

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 40027/2021**

In the matter between:

**ACCOLADE INTELLECTUAL PROPERTY HOLDINGS (PTY) LTD**

Applicant

and



**NATIONAL BRANDS LIMITED**

First Respondent

**THE REGISTRAR OF TRADE MARKS**

Second Respondent

**NOTICE IN TERMS OF RULE 16A**

**KINDLY TAKE NOTICE THAT** that the following constitutional issue is raised in the First Respondent's answering affidavit:

1. Registered trade mark rights, common law goodwill, and well-known trade mark rights, are all "property" for purposes of Section 25 of the Constitution.
2. Section 27(5) of the Trade Marks Act no. 194 of 1993 ("the Trade Marks Act") states that "Subsection (1) (a) and (b) does not apply to a trade mark in respect of which protection may be claimed under the Paris Convention as a well-known trade mark

within the meaning of section 35 (1) of this Act". This provides a defence to proprietors of well-known trade marks in instances where application is made to remove such trade marks from the register of trade marks on the ground of non-use, in terms of Section 27(1)(b) of the Trade Marks Act.

3. The current interpretation of Section 27(5) of the Trade Marks Act is that it cannot be relied upon by South African nationals and South African entities, as the view is that they do not qualify for protection under the Paris Convention, in South Africa. They would not be precluded from enforcing their well-known trade mark rights, on the basis of the Paris Convention, anywhere else in the world, and the question, on a reading of Section 27(5) is simply whether the mark is a mark "in respect of which protection may be claimed under the Paris Convention". The interpretation of this provision that seeks to exclude South African proprietors of well-known trade marks from relying on a defence available to foreign proprietors of well-known trade marks, in trade mark non-use cancellation proceedings, it is submitted, does not sit comfortably with Section 39(2) of the Constitution.
4. Section 39(2) of the Constitution obliges every court, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. In this case, Section 25(1) of the Constitution is directly relevant, as the First Respondent is entitled to its property rights under this section. This section provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
5. The First Respondent submits that its **HULA HOOPS** trade marks are well-known. These trade marks are subject to an application to remove them from the register in terms of Section 27(1)(b) of the Trade Marks Act, with the defence of Section 27(5)

of the Trade Marks Act not being available to the First Respondent only because it is a South African entity and not a foreign one. The First Respondent submits that this would constitute an arbitrary deprivation of the First Respondent's property, in the form of the registered trade marks and associated goodwill and reputation. It is humbly submitted that it cannot be rational that the defence provided to proprietors of well-known trade marks in terms of Section 27(5) of the Trade Marks Act should only be available to foreign nationals/entities, and that distinction is arbitrary. It is, further, humbly submitted that where a provision is open to multiple plausible interpretations, then the one that best conforms to the spirit of the Constitution should be applied. An interpretation that protects and promotes access to fundamental rights, rather than to hinder them, should be preferred.

6. The distinction also seems arbitrary as the First Respondent submits that it would be entitled to oppose any **HULA HOOPS** trade mark applications filed by the Applicant, and restrain their use, on the basis of its continued, significant goodwill (i.e. its common law rights) in its trade mark and the removal of its trade mark registrations in these circumstances, when a foreign trade mark proprietor's similarly well-known registrations would be saved under Section 27(5) of the Trade Marks Act, is unconstitutional. It is humbly submitted that this issue should be considered through the prism of the Constitution and consideration should be given to whether or not the present interpretation of Section 27(5) of the Trade Marks Act is the best interpretation, that conforms with the Constitution and promotes access to fundamental rights, or whether it permits arbitrary deprivation of property, unfairly differentiating between foreign owners of well-known trade marks, and local owners of equally (or more) well-known trade marks.

**KINDLY TAKE NOTE** that any interested party may, with the written consent of all the parties to the proceedings, given not later than twenty (20) days after this notice has been filed with the Registrar, be admitted therein as *amicus curiae* upon such terms and conditions as may be agreed upon in writing by the parties.

**KINDLY TAKE NOTE** that the written consent referred to above shall, within five (5) days of its having been obtained, be lodged with the Registrar and the *amicus curiae* shall, in addition to any other provision of the Rules, comply with the times agreed upon for the lodging of the written argument.

**KINDLY TAKE NOTE** that the terms and conditions referred to above may be amended by the Court.

**KINDLY TAKE NOTE** that if the interested party is unable to obtain written consent, they may, within five (5) days of the expiry of the twenty (20) day period prescribed above, apply to the Court in the manner contemplated by Rule 16A (6) to be admitted as an *amicus curiae* in the proceedings.

**KINDLY TAKE NOTE** that any party to the proceedings who wishes to oppose an application to be admitted as an *amicus curiae*, shall file an answering affidavit within five (5) days of the service of such application upon such party. The answering affidavit shall clearly and succinctly set out the grounds of such opposition.

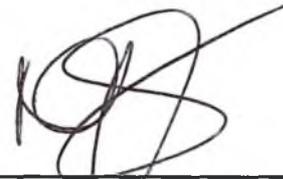
**KINDLY TAKE NOTE** that the Court may dispense with any of the requirements of Rule 16A if it is in the interest of justice to do so.

**TO THE REGISTRAR:**

This notice should be placed on the notice board designated for this purpose and it must be ensured that this notice remains on that notice board for a period of 20 (twenty) days, whereafter the notice shall be endorsed to state on which day the notice was placed on the notice board and, on the expiry of the 20 (twenty) day period, the endorsed notice shall be filed and uploaded on CaseLines.

**KINDLY TAKE NOTE** that a copy of this notice will be uploaded onto the SAFLII website at [saflii.org](http://saflii.org).

**DATED at PRETORIA** on this 22<sup>nd</sup> day of MAY 2024.



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**TO: THE REGISTRAR OF THE HIGH COURT  
PRETORIA**

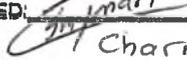
**AND TO: THE REGISTRAR OF TRADE MARKS**  
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