales and Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) para 29.

⁶⁸ *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at 315B

⁶⁹ *Pioneer Foods (Pty) Ltd v Bothaville Milling (Pty) Ltd* 2014 BIP 486 (SCA) at para 76.

⁷⁰ *Jennifer Williams* supra.

⁷¹ *Adcock-Ingram Products (Pty) Ltd v Beecham SA (Pty) Ltd* 1977 (4) SA 434 (W) at 436H-437C.

[89] The respondent's challenge that the applicant has not illustrated that it is the owner of the reputation relied on, has merit. According to the respondent, the trader who trades under the name is Wingsnaledi Travel Management (Pty) Ltd, not the applicant. Although disputed by the applicant, the founding affidavit fails to establish that the trader who relies on the reputation and is the owner thereof, is the applicant. Reliance is placed on the organogram of the various companies provided by the applicant. In the founding papers, much is made of the reputation of the Wings Group, this falls short of the mark. In order to consider factually whether a misrepresentation was made, it must be established that the applicant owns the reputation, failing which it lacks *locus standi* to complain of a misrepresentation. Even though it is the owner of the trade marks, that does not prove that it is the owner of the common law rights arising from the use to which the trade marks have been put. This issue is fatal to its case.

[90] I am not persuaded that the applicant has proved that it owns any of the goodwill or reputation vesting with any of the WINGS trade marks on which it relies. The applicant did not meet the respondent's challenge with any cogent countervailing evidence, nor did it rely on or refer to it having any licence or permitted use in its affidavits.

[91] Moreover, I have already concluded that the parties' respective marks are not confusingly similar. The differences between the marks by far outweigh their similarities. Considering the respective get-ups and the respective marks as a whole, from the perspective of the average consumer likely to purchase the parties' respective travel services, there is no likelihood that a substantial portion of those consumers are likely to be confused or deceived into believing that the respondent's services emanate from the applicant. The applicant has not in my view established any likelihood of the respondent's services being passed off as those of the applicant. Other than legal conclusions unsupported by primary facts, there is no cogent evidence that the respondent has

imitated the applicant's mark closely or that it has '*acted out of a common charade*', was '*sailing as close to the wind without brewing up a storm of deception*'.⁷²

[92] In the context of passing off relief, it is also significant that on the respondent's version, which I must accept under the *Plascon Evans* rule, the respective customers of the parties are different. The marketing material relied on by the applicant shows that the average user of its services is likely to be corporate. It appears that the applicant offers specialised complicated travel logistics, such as offshore oil rigging and marine based services. Its marketing material states:⁷³

'Wings travel management has been creating bespoke travel programmes for Corporate, Oil& Gas and Marine leading organisations for over 25 years'. "we have been providing top level travel management services to very specialised and complex industries, predominantly in Africa, for a number of years. "Our Purpose: We enable organizations to mobilize their people efficiently, reliably and safely to practically anywhere on earth'.

[93] On the respondent's version it on the other hand sells flight and tourism packages to holiday makers.⁷⁴ Given such differences in the fields of activity, I am not persuaded that on a factual basis the applicant has established a misrepresentation. Considering all the facts, I conclude that the applicant's claim based on passing off must fail.

[94] For the reasons provided, the application must fail. The normal principle is that costs follow the result. Considering the complexities involved, costs on scale C are justified.

⁷² *Red Bull supra* at 323F.

⁷³ Marketing material attached as JN3. Colloquially referred to as business to business of B2B.

⁷⁴ Business to customer (B2C).

[95] In the result, the following order is granted:

[1] Leave is granted to the applicant to supplement its founding affidavit;

[2] The respondent is granted condonation for the late delivery of its answering affidavit;

[3] The respondent's application to strike out certain portions of the applicant's replying affidavit is upheld with no order as to costs. The offending paragraphs are 10.1, 10.2; 10.3 to 10.5; 35.1; 36.2, 38.2, 38.3, 40.2, 41.2, 41.3, 42.1, 43.1, 51.1, 51.2, 54.2, 56.2, 56.3, 59.1, 62.2, 65.2 and portions of paragraphs 24.2.3, 24.2.5, 24.2.8, 24.2.9, 24.2.10, 24.2.11, 24.2.12, 24.2.13, 24.2 14, 24.2 16, 24.2 22, 26.3, 32.3 and 34.2.

[4] The application is dismissed with costs on Scale C.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

HEARING

DATE OF HEARING : 24 APRIL 2025

DATE OF JUDGMENT : 04 AUGUST 2025

APPEARANCES

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