

**DECISION OF THE REGISTRAR OF TRADE MARKS IN THE
MATTER OF TRADE MARK OPPOSITION NO. 65/2009 BOBO
BEEF LABEL IN CLASS 29 PURSUANT TO THE TRADE MARKS
ACT CAP 401 OF THE LAWS OF ZAMBIA AND REGULATIONS
THEREUNDER**

Between

YOYO FOODS LTD

And

EUSTACE SPAITA BOBO

APPLICANT

OPPONENT

Before Mr. L.S. Thole, Assistant Registrar of Trade Marks

For the Applicant : Mrs. M.G. Johnson Mwenda from M.G. Johnson-
Mwenda & Co appearing with Ms. Melody Sakala

For the Opponent : Mr. Sydney Watae from Messrs SW & Associates

Cases and Authorities referred to:

Trade Mark Opposition No. 111/2005 DAILY

Trade Marks Act Cap 401 of the Laws of Zambia

Inquires Act Cap 41 of the Laws of Zambia

**English Law (Extent of Application Amendment Act) Cap 11 of the Laws of
Zambia**

Interpretation and General Provisions Act Cap 2 of the Laws of Zambia

Fees and Fines Act Cap 45 of the Laws of Zambia



The Zambian Constitution

US Trademarks Act

Trade Kings Limited v Unilever & Others ZLR (2000)

Ruth Kumbi v Robinson Kaleb Zulu S.C.J. No. 19 of 2007 (Unreported)

Trade Kings v Attorney General ZLR (1999)

Swallow (1947) R.P.C. 92

Deputy v DuPont 308 U.S. 488, 495 (1940)

Welch v Helvering 290 U.S. 111 (1933)

McGinley 660 F. 2d or 211 USPQ

Re-Red Bull GmbH, 78 USPQ2d

Ordinarily, the Registrar should have presided over this matter but she recused herself to fend off any conflict of interest on account of the Opponent being a spouse. I am grateful to her for allowing me to determine this matter without any interference. In deciding this matter, I am mindful of the fact that I am not only duty bound to ensure that justice is done, but that I am also laying down a precedent or precedents that we may have to follow in future. Apparently, this opposition raises a number of issues never before handled by our office and possibly the entire Zambian judiciary, at least in recent years. Given the history and circumstances of this matter, I have found it prudent not to confine myself to purely legal matters. In the course of this decision, I will digress into administrative procedures to which this opposition was subjected. Furthermore, as has become our custom in opposition matters, I will take this opportunity to clarify some of the related issues for the benefit of practitioners before this office.

This is a matter in which Mr. Eustace Spaita Bobo (hereinafter called '**the Opponent**'), a Zambian national, is contesting the registration of trademark 65/2009 BOBO BEEF Label in Class 29 in the name of Yoyo Foods Ltd (hereinafter called '**the Applicant**'), a Zambian Company. The trademark application was lodged on 13th January 2009 and the proof of acceptance issued on 6th March, 2009. Registration was sought in respect of crisps and corn curls. It

was subsequently advertised in the trademarks journal of 25th March 2009, prompting the Opponent to file a notice of opposition on 08th May, 2009.

Two (2) grounds were advanced in the notice and accompanying statement of case, namely that the application violated sections 14(1) (c) and 16 of the Trade Marks Act Cap. 401 of the Laws of Zambia. The Opponent argued that if the mark was registered, it was likely to result in the public being misled into believing that the goods in respect of which it would be used, are manufactured by the Bobo family. The Opponent averred that he was a Zambian national whose surname was 'Bobo' and as such claimed the 'BOBO BEEF Label' was confusingly similar with his family name in both pronunciation and 'alphabetical presentation'. He also contended that the word 'BOBO' was widely used as a surname by a cross section of society as evidenced by photocopies of legal identification documents he exhibited. Fifteen (15) photocopies of Zambian national registration cards and passports of persons carrying the 'Bobo' surname, including that of the Opponent, were attached.

We transmitted the notice of opposition to the Applicant under cover of a letter dated 12th May, 2009. The Applicant Company responded via a counterstatement dated 18th June, 2009. It acknowledged, *inter alia*, that the mark had been accepted for advertisement on condition that registration thereof would exclude exclusive rights to the use of the device of a cow and that the mark consisted of the words 'YOYO' and 'BOBO' while the rest of the wording remained descriptive and therefore non-trademark matter.

The Applicant Company nonetheless argued that it was not 'BOBO' it had applied for but the label. It also disputed claims that section 14(1) (c) prohibited registration of surnames. Its position was also that the inclusion of 'Bobo' on the label, among other words and designs, could not violate section 16 as the mark could not be denied registration on grounds that it might become scandalous

during usage. The Applicant thus contended that the opposition lacked merit and prayed that it be dismissed with costs.

We transmitted the counterstatement to the Opponent on 24th June, 2009. On 6th August, 2009, however, the Applicant's Counsel, Messrs M.G. Johnson-Mwenda & Co, applied to amend paragraph 2 of page 2 of the counterstatement to read '65/2009' and not '292/2009'. The Opponent subsequently lodged an affidavit in support of opposition on 20th August, 2010. He denied preventing the Applicant from registering any part of the mark or representation thereof save for the word 'BOBO', a surname which he alleged was a distinctive feature of the mark.

It was Mr. Bobo's view that the Applicant could amend or vary its mark, including limiting it to 'YOYO' or any other feature not violating the statute. He added that registration would offend section 14(1) (d). He further deposed that under sections 14(1) (a), (b), (c) and (d) of the Trade Marks Act, distinctiveness was a prerequisite for registration. It was his view that in light of the statutory provisions aforesaid, a geographical name or surname did not qualify for registration. He further reiterated that the evidence put forward demonstrated that 'BOBO' was commonly used as a surname in Zambia and consequently that registration of the mark would be contrary to section 16. He argued that irrespective of whether the mark was used independently or with other words, a surname remained a surname. Mr. Bobo thus reemphasised that the Applicant amends the mark either by the deletion of the word 'BOBO' or withdrawing the application completely in the interest of justice.

The affidavit was transmitted to the Applicant on 28th August, 2009. On 18th September 2009, however, its advocates wrote and alleged a conflict of interest on the part of the Registrar, apparently on grounds that she was also a 'BOBO'. Counsel alleged that such conflict extended to the Registrar's subordinates in the Trade Marks Office. The Registrar consequently referred the matter to the Attorney General on 14th October 2009 for an opinion. While the Registrar was

willing to recuse herself, she sought guidance on who could hear the matter if, as alleged, her deputy could not do so. The Attorney General advised in a letter dated 23rd December 2009 that her deputy, the Assistant Registrar for Industrial Property, hears the matter.

Henceforth, the Registrar played no role in this matter. I communicated the Attorney General's advice to the Applicant's advocates on 30th December, 2009. As a matter of fact, a copy of the legal opinion itself was transmitted. In the letter, I also sought the Applicant's views on the way forward in the light of the opinion aforesaid. The Applicant replied through counsel, acknowledging receipt of the opinion but requested the Office to confirm that the Registrar had indeed recused herself. This we did in a letter dated 21st January, 2010. Further to the Applicant's request, a one (1) month extension of the period within which the Applicant was to file the affidavit in support of application was also granted.

The Applicant filed the affidavit on 19th February, 2010. Mr. Junaid Deedat, the Applicant Company's Managing Director, deposed that the Applicant manufactured a range of food products in Zambia. He exhibited the lodgment certificate, proof of acceptance, receipt for advertisement payment and a photocopy of the advertisement in the journal. Several other marks applied for by the Applicant and advertised with the 'BOBO BEEF Label' in the patents and trademarks journal were also reproduced as advertised as exhibits 'JD3' and 'JD4'. Mr. Deedat further refuted assertions that section 14(1) (c) prohibited registration of surnames as trademarks. Over and above this, he contended that contrary to the Trade Marks Act and Regulations thereunder, the Opponent introduced new grounds of opposition in the affidavit in support of opposition and urged us not to entertain them.

The Attorney General's legal opinion and the letter under cover of which it was transmitted to the Applicant, were also exhibited. Mr. Deedat's further evidence was that in view of the lead time between ordering, printing and receipt of the

labels, the art work for the contested mark had been sent abroad much earlier. He deposed that printing had to be done expeditiously as the company was already operating. He also claimed that the Applicant Company had procured three (3) tons of BOBO BEEF flavor valued at USD 9, 622; ten thousand (10, 000) polybags valued at K 8, 468, 000; and seven point one (7.1) tons of inner packaging valued at USD 29, 859.33. These were exhibited as 'JD7', 'JD8' and 'JD9'

The Managing Director alleged that unless the above material was utilised by the end of March 2010, it risked going to waste, thereby causing colossal financial loss to the Applicant and the country in the form of foreign exchange. In reinforcing this argument, he argued that to his knowledge, BOBO was not a trademark – that the Opponent was not using the words 'BOBO BEEF' as a trademark in manufacturing business for it to conflict with the Applicant's mark. It was his position that, in any case, the label clearly indicated that the product was manufactured by the Applicant Company and that there was consequently no likelihood of the public being misled into believing that the product was manufactured by the Bobo family.

A sample of the mark in issue was reproduced and exhibited as 'JD11'. A letter dated 11th February 2010, allegedly from the National Archives Office, was also exhibited as 'JD12'. The said letter, signed by one, Brian Mwale, Acting Senior Librarian, was to the effect that research undertaken by the National Archives suggested that the word 'BOBO' did not originate from Zambia nor was there a publication registered under that name. It was further deposed that the National Heritage Conservation Commission had advised that the word 'BOBO' was used in the United States of America, Zimbabwe and Ghana, among other countries.

The Applicant also deposed that a search on the world-wide web (the internet) revealed that the word 'BOBO' had several meanings, including: an ethnic group in West Africa; an Ashanti group within the Rastafarian movement; a child's

cartoon from Sweden; a French word meaning sore; and a boutique restaurant that 'caters to the discriminating steak eater'. He added that 'BOBO BEEF' was intended to be an added attraction to the consuming public which included both adults and children.

Further Mr. Deedat's evidence was that, in any event, the Registrar had set a precedent of accepting as trademarks, words that could serve as surnames. He cited trademarks 96/2008 THOMSON & LOGO, 462/2007 ADAM and 369/2007 TOM TOM TISSUE. Extracts of the trademark journal in which these marks were advertised for registration were also reproduced and exhibited as 'JD13', 'JD14' and 'JD15,' respectively. He concluded that as 'BOBO' had several uses, the Opponent had no legal justification to object under sections 14(1) (c) & (d) and 16. Over and above this, he cautioned that the last sentence of the Registrar's letter of 26th October 2009 needed not prejudice the Assistant Registrar against the Applicant. The said letter was exhibited as 'JD16'.

The last paragraph of which the alleged sentence is a part read:

'As regards the extension of time you have requested, my office cannot execute the same as I am still bound by your letter of 18th September 2009 in which you requested me and the staff at PACRO who are under my supervision and control not to be involved with this matter. I am at a loss as to who I should delegate to, to deal with your request since all PACRO staff are under my supervision'.
(Emphasis by underlining ours).

Mr. Bobo's response, in relation to paragraph 12 of the affidavit in support of application, in his affidavit in reply lodged on 16th April 2010, was that sections 14(1)(c) and (d) prescribe an absolute ground for refusal of surnames. Regarding paragraph 19, he responded that registration of the mark in contention was prohibited as it had 'certain public interest objections'. He further repeated that registration would cause deception and as such confuse the public into thinking the associated product was manufactured by the Bobo family. He also argued

that in view of the fact that the Applicant would upon registration enjoy legal title to the name 'BOBO' to the detriment of others, registration of the mark was also precluded by section 13(a).

With respect to paragraph 26, Mr. Bobo reaffirmed that infringement existed. He also argued that notwithstanding the lack of registration, the word 'BOBO', at least in the loose meaning of a trademark, was equally his trademark. He thus argued that registration of the mark would infringe on his right to the free use of the word as a surname. He added that 'BOBO' was not distinctive and would therefore deceive the public into thinking he was the source of the product. His position was that the word 'BOBO' had not yet entered into common vocabulary, consequently the consuming public would associate the mark with him.

Having gathered the necessary affidavit evidence, a hearing was held on 27th May 2010, in accordance with Regulation 54 of the Trade Marks Regulations as read with Section 23 of the Trade Marks Act, during which both parties made oral submissions. Mrs. M.G. Johnson Mwenda of M.G. Johnson-Mwenda & Company appeared for the Applicant while Mr. Sydney Watae of Messrs SW & Associates, represented the Opponent. Mr. Bobo, the Opponent, was also in attendance.

Before submissions on substantive matters could be made, however, two preliminary issues were raised. Mr. Watae started by seeking guidance on the legality or lawfulness of the usage by the Applicant of the contested mark before registration. He alleged that the Applicant had already put the mark to use as evidenced by a packaging he produced. He added that the mark was being used in advertising in the media, among them Muvi Television, and on bill boards scattered around the city, one being the one erected near the Mulungushi International Conference Centre. He argued that such use should only happen after the mark has been registered. Counsel undertook to make available a compact disc (CD) containing the adverts alleged to be running in the electronic media.

I must point out in this regard that the Opponent had earlier brought this concern to our attention but we advised in a letter dated 17th May, 2010, copied to the Applicant's advocates, that the matter be raised at the hearing. At the hearing, Mrs. Mwenda argued that it was irregular for the office to have had contact with the Opponent in the Applicant's absence. She added that the said letter, signed by Mr. Mapani Christopher, Senior Examiner for Trademarks, made reference to 'our discussion regarding possible violation of section 69 of the Trademarks Act Cap 401 of the Laws of Zambia'. She argued that she had not seen the contents of the Opponent's letter and demanded that she be availed of it and that the substance of Mr. Mapani's discussion with the Opponent be disclosed.

I availed her copy of the letter which read: -

13th May 2010

*The Registrar
Patents and Companies Registration Office
P.O. Box 32075
Lusaka*

Dear Madam

*RE: TRADEMARK APPLICATION NO. 65/2009 BOBO LABEL IN CLASS 29
IN THE NAME OF YOYO FOODS LIMITED AND OPPOSITION
THERE TO BY EUSTACE SPAITA BOBO*

Refer to the above captioned matter.

We kindly draw your attention to the fact that despite filing a Notice of Opposition to the Application for Registration of Trade Mark, the Applicant herein, Yoyo Foods Limited has already started using the trade name 'Bobo Beef' and products bearing the said trade name are already in circulation.

We find this contemptuous of proceedings in this matter and therefore ask your indulgence in this matter.

Kindly acknowledge safe receipt thereof.

Yours faithfully

*Signed
SW & Associates
Per Maggie Banda Kaunda*

Our reply to this letter read:

TM. No. 65/2009

17th May 2010

*Messrs SW & Associates Legal Practitioners
Stand No. 3065A, Suite C, Great East Road - Fairview
P.O. Box 51302
Lusaka, Zambia
Dear Sir(s)/Madam*

Re: Trademark Application No. 65/2009 BOBO BEEF Label in Class 29 in the name of Yoyo Foods Ltd and Opposition thereto by Eustace Spaita Bobo - Possible violation of Section 69 of the Trademarks Act Cap 401 by Yoyo Foods Ltd

We refer to your letter of 13th May 2010 and to our prior discussions regarding possible violation of section 69 of the Trademarks Act Cap 401 of the Laws of Zambia by the Applicant by reason of continued use of the trademark BOBO and misrepresenting that the same is already registered.

I have consulted with the Assistant Registrar (IP) and he is also of the view that this matter could be brought up at the upcoming hearing. That way, both parties will be afforded the opportunity to be heard on the matter and to adduce any evidence in support or against, as the case may be. I am therefore directed to advise accordingly.

Yours faithfully,

*signed
Mapani Christopher
Senior Examiner (Trade Marks)*

For/REGISTRAR OF PATENTS AND TRADEMARKS

*Cc. Messrs M.G. Johnson-Mwenda & Co, 1st Floor, CUSA Zambia House,
P.O. Box 33645, Lusaka, Zambia*

Mr. Mapani, at the hearing, explained that the Opponent's advocates, through one of their staff, approached the office to report what they considered to be a violation of section 69 of the Trade Marks Act. The said representative also brought with her a copy of the BOBO BEEF packaging bearing an encircled R. He added that strictly speaking, this issue was outside these opposition proceedings and could have thus been dealt with independently. This notwithstanding, he further explained, it was felt that it was preferable, in the interest of justice, that the matter was raised in the Applicant's presence at the hearing, thereby affording both parties the opportunity to be heard and adduce any evidence in support of their case.

Mr. Mapani thus contended that there was nothing irregular in his contact with the Opponent's advocates. Apparently, the reply to the Opponent was deliberately copied to the Applicant's counsel to alert them that the matter would be coming up at the hearing and thus avoid an ambush. Mrs. Mwenda nonetheless insisted that it was irregular. She further argued that contrary to the Opponent's allegations, the R on the alleged mark was next to 'YOYO'. She submitted that 'YOYO' was registered in Class 29 under number 47 of 2003 in the name of Trade Kings Ltd.

A photocopy of the renewal certificate was produced reflecting the YOYO mark as having been last renewed on 29th January 2010. Applicant's counsel also produced a letter from Trade Kings Ltd dated 19th May 2010, addressed to the Registrar, indicating that Yoyo Foods Ltd was a wholly owned subsidiary of the Trade Kings Group of Companies. According to counsel, there was thus absolutely nothing wrong with R being next to YOYO nor was there any passing off. She added that section 69 was concerned with falsely representing a trademark as registered which she said the Applicant was not doing.

Mr. Watae's response was that, at issue, as pointed out in the letter of 13th May 2010, was that the words BOBO BEEF were predominant on the mark, thus, any reasonable person buying the product would be under the impression that he or she was buying the BOBO BEEF flavor of crisps and corn curls. The Opponent's objection, according to counsel, was against putting the product onto the market before registration. He submitted that the objection was to the use of the trademark and the name 'BOBO' which was very conspicuous on the label. Mrs. Mwenda responded that section 69 was about using a mark as if registered.

The other preliminary issue concerned the validity and thus the admissibility of the Opponent's affidavit in reply. Mrs. Mwenda argued that the affidavit was not dated and therefore ought to be excluded. She submitted that the Registrar was bound by Order 5 Rule 20 of the High Court Rules which under (g), stipulates, *inter alia*, that an affidavit 'shall state the date of the swearing and the place where it is sworn'. She further argued that similarly, the White Book, Rules of the Supreme Court of England, in particular Order 41/11/2, which requires that the date be indicated on an affidavit, was binding in opposition matters. In the light of this irregularity, she contended, the affidavit was inadmissible.

The said Order 41/11/2 of the White Book provides:

Affidavits

Marking

1. *At the top right hand corner of the first page of every affidavit, and also on the backsheet, there must be written in clear permanent dark blue or black marking:*
 - (i) *The party on whose behalf it is filed;*
 - (ii) *The initials and surname of the deponent;*
 - (iii) *The number of the affidavit in relation to the deponent;*
 - (iv) *The identifying initials and number of each exhibit to the affidavit;*

and

- (v) *The date when sworn. For example. 2nd Dft: E.W. Jones: 3rd: 24.7.82.EW/J.3, 4 and 5.*

Mr. Watae's responded that whereas it may be true that the date was omitted, the Registrar, in opposition matters, was not bound by strict rules of evidence. In any case, he added, the Opponent could rely on previous affidavits as the affidavit being challenged merely restated the contents of previous ones. I reserved ruling on the Applicant's objection and invited parties to proceed to make their submissions including those related to the contested affidavit. I guided that in the event that I upheld the objection, related evidence and arguments would be excluded.

On the substantive issues, counsel for the Opponent submitted that the objection to registration of the mark was based on grounds stated in the affidavits and the notice of opposition of 28th April, 2009. It was submitted that registration of the name or term BOBO BEEF, particularly BOBO, which was the Opponent's surname and family name, would violate sections 14 and 16 of the Trade Marks Act.

Mr. Watae repeated that the name BOBO relates to a particular family and clan of which the Opponent is a part. He thus reiterated that the trademark may be falsely associated with his client. Further, he argued, depending on what use the mark was put to, the Opponent could be subjected ridicule and scandal. Counsel alleged that this was already happening as evidenced by the advertisements he had earlier referred to which he said depicted a caricature of a cow with the word BOBO inscribed across its breast, dancing and extolling the attributes of the product. In Mr. Watae's view, this exposed the Opponent to ridicule. He thus prayed that the mark be denied registration.

Mrs. Mwenda, in response, observed that the matter was being heard by the Assistant Registrar as a result of the legal opinion from the Attorney General's Chambers annexed to the Applicant's affidavit in support of application, on which

affidavit she said she was relying. She submitted that the application for registration of the BOBO BEEF Label was duly filed at the trademarks office, accepted by the Registrar and duly published in the trademark journal dated 25th March 2009, as shown in the affidavit.

She argued that paragraph 18 of the affidavit demonstrated that BOBO was not a registered trademark in Zambia and that the Opponent was not using it in any manufacturing business or any other way that could conflict with the Applicant's application. Mrs. Mwenda further argued that it was clear from exhibit 'JD11' that Yoyo Food Ltd was the manufacturer. She referred me to our supreme court decision in **Trade Kings Limited v Unilever & Others SCJ No. 2 of 2002**, where at page 20, the court observed: *'It would off course be unpardonable for any court to assume that the average Zambian consumer is some kind of a retard as suggested by some of the affidavits..'*

Counsel reaffirmed that the National Archives had advised in a letter dated 11th February 2010, signed by one Brian Mwale, Acting Senior Librarian, a copy of which was exhibited as 'JD12', that the word BOBO, which Mrs. Mwenda emphasized was not a trademark, did not originate from Zambia. She also repeated that a search on the internet revealed that BOBO was an international word carrying different meanings depending on the jurisdiction. The National Heritage Conservation Commission had also allegedly confirmed that BOBO is not linked to any cultural grouping but is rather used internationally. Mrs. Mwenda thus contended that it was a word of common usage.

Regarding section 14 (d), counsel drew my attention to the words, 'according to its ordinary signification'. She submitted that it was essential to bear in mind that statutes are not read in isolation of established principles and case law. Unfortunately, she observed, there appears to be no Zambian decided cases on this question meaning we have to refer to those in other jurisdictions *albeit* merely persuasive. I was also referred to the case of **Swallow (1947) R.P.C 92**.

In Mrs. Mwenda's view, this authority demonstrates that BOBO BEEF qualifies for registration in Part A of the register. She stated that it was essential to bear in mind that section 14 did not require a mark to meet all the requirements thereunder to be registrable but merely one. She also argued that the mark had no direct reference to the quality or character of the goods concerned. Counsel further submitted that 'BOBO' was not, 'according to its ordinary signification', a surname.

Mrs. Mwenda also argued that exhibit 'JD11' showed that there were other unique features in the mark. She cited the shape, which in her view, 'starts small' and the two cartoons allegedly standing on top of the registered mark YOYO. Further, she argued, the mark should be read as one i.e. 'BOBO BEEF Label' and that it was consumed by both adults and children. Counsel also argued that while not admitting that BOBO was a name, there were several names that had been registered as trademarks. Her view was therefore that BOBO qualified under 14(d) of the Trade Marks Act and that consequently, the prohibition under section 16 fell off.

But notwithstanding the foregoing, Mrs. Mwenda addressed herself to section 16, breaking down the provision. She submitted, in relation to 'likelihood to deceive', that the Act used the word 'or' instead of 'and' and repeated that the mark clearly showed that it was owned by Yoyo Foods Ltd. Counsel augmented this argument by contending that Zambians were not retards to confuse that fact. She emphasized that the mark was 'BOBO BEEF' and not 'BOBO'. Regarding 'being disentitled to protection in a court of law.' she submitted that she had demonstrated that the mark qualified for registration and thus protection.

On 'scandalous', her view was that this was synonymous with being contrary to law or morality - something shocking, relating to decency or slang. Morality, she contended, referred to scandalous designs. She argued that the mark BOBO did not represent any of these. It was thus her view that the Opponent had no legal

basis for objecting to the registration of the mark 'BOBO BEEF Label'. Mr. Watae's view on this issue was that what amounted to scandalous needed to be interpreted in the context of the environment in which the trademark was to be used. He repeated that a carton with a caricature having someone's name written on its breasts opens such a person to ridicule.

Regarding her earlier objection to the admission of the Opponent's affidavit in reply, Mrs. Mwenda explained that she had objected on account of the fact that the Opponent introduced therein a new ground pursuant to section 13(a). She was of the considered opinion, nonetheless, that the Opponent had misread and misrepresented this provision. She argued that contrary to the Opponent's interpretation, the provision did not prevent registration of a name as a trademark. Counsel submitted that the drafting style of the statute showed that sections 16 and 17 were the prohibition clauses and further that an unregistered trademark could not be infringed. She argued that it followed that a name could not be infringed. Mr. Watae's response was that if the mark were registered, the Opponent would further to section 13(a) be precluded from using his name in market goods under that name in future should he so desire. He emphasized that the provision employed the words 'or' and not 'and', meaning they are separate.

After the submissions, I enquired whether the Applicant Company could be willing to amend the mark in a manner that minimises or completely takes away offence to the Bobo family. Applicant's counsel nonetheless stated that she needed to get fresh instructions on that. I am indebted to both counsel for their learned submissions.

I have found it expedient to first dispense with the preliminary issues. A total of three (3) preliminary or procedural issues have been raised in the course of these proceedings, one having been raised before the hearing. The Applicant had argued in paragraph 13 of its affidavit in support of application that contrary to the Trade Marks Act and its Regulations, the Opponent had introduced

additional grounds in its affidavit in support of opposition. I have perused the notice of opposition and the accompanying statement of case and it would appear that the Applicant Company is on firm ground in so far as it alleges that the Opponent, initially only specifically relied on sections 14(1)(c) and 16.

But I should point out that our view regarding matters of procedure has been that procedure in opposition matters is rather informal. We have generally taken the view that provided no injustice is occasioned to either party in the process, our ability to do justice should not be fettered by procedural rigidities. We are fortified in this view by section 48(2) of the Trade Marks Act which imports into the Trade Marks Act, provisions of the Inquiries Act Cap 41 of the Laws of Zambia. Further to the said section 48(2), powers, rights and privileges under the Inquiries Act apply *mutatis mutandis* to trademark opposition proceedings.

Section 13(1) of the Inquiries Act stipulates that Commissioners, in the discharge of their functions, are not to be bound by the rules of evidence or procedure of any court or tribunal, but that they may conduct their proceedings in such manner as they think proper and admit any evidence, written or oral, whether or not such evidence would be admissible in civil or criminal proceedings. Considering that the Applicant had the opportunity to respond to the 'additional' grounds via the affidavit in support of opposition and during the hearing, no injustice would seem to have been suffered. I have therefore admitted the 'additional' grounds.

Regarding the guidance sought on the Applicant's use of the mark prior to registration and possible violation of section 69 of the Trade Marks Act, I propose to address the issues related to section 69 after I have dealt with the substantive issues. I only wish to indicate at this point that I have given due consideration to Applicant counsel's protestation and I have difficulties seeing any irregularity in the contacts the Senior Examiner (Trade Marks) had with the Opponent advocate's staff. I wonder whether we should not even have enquired why we were being approached.

I see nothing prejudicial to the Applicant. At the very least, the Applicant's counsel came to the hearing prepared to argue on this point. In fact, the fact that we referred to the 'discussion' in the reply we copied to the Applicant's counsel when the Applicant's letter had not done so, should demonstrate that the office had nothing to hide. In any case, as pointed out by Mr. Mapani, allegations of section 69 being violated could have been dealt with outside these opposition proceedings as they concern commission of an offence, a matter which any member of the public could bring up irrespective of whether there is an opposition or not. But as stated by the Senior Examiner and corroborated by our letter reproduced above, we decided not to act *ex-parte*s but invited the Applicant to raise the matter at the hearing where the Applicant would be present. Under the circumstances, I find it strange that Opponent's counsel still found it irregular.

Returning to the question of whether it was lawful for the Applicant to have used the mark prior to registration, it is essential to note that trademark registration is not a pre-condition for use of a mark. All registration does is confer exclusive rights on the proprietor. It confers 'negative rights', essentially rights to exclude others. Thus, one can use a mark without necessarily registering it, save that registration confers several benefits related to entitlement to the use of a mark. As counsel for the Applicant observed, infringement of an unregistered trademark is not possible. Section 7 of our Trade Marks Act expressly excludes infringement actions in respect of unregistered trademarks.

It follows, therefore, that an Applicant can use a mark notwithstanding that it is yet to be registered. I nonetheless agree that in cases of this nature where continued use of a mark may cause irreparable damage to be suffered by the Opponent and thus render opposition proceedings academic, an order restraining such continued use should be tenable. This, unfortunately, was never done in this particular case. For the avoidance of doubt, however, let me clarify

that representing a mark as registered when it is not, is an offence under section 69 aforesaid. As earlier indicated, I will return to this issue later on.

On the question whether the affidavit in reply is admissible, I wish to start by pointing out that while the Registrar is bound by general principles of court practice, we are not bound by rules of a particular court, in this case the High Court. In any case, if we were bound by High Court Rules as counsel for the Applicant would seem to suggest, it would follow that the mode of commencing opposition proceedings and other filings would be similar to that in the High Court. Similarly, the Registrar would enjoy the powers and privileges of High Court judges. But evidently, that is not the case. Moreover, rules of the High Court are intended to govern procedure in that particular court. Thus, not even do they bind the Subordinate Court as it has its own laid down procedure. Procedure in opposition proceedings is governed by the Trade Marks Act as read with the Inquiries Act, Regulations under the Trade Marks Act and generally accepted principles of law.

As for the White Book, I should point out that I am alive to our Supreme Court decision in **Ruth Kumbi v Robinson Kaleb Zulu SCZ No. 19 of 2007** to the effect that following the amendment and insertion of sub-section (e) in section 2 of the English Law (Extent of Application Act) Cap 11, the 1999 edition of the White Book, Rules of the Supreme Court of England, no longer merely fills gaps in our rules of procedure but is now binding in its entirety on our courts of law. But even then, a tribunal constituted by the Registrar to hear a trademark opposition is not a court, at least in the conventional sense of the word. The Trade Marks Office is certainly not part of the judicature but an agency of the executive arm of government *albeit* performing *quasi* judicial functions. Neither under Article 91 of the Constitution nor the **Interpretation and General Provisions Act Cap 2** of the Laws of Zambia does it qualify.

But as I pointed out, it is bound by general principles of court practice, in this case, those relating to preparation of affidavits. To that extent, I agree with the Applicant's counsel that it is a standard practice or requirement that an affidavit be dated. Apparently, both Order 5 Rule 20(g) of our High Court and Order 41/11/2 of the 1999 edition of the White Book make this a requirement. It does not however seem to necessarily follow from both these provisions that an affidavit omitting a date or indeed any defective affidavit should be rejected.

While laying it down as a requirement, neither the High Court Rules nor those of the White Book stipulate that such defective affidavit should be dismissed. In this regard, I find it insightful that Order 5 Rule 12, on the other hand, expressly states that an affidavit sworn by a person on whose behalf it is sworn should not be admitted. Further and more importantly, Rule 13 of Order 5 allows the Court to admit a defective affidavit if it can be shown that it was sworn before a person duly authorised to do so. Accordingly, the principle I deduce from the above provisions is that where the dangers posed by the defects in an affidavit have been accounted for, a defective affidavit is admissible.

There is no question, in the instant case, that the affidavit was sworn before a qualified commissioner of oath. Neither is it in dispute that Mr. Bobo, who happened to be present when the affidavit was being contested, deposed to it. The place at which the affidavit was sworn, namely Lusaka, is also indicated, the only omission therefore being the date on which it was sworn. Regard being had to the discretion available to me vis-à-vis admission of evidence and the aforesaid particular circumstances of this case, I am persuaded that this is an appropriate case in which to admit the affidavit notwithstanding its defect. In so doing, I am also persuaded by Opponent's counsel that save for arguments in relation to section 13 (a) which was introduced in the affidavit in reply, the affidavit is a mere restatement of previous affidavits. I accordingly admit the affidavit into evidence.

I have equally addressed my mind to the Applicant's objection to the inclusion of section 13(a), itself, in the affidavit in reply. I am in agreement with Applicant's counsel that further to Regulation 51 of the Trade Marks Regulations, the Opponent should have confined himself strictly to matters in reply. I am nonetheless satisfied on this score, as well, that no injustice would be suffered by reason of admitting section 13(a) considering that Applicant's counsel had occasion to address me on this question. Section 13 (a) will therefore also be taken into account.

I will now proceed to consider the substantive issues arising from this opposition. It is incontrovertible that the Opponent has not registered the word 'BOBO' as a trademark. In my view, however, it is immaterial where the word 'BOBO' might have originated. I am also not sure what the evidentiary relevance of the legal opinion from the Attorney General's Chambers, is. Perhaps the only thing it demonstrates is the openness, impartiality and professionalism with which this matter has been handled, to the extent, arguably, of giving away our client-lawyer privilege.

Having said that, there appears to be essentially three (3) issues to resolving this matter, the first being whether the Opponent is entitled under section 16 to prevent registration of a trademark on grounds that it is confusingly similar with an unregistered family name. Secondly, can a mark be denied registration on grounds that it may become scandalous through usage? Thirdly and finally is the question whether the word 'BOBO' is disqualified from registration under section 14 for being the Opponent's surname.

Before going further, it may be opportune to indicate, as argued by the Applicant, that trademark THOMSONS 96/2008 and other marks akin to surnames may have been registered. Admittedly, also, it is essential for this office to be consistent in its decisions and treatment of trademarks. The practice has in fact been to refer to our previous decisions. But without delving into the merits or

demerits of the above cited registrations, it must be pointed out that each application, as I will show later, must be examined on its own merit.

Further, the mere fact that the correct procedure may have been followed in prosecuting a trademark application is not a bar to challenge its validity. If anything, that is the more reason why provision was made in the law for opposition. This provision, according to Justice Silomba in **Trade Kings v Attorney General ZLR (1999)** at page 55, is intended to enable interested parties to know whether what was being proposed for registration was injurious to their business interests.

In so far as section 16 is concerned, the contention is that the mark is visually and phonetically confusingly similar with the BOBO family name and as such, its registration is likely to mislead the public into believing that goods sold under the mark originate from the BOBO family. It is further argued that the mark might become scandalous through usage and is therefore disqualified. In response, the Applicant argues, *inter alia*, that the mark applied for was not 'BOBO' as alleged but 'BOBO BEEF Label'.

I find merit in the Applicant's contention that the trademark does not only comprise of the word 'BOBO'. In fact, the proof of acceptance read in part: *'...the mark consists of the words YOYO and BOBO while the rest of the wording appearing is descriptive and non-trademark matter'*. Scrutiny of the label nonetheless shows that 'BOBO' is the prominent feature. As a matter of fact, my inference is that 'YOYO' is meant to identify the manufacturer while 'BOBO' identifies the particular flavor or product and is thus, to all intents and purposes, the trademark.

I am fortified in this view by the fact that the other marks the Applicant applied for, some of which were also exhibited in the affidavit in support of application, namely trademarks 63/2009 YOYO SPACEBALLS Labels, 64/2009 YOYO and

KOKOLIKO CHICKEN Label, all include 'YOYO' in combination with other matter. They all depict 'YOYO' somewhat subordinated to the other words and the graphical representation forming the trademark. 'YOYO' is generally positioned in the top left corner while the name of the particular flavour is in the center of the label. Given BOBO's prominence on the label, it seems of little consequence whether the Applicant only applied for 'BOBO' or with other trademark matter.

Our view of section 16 is that it should not be read in isolation but in the context of sections 7 and 17. We have therefore taken the view that it presupposes the existence of a registered trademark as is the case under section 17 and consequently held, in previous matters, that an unregistered trademark proprietor, as in the instant case, lacks the legal basis upon which to oppose registration of a mark on grounds of confusion with his unregistered trademark. This was our view in **Trade Mark Opposition No. 111/2005 DAILY**, for instance.

I therefore side with Applicant's counsel that in the absence of a registered trademark, the Opponent cannot rely on section 16. Similarly, section 13 cannot be relied upon. Contrary to the Opponent's view, my interpretation is that this provision is not a prohibition clause, as Applicant's counsel put it but instead provides exceptions to rights accruing from registration. It allows persons to continue using their names notwithstanding that the same may have been registered as trademarks. Like the preceding section 12, it, in a sense, safeguards vested rights.

What is fundamental, in my view, is that, as already pointed out, the Opponent is not using the mark as a badge of origin. It must be recalled, in this regard, that further to the doctrine of 'specificity', even for registered trademarks, protection is not wholesale but confined to the goods in respect of which the mark is registered. The confusion envisaged under the said section 16, in my considered view, is that in respect of other 'indicators of origin'. Holding otherwise would

seem to be imputing a form of protection analogous to copyright or other protection not envisaged by the legislature.

But notwithstanding the foregoing, it appears that a challenge under section 16 on grounds of morality, law or being scandalous, need not be founded on a registered mark. The Opponent's contention is that the mark might become scandalous through usage – that it is potentially scandalous. The contention is that it might be used in a scandalous manner. Paragraph 4 of the Statement of Case which reads in part: *'...the mark could not be entitled by law to registration on the basis that it might become scandalous during usage'*. The Opponent's counsel argues that the mark is in fact already being used in a scandalous manner.

Admittedly, section 16 is alive to the potentials of registration, namely likelihood of confusion, deception or such other similar effect. It precludes marks likely to have such an effect from being registered. But there is an apparent departure in so far as 'scandalous' is concerned. The said section reads in part *'....be disentitled to protection in a court of justice or would be contrary to law or morality, or any scandalous design'* (Emphasis by underlining ours).

My view of the above provision is that unlike for deception and confusion, the design of the mark, as it appears and not as a consequence of future use, must be scandalous. It should be scandalous on the face of it or in the context of surrounding circumstances. The statute does not however shade light on what amounts to a 'scandalous' trademark. As counsel for the Applicant noted, neither has the Zambian judicature had occasion to consider this question. In the circumstances, we have to fall back on dictionary definitions and how courts in other jurisdictions, the US for instance, have approached this issue.

The Longman's Dictionary of Contemporary English, published by the Longman Group Limited of England in 1978, defines 'scandalous' as 'offensive to feelings

of what is right or proper'. Similarly, the Webster's Third New International Dictionary assigns the following meanings to scandalous: 'constituting a spiritual or moral lapse endangering, by example, faith or morals; endangering faith or morals through conduct or views; and or containing shocking or defamatory information'.

Evidently, 'scandalous,' in the context of trademark law, connotes marks that either have the tendency of corrupting public morals or are offensive, mostly derogatory to the public or a portion thereof. The US Trademarks Act 15. U.S.C., for instance, equates 'scandalous matter' to 'immoral matter'. Section 2(a) thereof bars the registration of 'immoral or scandalous material'. US case law generally considers scandalous marks to be those 'shocking to the truth, decency or propriety; disgraceful; offensive; and disreputable'. This was the view of the US Court of Customs and Patent Appeals in **McGinley 660 F. 2d at 486, 211 USPQ at 673**. The court based its view on dictionary definitions of 'scandalous' as *inter alia* 'shocking to the sense of propriety', 'offensive to the conscience or moral feelings' or 'calling out for condemnation'. It has further been held in the US that the question whether a mark is scandalous should not be determined in isolation but in the context of the goods in the marketplace and contemporary attitudes.

But even for what may appear to be 'scandalous' marks, rejection would seem to be reserved for those that are exceptional. The standard for 'scandalous,' particularly in the US, is rather high. Depending on the connotation and/or industry, some words or phrases that some have found derogatory or offensive, have been allowed registration. For example, DICK is a registered trademark for a series of hand tools. Equally, REDSKINS, a term many consider derogatory to native Americans, is registered and has been upheld by the courts of law.

In the **McGinley case**, on the other hand, the court upheld the rejection of a mark comprising of a photograph of a nude, reclining man and woman, kissing

and embracing for a newsletter devoted to social and interpersonal relations topics. PUSSY, equally, was rejected in **Re-Red Bull GmbH, 78 USPQ2d at page 1379-1380** on grounds that, taking into account the substantive composite of the public, in particular women, the term PUSSY had a vulgar, offensive sexual meaning.

Undoubtedly, the word 'BOBO', in and of itself, carries no immoral connotation; otherwise, the Bobo family would not be seeking to protect it. If, as claimed by the Opponent, a mark with the word 'Bobo' inscribed on the breasts of a cow is being used, then, in effect, the Applicant has amended the mark without our approval and such mark is not entitled to protection under the Trade Marks Act. Section 40 requires that any alteration to a mark be notified and approved by this office. Legally, therefore, the Opponent could be using a different mark. The irony, as indicated, is that registration is not a pre-condition for use of a mark. The offence is to purport that the mark is registered when it is not.

The Bobo family is nonetheless justified to be concerned that even without alteration, it is possible for the mark to be used in a manner they might find offensive. This is certainly possible in advertising. One would also not completely rule out, as argued, the possibility of certain sections of society mistaking the product as originating from the family. Unfortunately, section 16 seems oblivious to these concerns.

Turning to the question whether section 14(1) precludes the registration of surnames, the said sections 14(1)(a) to (e) provide: -

'14(1) In order for a trade mark (other than a certification trademark) to be registrable in Part A of the register, it must contain or consist of at least one of the following essential particulars:

- (a) The name of a company, individual or firm, represented in a special or particular manner;**

- (b) **The signature of the applicant for registration or some predecessor in his business;**
- (c) **An invented or invented words;**
- (d) **A word or words having no direct reference to the character or quality of the goods and not being, according to its ordinary signification, a geographical name or a surname;**
- (e) **Any other distinctive mark, but name, signature or word or words , other than such as falls within the descriptions in the foregoing paragraphs (a), (b), (c) and (d) shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness’.**

Apparently, this provision stipulates the qualifications for registration. It is essentially concerned with the need for a mark to be distinctive, that is, capable of distinguishing the respective goods. Under sub-section (d), a mark may be a word or words but the same should have no direct reference to the character or quality of the relevant goods. It should also not, ‘according to its ordinary signification’ be a geographical name or a surname. Under subsection (e), marks falling short of the requirements in sub-sections (a) to (d) are disqualified from registration except upon evidence of their distinctiveness.

A surname has not been defined, however. Thus, it should be given its ordinary meaning. The learned author’s of the Longman’s Dictionary of Contemporary English define ‘surname’ as ‘the name one shares with the other member’s of one’s family, often the last name’. An example given is that of Alan Smith whose surname is said to be Smith. Equally, the author’s of Webster’s Third New International Dictionary of 1961 define surname as: ‘a name added onto an original or baptismal name from some pertinent or accidental circumstances; a second name or an alterative title given to one; a name borne in common by members of a family as distinguished from an individualizing forename; or the inherited last name taken by children and changed only legally’. One deduces

from these definitions that a surname is an acquired or inherited name, a family name. Based on the foregoing, I have no doubt and do find as a fact that 'Bobo' is indeed the Opponent's surname.

But as earlier indicated, I find it immaterial what various meanings a particular surname might have or where it might have originated. Accordingly, it is inconsequential, in my view, what the word 'BOBO' might mean in the various jurisdictions. But as argued by counsel for the Applicant, there is a qualification under section (d) 14 to the effect that the mark should be denied registration if it is a surname or geographical name 'according to its ordinary signification', that is, its 'ordinary signification' should be that of a surname. The only issue, then, is whether the word 'BOBO' is 'according to its ordinary signification', a surname.

Longman's Dictionary of Contemporary English defines 'ordinary' as 'not unusual or common'. 'Signification', on the other hand, is defined as 'the intended meaning of a word' or 'the sense'. It also defines 'signify' as *inter alia*: 'to be a sign of; represent, mean, denote; to make known (especially an opinion) by an action'. The Webster's Third New International Dictionary of 1961 similarly defines 'signification' as: 'the act of signifying....; the meaning that a sign, character or token is intended to convey; the connotation or comprehension of a term'.

Signification is also defined as: 'occurring or encountered in the usual course of events; not uncommon or exceptional; not remarkable – routine, normal; being of frequent abundance – common, abundant; commonly experienced or practices; or characterized by common quality, merit, rank or ability'. Similarly, the US Supreme Court defined 'ordinary' in the case of **Deputy v DuPont 308 U.S. 488, 495 (1940)** as 'normal, usual or customary'. Equally, in **Welch v Helvering, 290 U.S. 111 (1933)**, the court held, in relation to 'ordinary', that 'it must be habitual or normal'.

Invariably, the mischief intended to be addressed by section 14 should be the guiding principle in interpreting sub-section (d). The mischief, in my view, is the registration of words or labels incapable of distinguishing products. The question then becomes what a word is generally associated with, what it generally signifies. I interpret this to mean what immediately comes to an average person's mind when he or she hears such a word. Simply put, is an average consumer likely to associate the word with a product or the name of a person. If likely to be associated with the name of a person, then it would be incapable of distinguishing a product. This would appear to be the approach adopted in **Swallow (1947)** R.P.C 92, where the court opined:

'...where the word propounded is found to occur very rarely as a surname and obviously has an overwhelmingly commoner and better known meaning otherwise than as a surname (e.g. words such as 'Coup' or 'Cheer'), the Registrar would be prepared to regard the surname signification as a non-ordinary one, to recognize that the word falls within the terms of section 9(1) (d)...'

Take the case of an indication of geographical origin, a word may coincide with a geographical name but which place or name the consuming public may not necessarily associate with a particular product. In such a scenario, such a word cannot be said to be one whose 'ordinary signification' is an indicator of geographical origin. As it would not connote a geographical place, it would be well capable of differentiating products in the market place. To that extent, therefore, it would be distinctive. Thus, in the case of surnames, only those that are very common would seem to be disqualified as they would lack 'distinctiveness'.

The question can thus be put: can the word 'BOBO' distinguish products. If a man shouts 'BOBO' in the middle of a street in Zambia, what is likely to immediately come to the minds of average listeners? Obviously, this is a

question of opinion on which reasonable men and women may differ. It invites a judgment on a matter I may not competently answer in the absence of a survey. Perhaps one way of looking at it, then, is to look at how 'BOBO' compares with arguably common Zambian surnames like 'Bwalya', 'Mulenga', 'Chanda', 'Banda', 'Mwanza' and 'Mubita'. It seems more than likely that if one of these names were called out, those hearing will think it is a person being called as opposed to associating it with something else.

The primary question then becomes whether the same could apply to 'BOBO'. I would not think so. I would therefore take the view that 'BOBO' does not pass the test under section 14(1) (d). To borrow from the Opponent himself in paragraph 9 of the affidavit in reply, 'BOBO' has not yet entered into common vocabulary. For these and the reasons earlier given, the Opposition cannot succeed and is therefore dismissed.

I now wish to turn to allegations of possible violation of section 69 of the Trade Marks Act. Section 69 provides: -

'(69) (1) Any person who makes a representation

(a) with respect to a mark not being a registered trade mark to the effect that it is a registered trade mark; or

(b) with respect to a part of a registered trade mark not being a part separately registered as a trade mark to the effect that it is so registered; or

(c) to the effect that a registered trade mark is registered in respect of any goods in respect of which it is not registered; or

(d) to the effect that the registration of a trade mark gives an exclusive right to the use thereof in any circumstances in which, having regard to limitations entered on the register, the registration does not give that right;

shall be guilty of an offence and liable to a fine of one thousand five hundred penalty units or, in default of payment, to imprisonment for a period not exceeding six months, or to both.

There is no dispute that the Applicant has been marketing goods in a packaging carrying the word 'BOBO' with an encircled R. The Applicant's defense is that the encircled R is positioned closer to the words 'YOYO' and therefore relates to trademark 47/2003 YOYO. Apparently, it is universally settled that an encircled R symbolises that a trademark is registered. I have examined the pack availed to me at the hearing and, as argued by Opponent's counsel, BOBO BEEF is predominant on the label. I have equally compared it with the mark the Applicant applied for and I am satisfied that it is an exact replica of the latter, the only difference being the encircled R. With due respect to senior counsel for the Applicant, I find the arguments in defense unsustainable. I wonder why the mark should only relate to a word in the corner of the label. I entertain no doubt that the center of attraction in so far as the label is concerned, is the word BOBO.

In fact, as I had earlier noted, all the marks the Applicant applied for carry the word 'YOYO' in the top left corner. Could it then be argued that they are all YOYO trademarks, when YOYO, according to counsel, is already registered. Why then would the Applicant register the same mark several times in respect of the same class and description of goods. My only inference, as I have indicated, is that it is the different words in the center of the respective labels that constitute the trademark.

Notwithstanding that I have not had sight of the CD containing the alleged adverts in the media; I am convinced beyond any reasonable doubt that the

Applicant has falsely misrepresented the BOBO BEEF label as having been registered contrary to section 69(a). I equally have no doubt that this is not a kind of innocent misrepresentation but calculated to deceive. I find this particular misrepresentation regrettable because in paragraphs 16 and 17 of its affidavit in support of application, the Applicant Company had falsely claimed that it was not using the mark and consequently that the raw material for the packaging was in danger of going to worst.

In the premises, I feel duty bound to mete out the maximum punishment possible. Unfortunately, the law, as it stands, does not seem to provide for an effective deterrent to the behavior engaged in by the Applicant. But be that as it may, further to section 69 of the Trade Marks Act as read with section 3 of the Fees and Fines Act and section 45 of the Interpretation and General Provisions Act, I fine the Applicant one thousand five hundred penalty units, translating into K270, 000 (Two hundred and seventy thousand Kwacha). I further order that the said payment be made into the accounts of this office within the next seven (7) days of this decision. In default of payment, a director of the Applicant Company, the chairman of the Board in particular, is to be arrested and imprisoned for six months. I caution the Applicant against further commission of this offence until the mark is registered.

In sum, I dismiss the opposition but find the Applicant Company guilty of contravening section 69 of the Trade Marks Act and accordingly fine it one thousand five hundred penalty units payable within the next seven days from the date of this decision, in default thereof, imprisonment of one of its directors for six months. Leave is granted to either party to appeal if dissatisfied with the decision herein. Each party will bear its cost of and incidental to this application.

DELIVERED AT LUSAKA THIS 11TH DAY OF JUNE, 2010

A handwritten signature in black ink, appearing to read 'Lloyd S. Thole', with a long horizontal stroke extending to the right.

Lloyd S. Thole
ASSISTANT REGISTRAR (INDUSTRIAL PROPERTY)