

**DECISION OF THE REGISTRAR OF TRADE MARKS IN THE MATTER OF
TRADE MARK OPPOSITION NOS 593-600/2008 TIGER LABEL IN
CLASS 30 PURSUANT TO THE TRADE MARKS ACT CAP 401 OF THE LAWS
OF ZAMBIA AND REGULATIONS THEREUNDER**

Between

N.R INVESTMENTS LIMITED

APPLICANT

And

**TIGER FOOD BRANDS INTELLECTUAL
PROPERTY COMPANY (PTY) LIMITED**

OPPONENT

Before Mr. Anthony Bwembya, Registrar of Trademarks

For the Applicant : Ms F. Kalunga of Ellis & Co.,

For the Opponent : Ms M. Masengu of Musa Mwenye-Advocates

Cases and Authorities referred to:

Trade Marks Act Cap. 401 of the Laws of Zambia

Pianotist Company Limited's Application (1906) 23 R.P.C. 774 Ch. D

William Baily (Birmingham) Limited's Application (1935) 52 R.P.C. 137 Ch.D

Trade Kings Limited v Unilever PLC & Others 2000 ZR 16

Trade Kings Limited v The Attorney General (1999) ZR 53

British Sugar Plc v James Roberson and Sons (1996) RPC 281

Lloyd Schufabrik Meyer & Co GmbH v Klijsen Handel BV Case C-342/97 (ECJ)

Cowbell AG v Ics Holdings Ltd 2001(3) SA 941 (SCA)

This is a matter in which Tiger Brands Intellectual Property Company (Proprietary) Limited, a South African based Company, (hereinafter referred to as 'the Opponent'), is opposing the registration of trademark nos 593-600/2008 TIGER Label in class 30 by N.R. Investments Limited, a Zambian company, (hereinafter referred to as 'the Applicant'). The trademark applications leading to this opposition was lodged on 28th July, 2008 pursuant to the Trade Marks Act Cap. 401 of the Laws of Zambia. The Applicant is seeking registration for trade mark nos 593-599/2008 in respect of biscuits and wafers and trade mark no. 600/2008 in respect of puffs, crisps, cereals prepared for human consumption.

The applications were duly examined and conditional proof of acceptance were issued on 3rd May 2010. The condition was that registration would consist of the word 'TIGER' while the rest of the wording is descriptive and non trade mark matter and further, the marks were advertised in the trademarks journal of 25th May, 2010 in accordance with section 23(1) of the Trade Marks Act Cap 401 of the Laws of Zambia. The opponent instituted these opposition proceedings on 23rd July, 2010.

The grounds advanced in the notice of opposition were that the opponent is the lawful proprietor in Zambia and many countries around the world of the trade mark TIGER and in particular, in Zambia by virtue of trade mark registration no. 730/2006 TIGER BRAND & Tiger Device in Class 30 lodged on 19th September 2006. The opponent contends that its trade mark has for many years been registered in numerous countries throughout the world long before the opposed applications and as a result, has become well-known in Zambia as capable of distinguishing their goods from the goods of all others, well before the opposed application was lodged.

The Opponent averred that the goods specified in the Applicant's applications are the same goods and/or of the same description of goods as the opponent's registered mark and that the Applicant's trade mark consists of, in its entirety, the opponent mark TIGER and should not be allowed registration as there is no doubt that deception and/or confusion would arise in the minds of the purchasing public, if the Applicant's applications were allowed to proceed to registration.

It was argued that in light of the foregoing, the Applicant's offending marks would be likely to deceive and/or cause confusion between the Opponent's goods on the one hand and the goods of the Applicant, contrary to sections 16 and 17 (1) of the Trade Marks Act, Cap 401 of the Laws of Zambia. It was further contended that the Applicant has no legal claim, be it in law or equity, to own or use the opponent's mark and that the Applicant made the applications fully aware of the reputation of the Opponent's mark TIGER.

The Opponent's case was that given the foregoing, the Applicant's trade mark applications cannot be said to be a trade mark within the meaning of section 2 (1) of the Trade Marks Act and as such the Applicant is disentitled, in terms of section 22(1) of the Trade Marks Act, from applying for registration thereof. It was further argued that the Applicant's application be refused and that an order of costs be made in the Opponent's favour.

In resisting the Opposition, the Applicant argued in its counterstatement to the notice of opposition that its applications for the mark TIGER Label do not infringe on the Opponent's trade mark TIGER, in that they are not registered in respect of the same description of goods.

The Applicant's averments further, were that the Applicants are proprietors of trade mark nos 593-600/2008 TIGER Label in Class 30, in respect of biscuits and wafers in accordance with section 9 of the Trade Marks Act and argued that the Opponents do not have any specific description of goods that depict biscuits and wafers. The Applicant further contended that Section 8 of the Trade Marks Act states that goods must be registered in respect of particular goods and that it was impossible to produce all goods falling in a particular class.

In fact, it was argued that section 9 of the Trade Marks Act provides that infringement can only arise when identical marks are used in respect of goods registered by another entity and that in the instant case, the goods are different and cannot be confused with each other.

Mr. Ian Wilson Martin Isdale, the Opponent company's director, swore an affidavit on behalf of the Opponent dated 10th March, 2011. His evidence, tendered in support of opposition, was that the Opponent's company was a fast moving consumer goods company with a broad portfolio of leading food and beverage brands that include household names as JUNGLE, MORVITE, ACE, FATTI'S & MONI'S, OROS, ROSES, SUPER7, BROOKS, ENERGADE, ALL GOLD, MONIS, HALLS, BEACON, KOO, ENTERPRISE, CROSSE & BLACKWELL and PURITY.

According to Mr. Isdale, the Opponent is the proprietor in Zambia of the trade mark registration no. 730/2006 TIGER BRANDS Logo whose copy was exhibited as 'IWMI1' and that the specification of goods in respect of which the Opponent's trade mark is registered specifically include 'flour and preparations made from cereals' as well as 'pastry and confectionery'. He further contended that the specification of goods in respect of which the Applicant's applications have been applied for read 'biscuits, wafers' and that the opponent has endeavoured to provide definitions of the words 'biscuit' and 'wafer' by way of The Cambridge Dictionaries Online Advanced Learner's Dictionary and various websites as demonstrated in paragraphs 6.1, 6.2, 6.3 & 6.4 and that based on the findings, the definition of the words 'biscuit' and 'wafer' are included in the specification of the Opponent's trade mark no. 730/2006 TIGER BRANDS Logo.

He further deposed that the Opponent consistently uses its trade mark TIGER BRANDS Logo as an endorsement mark in respect of all its products, specifically its well-known cereal products JUNGLE OATS, MORVITE and ACE and that the use of their trade mark on the full range of the Opponent's products serves to identify the various brands as emanating from the Opponent which clearly identifies goods and distinguishes them from products of other entities.

Mr. Isdale reiterated that the Opponent's products bearing the trade mark TIGER BRANDS Logo has been available in Zambia since at least 2006 and are also sold in various African and Middle East countries as listed in paragraph 10 of the Affidavit in support of Opposition. Additionally, the figures of sales of the Opponent's product bearing the trade mark TIGER BRANDS Logo in Zambia for the past four years i.e.

2007, 2008, 2009 & 2010 were illustrated in paragraphs 11 and show a gradual increment yearly ranging from R15,300,000 in 2007 to R54,800,000 in 2010.

He further deposed that the Opponent particularly uses the trade mark TIGER BRANDS Logo in respect of JUNGLE oats products which includes JUNGLE oats cereal and JUNGLE OATSO EASY cereal images of the product range which are exhibited as 'IWMI2'. In Zambia, these products are sold through Pick 'n Pay, Shoprite and Spar retail chains who promote the JUNGLE products via broadsheets and that the JUNGLE oat cereal products are of particular interest to the Opponent, as there is a clear trend in the market related to extend these products to include healthy alternative snacking portions which usually develop in the form of cereal snack bars and these brands include QUAKER OATS, FROSTIES, SPECIAL K, RICE KRISPIES, COCO POPS, FIBER PLUS, NUTRI-GRAIN, CRUNCHY NUT, ALPEN, CHEERIOS, OATS & MORE, NESQUIK and SHREDDIES which was exhibited as 'IWMI 3'

According to Mr. Isdale, the Opponent has also extended its own JUNGLE OATS breakfast cereal products to a range of healthy snack bars which was exhibited as 'IWMI 4' and contended that the commercial benefit of the extension of breakfast cereal products to snack products not only includes a novel consumption opportunity, but also offers a healthier alternative for consumers. Rather than just a brand for consumption at breakfast, there is a product that can be consumed as a snack in the form of a bar at school or work which for the consumer provides a healthier alternative for example a chocolate bar, biscuit or wafer. The Opponent further submitted that as cereal bars are positioned to offer an alternative snacking option to consumers, these products are usually displayed within retail stores alongside, or in close proximity to products such as chocolate bars and biscuits.

The Opponent had the opportunity to respond specifically to some allegations made in the Applicant's counterstatement and stated that any allegation made by the Applicant in their counterstatement and not specifically admitted nor denied would result in the Applicant being put to the strict proof thereof. To this end, the Opponent categorically denied the contents of paragraphs 1, 2, & 3, while his denial of contents of paragraphs 4 and 5 were fortified by reproduction of sections 8 and 9(1) of the

Trade Marks Act respectively. The Opponent concluded its submission by praying that the Registrar refuse the Applicant's trade mark applications with costs in favour of the Opponent.

Mr. Rahim Virani, the Applicant's Company Director, deposed an affidavit in support of application dated 3rd August 2011. His evidence was that the Applicant's trademarks are not identical with nor are they confusingly similar to the Opponent's registered trademark when each is considered as a whole. He contended that when considering the overall impression that would be created by each trade mark, including the visual impression in the respective logos of the two trade marks, the description of goods to which each trademark relates and the channels of distribution of the particular products to which trade marks are applied, there would be no likelihood of confusion in the minds of consumers if the Applicant's trademark is registered.

He further submitted that contrary to the Opponent's assertion, the Applicant's trademark and logo relates to goods which are not covered by the Opponent's registered trademark and that the Opponent's claim in paragraphs 13 and 14 that it is a growing company that would extend its cereal products to possibly cover the specification of goods in the Applicant's applications is not supported by law.

Mr. Virani further deposed that the Applicant's trademark was created independently of the Opponent's trademark to identify and distinguish its products and is not in any way intended to pass off its products as belonging to the Opponent or any way related to it and further submitted that he had been advised by his advocates and verily believed that the Registrar is empowered to register similar or identical trademarks under certain circumstances and this case presents such circumstance as the Applicant's trademark relates to goods not covered by the Opponent's trademark and is not identical with the Opponent's trademark and that no prejudice will be caused to the Opponent or any party if the Applicant's trademarks are registered.

Mr. Ian Isdale, deposed a further affidavit in reply to the Applicant's affidavit dated 29th September 2011 in which he submitted that the Opponent had no knowledge of

the contents paragraphs 1 to 4 of the Applicant's affidavit but does nonetheless deny them and further contended that paragraphs 5,6,7,8,9,10 &11 of the Applicant's affidavit does not contain any evidence whatsoever, but only arguments which should not be contained in an affidavit or statutory declaration as these could be best dealt with at the hearing;

According to Mr. Isdale, the Opponent's founding affidavit which was specifically in response to the applicant's response to paragraph 8 of the statutory declaration in reply, the Opponent confirms that its trademark described as TIGER BRANDS logo is registered in Zambia under 703/2006 in class 30 in connection with confectionery and in that regard attached IWMI9, IWMI10, IWMI11, IWMI12, IWMI13 & IWMI14 as reproduced in paragraph 6.

He further argued that the Opponent's product referred to in paragraph 6 are and have been sold in Zambia from a date earlier than the filing date of the Applicant's applications and that further, the Opponent's product range already extends beyond energy cereal bars to a range of confectionery as evidenced by the annexures referred and concluded by praying that the opposed Applicant's applications be refused and that an order of costs be made in favour of the Opponent.

The parties made oral submissions at a hearing held on 14th March 2011.

Ms. M. Masengu of Messrs Musa Mwenye-Advocates appeared for the Opponent, while Ms. F. Kalunga of Messrs Ellis & Co., appeared for the Applicant. Both parties relied on their affidavits, notice of opposition and counterstatements, respectively, while it was agreed at the hearing that written submissions which were to supplement oral arguments would be filed later. In her oral submission, Ms. Masengu highlighted that the Opponents would rely on the notice of opposition and the affidavits filed. She pointed out that the opponents opposed the registration of the application on account of three grounds.

According to counsel, the first ground was that the Applicant's proposed trade marks are not only identical to the Opponent's trade mark registration no. 730/2006 but that the two marks are in fact the same. She reiterated that this fact was admitted by the Applicants themselves under paragraph 10 of the statutory declaration in reply filed

on 3rd August 2011 and submitted that the registration and use of the trade mark will constitute infringement in terms of sections 9 and 17 of the Trade Marks Act. Furthermore, counsel submitted that the nature and description of goods of both trade marks in issue are the same as demonstrated in the Opponent's submission which render illegal the use thereof, in terms of section 17 of the Trade Marks Act which expressly proscribes the registration and use of similar or identical trade marks in respect of the same goods or description of goods.

As regards the second ground, counsel emphasized that the Opponent had in the recent past extended its products to include snacking options such as snack bars and other confectionaries which are usually displayed and sold within close proximity to products such as chocolate bars, biscuits and wafers, such that the likelihood of an ordinary consumer being deceived or confused with the obvious similarity between the products is extremely high. Ms Musengu contended that the registration and use of the applicant's TIGER Label trade mark would likely cause confusion and deceive the ordinary members of the Zambian public who will mistakenly believe that they are purchasing the Opponent's products and that such a state of affairs will adversely affect the Opponent's long standing business. Counsel highlighted that the registration of the Applicant's trade mark would not only contravene Sections 16 and 17 of the Trade Marks Act, but also the very spirit of the Act.

On the third ground, counsel submitted the opponent's trade mark TIGER BRAND Logo is long established and has been in existence in Zambia since at least 2006, which is prior to the Applicant's applications for registration of the TIGER Label. The Opponent's trade mark is also available in many African countries and the Middle East, which evidences the fact that the TIGER BRAND Logo is a well known trade mark and prayed that based on the three aforesated grounds, costs be in favour of the opponents.

Respondent's counsel, on her part, began by reaffirming that they would rely on counterstatement and affidavit in support of the application and that their argument was basically in three parts. Counsel argued that the two trade marks TIGER BRANDS & Logo and TIGER are not identical nor are they so similar so as to cause confusion to the consumer and drew my attention to the case of **Pianotist Company**

Limited's Application (1906) 23 R.P.C. 774 Ch. D, wherein the court gave directives on the rules that have been applied in comparing trade marks for similarities. She reiterated that when applying that test we find that there are no visual or phonetic similarities between the trade marks. Whereas the Opponent registered trade mark no. 730/2006 is TIGER BRANDS & Logo on the one hand, the Applicant's proposed registrations 593-600/2008 are simply TIGER with other descriptive non-trade mark matter/material. She further submitted that you cannot take one part of the trade mark for instance breaking, TIGER BRANDS into two and then compare them with TIGER and say that the two are identical. Regard must be had to the overall impression caused by the trade mark to the customer, not an element by element comparison. She fortified this position by drawing my attention to the case of **William Baily (Birmingham) Limited's Application (1935) 52 R.P.C. 137 Ch.D**, specifically pages 151-152, where it was stated thus:

"I do not think it is right to take a part of the word and compare it with a part of the other word, one word must be considered as a whole and compared with the other as a whole".

Counsel highlighted the view that although there is a limitation on the Opponent regarding the word 'BRANDS', the limitation only applies when it is used as a whole. She added that the protection given by the registration 730/2006 is on the mark TIGER BRANDS & Logo and not the word TIGER. Furthermore, Counsel submitted that even when comparing logos in terms of visual comparison, the opponent's trademark contains a picture of an animal, that is, a Tiger, while the applicant's labels contain animated Tigers in form of cartoons. That being the case, Counsel argued that there is no way that the average consumer is likely to confuse the products of the applicant with those of the opponent. In this regard, Counsel referred to the test for an average consumer as discussed in numerous cases, inter alia, **Trade Kings Limited v Unilever PLC & Others 2000 ZR at page 16**, where the court observed that it would be unpardonable to assume that the average Zambian consumer is likely to be a retard.

Counsel referred to Section 17(1) of the Act which provides that:

'Subject to the provisions of subsection (2), no trademark shall be registered in respect of any goods or description of goods that is

identical with a trademark belonging to a different proprietor and already on the register in respect of the same goods or description of goods, or that so nearly resembles such a trademark as to be likely to deceive or cause confusion.....'

She contended that her argument is in respect of the phrase **'in respect of any goods or description of goods'** and further submitted that Section 17 be read together with Section 8 of the Act which provides thus:

'A trademark must be registered in respect of particular goods or classes of goods, and any question arising as to the class within which any goods fall shall be determined by the Registrar whose decision shall be final'.

According to Counsel, the reading of these two sections together effectively means that protection must be granted to a particular set of goods that have been provided for in the registration. However, such classification of goods and services is merely for administrative purposes and is not intended to grant blanket monopoly to a proprietor of goods falling in a particular class. As such, Counsel submitted that the opponent cannot claim monopoly of all good falling in Class 30.

Further, with regard to the argument that the opponents is expanding its product range to include lunch bars and candy, Counsel submitted that such expansion does not grant automatic protection that the latter goods are registered under that class. It is trite that trade mark protection is territorial and as such, it is irrelevant that the opponent has sold such product in Africa or elsewhere, as Zambia is the relevant market.

As regards the third argument that TIGER BRANDS & Logo is long established in Zambia since 2006, the opponent has not adduced evidence to substantiate that their trademark is a well-known mark so as to accord it protection in terms of Section 32 of the Act. Counsel submitted an argument in the alternative, to the effect that the Honourable Registrar has authority under Section 17 (2) which provides as follows:

'In case of honest concurrent use or other special circumstances an appeal from the decision of the Registrar, make it proper so to do, the Registrar or the High Court as the case may be, may permit the registration of trade marks that are identical or resemble each other in respect of the same goods or description of goods by more than one proprietor subject to conditions and limitations, if any, as the Registrar or the High Court may think it right to impose which'

Counsel contended that this case falls under those special circumstances, particularly with regard the use of the trade marks on the respective products. Apart from showing that the two trade marks are dissimilar, Counsel argued that the product ranges exhibited by the opponent in both its affidavits show that the products have specific trademarks with features that distinguish their products. Thus, using the test of the average consumer, it would be highly unlikely that the consumer who wants to buy a jungle bar would call it a tiger brands bar, even if they are displayed.

Counsel concluded her submission by stating that the refusal to register the Applicant's mark would create unnecessary monopoly which is not in line with the spirit of competition. She therefore prayed that the Registrar allows the Application and that the Opposition be dismissed with costs to the Applicant.

In response, Counsel for the Opponent argued that the test for determining similarities and dissimilarities was set in **Trade Kings Limited v The Attorney General (1999) ZR 53**, in which it was held that the test was whether the ordinary sensible Zambian consumer would be confused by the use of the two mark. Counsel submitted that the two marks in issue sound the same, notwithstanding the additional label brand which distinguishes them. A perusal of both trademarks will reveal that both marks have an animal, that is, a tiger, on them and not tigers for the opponent's mark as submitted by the Applicant. Further, taking into account the visual test, it is evident that ordinary members of the public would be confused by the two marks notwithstanding the manner in which they are presented.

Counsel further contended that both the nature and description of goods that both the marks seek to protect are the same as has been demonstrated at paragraphs 5

to 6.4 of the Opponent's affidavit filed on 10th March 2011. She made reference to the provisions of Section 8 of the Act which refers to not only particular goods, but also goods falling in a particular class. In this regard, she earnestly submitted that "preparations from cereals" is a blanket term which includes "biscuits" and "wafers" which goods the registration of Opponent's trade mark TIGER BRANDS Logo is intended to protect.

Responding to the Applicant's alternative argument, Counsel's contention was that this case does not fall within the ambit of section 17(2) and that the Applicant had not adduced cogent evidence to warrant registration of their trade mark under that section. In conclusion, she submitted that the proposed Applicant's trademark would give undue advantage to the goodwill and long established reputation of the opponents and therefore, it was her prayer that their registration be refused.

I commend both Counsel for their articulate and thorough arguments. Having studied the facts of this matter and given due regard to Counsel's submissions, it would seem that the issue in contention is whether the TIGER Label would be likely to deceive and/or cause confusion with TIGER BRANDS & Tiger Device, a registered trademark and consequently, whether it should be denied registration for being contrary to sections 16 and 17(1) of the Trademarks Act Cap 401 of the Laws of Zambia.

It is trite that a trademark is meant to distinguish goods and services from one source, from identical or similar products or services from other sources, namely, the various enterprises that offer such products or services. Thus, a trademark is disqualified from registration if this would result in deception or confusion about the source of the product. This opposition is premised on sections 16 and 17 of the Trade Marks Act Cap 401 of the Laws of Zambia.

Section 16 of the Trade Marks Act Cap 401 provides:

' It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would, by reason of its being likely to deceive or cause

confusion or otherwise, be disentitled to protection in a court of justice or would be contrary to law or morality, or any scandalous design'

Similarly, Section 17 (1) provides:

'Subject to the provisions of subsection (2), no trade mark shall be registered in respect of any goods or description of goods that is identical with a trade mark belonging to a different proprietor and already on the register in respect of the same goods or description of goods, or that so nearly resembles such a trade mark as to be likely to deceive or cause confusion'

It is settled at common law that in determining whether marks are confusingly similar, regard must be had to all the surrounding circumstances. In the leading case of **British Sugar Plc v James Robertson and Sons (1996) RPC 281**, Jacob J. summed up the factors to be taken into account as being the uses, users, physical nature of the respective goods, the trade channels through which the goods are marketed, the respective locations where it is sold in the supermarket and whether the goods concerned are rivals in the same market. The Supreme Court of Zambia has since upheld the approach formulated in the British Sugar Case, as is illustrated by the view of then Chief Justice Mathew Ngulube in **Trade Kings Ltd v Unilever and Others SCZ Judgment No. 2 of 2000 ZLR p. 16**, where he stated:

'It is necessary to consider the nature of the article sold, the class of customers who buy, to remember that it is a question of likelihood of deceiving the average customer of the class which buys, neither those too clever, nor fools; neither those over careful, nor those over careless. One must bear in mind the points of resemblance and the points of dissimilarity, attaching fair weight and importance to all, but remembering that the ultimate solution is to be arrived at, not by adding up and comparing the results of such matters, but by judging the general effect of the respective wholes...Another matter of vital importance to be considered is whether there is, or is not, some essential point of difference or resemblance which overcomes or establishes the effect of other points of resemblance...but the ultimate decision must be come to, having regard to all considerations, as a matter of judgment on a question of fact.' (emphasis ours).

Thus, the pertinent point of inquiry in this instance, is whether on the facts of this particular case, there is a likelihood that the ordinary average consumer who buys products in Class 30 is likely to mistake the products of the Opponent for those of the Applicant and vice-versa. While an average consumer should be expected to be reasonably well informed about the product, allowance should be made for the consumers' imperfect recollection. This was the view of the European Court of Justice in **Lloyd Schufabrik Meyer & Co GmbH v Klijsen Handel BV Case C-342/97 (ECJ)** where it opined:

'For purposes of global appreciation, the average consumer of the category of products is deemed to be reasonably well-informed and reasonably observant and circumspect. However, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has in his mind. It should also be born in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.....In addition, the global appreciation of the likelihood of confusion must, as regards the visual, aural or conceptual similarities of the marks in question, be based on the overall impression created by them, bearing in mind, in particular, their distinctive and dominant components....The average consumer normally perceives a mark as a whole and does not proceed to analyze its various details'.(emphasis ours)

Thus, while there may be dissimilarities between the two marks, the question however, is whether the overall impression of the marks as a whole gives a clear distinction between them, so as to avoid the danger that they may be confusingly similar. In addressing these questions, regard should be had to the fact that a consumer generally has no time to compare the two marks or products in detail and

therefore, has an imperfect recollection of which mark relates to a particular producer's product. Applying this principle to the instant case, it is clear that a comparison of the two marks reveals that not only does the Applicant's mark bear the word TIGER like the Opponent's, it also has the idea of the tiger device, albeit differently portrayed from that on the Opponent's mark. It is thus arguable that there are conceptual similarities.

In the view of the South African court in **Cowbell AG v Ics Holdings Ltd 2001(3) SA 941 (SCA)**, it was held that it is sufficient to find likelihood of confusion if there is a reasonable probability of one being confusion. The Court, in this case, took the view that 'likelihood of confusion' is synonymous with 'reasonable probability'

It is my considered view that there is a reasonable probability of the average consumer confusing the Opponent's trade mark TIGER BRANDS Logo with the Applicant's trade mark TIGER Label, for the reason that the marks and associated goods are so similar that the consumer may or is likely to mistakenly pick one product for the other.

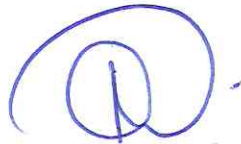
In light of the foregoing, it therefore follows that the Applicant's mark is indeed confusingly similar to that of the Opponent and therefore, does in fact offend Sections 16 and 17 of the Trade Marks Act.

As to the alternative argument raised by the Applicants regarding the use of Section 17 (2), it is my finding that there are no special circumstances in this instance in terms of which the application to register the trade mark TIGER Label may be allowed. As such the alternative argument on behalf of the applicant has failed accordingly.

In view of the foregoing, I uphold the opposition and dismiss the trademark applications for likelihood of confusion with a prior registered mark as the same are contrary to sections 16 and 17(1) of the Trade Marks Act. Likewise, I dismiss the alternative argument raised pursuant to section 17 (2).

Leave to appeal to the High Court if dissatisfied with this decision is granted. Each party shall bear its own costs.

DELIVERED THIS 16th DAY OF APRIL, 2012



Anthony Bwembya
REGISTRAR OF TRADEMARKS

