REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024 / 095598

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

[redacted]

28 FEBRUARY 2025

Judge Dippenaar

In the matter between:

BLISS BRANDS (PTY) LTD **APPELLANT**

and

COLGATE-PALMOLIVE (PTY) LTD **FIRST RESPONDENT**

COLGATE-PALMOLIVE COMPANY **SECOND RESPONDENT**

ADVERTISING REGULATORY BOARD NPC **THIRD RESPONDENT**

Coram: Adams, Dippenaar JJ et Botsi-Thulare AJ

Heard: 18 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail and by being uploaded to the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 28th of FEBRUARY 2025.

Summary: Appeal by respondent under s 18(4)(ii) of Superior Courts Act – enforcement order granted under s 18(3) in favour of respondent – requirements: (a) the existence of exceptional circumstances; (b) proof, on a balance of probabilities that: (i) respondents have suffered and will continue to suffer irreparable harm and (ii) the appellant will not suffer any irreparable harm – principles restated – exceptional circumstances a factual enquiry – history of litigation in context of the facts of the case and existence of extant order of 21 February 2024 constituting exceptional circumstances – remaining requirements established – appeal dismissed with costs of two counsel on scale C.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Manoim J sitting as Court of First Instance)

1. The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel, one being senior counsel, on Scale C.

JUDGMENT

DIPPENAAR J (ADAMS J et BOTSI-THULARE AJ concurring):

[1] This is an automatic appeal in terms of s 18(4)(ii) of the Superior Courts Act ('the Act')[1] in terms of which the appellant, Bliss Brands (Pty) Ltd ('Bliss') seeks to set aside an order granted by Manoim J ('the court *a quo*') on 27 January 2024 ('the enforcement order') under s 18(1), read with s 18(3) of the Act. In terms of that order, it was directed that the order of Manoim J of 13 December 2024 ('the December judgment') be enforced pending the appeal of that judgment to the Supreme Court of Appeal. The enforcement order in relevant part provides:

> *'1. The operation and execution of the order of Manoim J dated 13 December 2024 is not suspended by any application for leave to appeal or any appeal and will continue to operate and be executed in full, until the final determination of all present and future leave to appeal applications and appeals;*
>
> *2. The First respondent ('BLISS') is to pay the costs of this application such costs to include the costs consequent upon the employment of one senior and one junior counsel on scale C'.*

[2] Bliss contended that the court *a quo* erred in finding that the requirements of s18(1) and s 18(3) of the Act were satisfied. The first and second respondents, (collectively referred to as 'Colgate') opposed the application and contended the opposite. The third respondent, the Advertising Regulatory Board NPC ('ARB'), did not participate in the appeal.

[3] The order of Manoim J in the December 2024 judgment provides in relevant part:

> *'The First Respondent [Bliss] is directed to comply with paragraph 3 of the Manoim J order, forthwith, and no later than 15 working days from the date of this order, by withdrawing the Offending Packaging and the Latest Offending Packaging, depicted in Annexures B and C annexed to the Notice of motion, from every medium in which they appear, over which the second respondent has jurisdiction, by virtue of them being members'.*

[1] 10 of 2013.

[4] The Manoim J order referred to is an order which was granted on 21 February 2024[2] in review proceedings launched by Bliss against a ruling of the ARB's Final Appeal Committee (FAC) during August 2020. That order was never the subject matter of an appeal and remains extant.

[5] To contextualise the present appeal, it is necessary to set out the litigation history between the parties in some detail, which has endured for some five years. This is necessary as the primary contentions of Colgate for the existence of exceptional circumstances are predicated on that history.

[6] Colgate and Bliss both produce a functionally similar product, known as hygiene soap; Colgate under the name Protex and Bliss under the name Securex. Colgate first made a complaint with the ARB during December 2019 pertaining to Bliss' similar packaging. The complaint went through the ARB's internal processes. The ARB's Advertising Appeals Committee ('the ACC') found in favour of Colgate.

[7] Bliss appealed to the FAC. The FAC finally decided the matter on 3 August 2020 with its Chairperson, Ngoepe JP, as the presiding member, exercising a casting vote in favour of Colgate. The FAC held that Bliss breached clause 8 (which deals with exploiting the advertising goodwill of a member's product) and clause 9 (which deals with imitation of another's packaging) of the ARB's Code, given the substantial overall similarity between the two competing architectures of the packaging. It accepted that creativity should not be stifled but found that *'to allow imitation masquerading as creativity does nothing to nurture or encourage the latter'*. It held that Bliss, in introducing Securex, was *'inspired by Protex's secret sauce on a number of levels. This inspiration, instead of resulting in a healthy, competitive visual distance (visual differentiation) between Protex and Securex actually had the opposite effect. Instead of taking a spoonful of inspiration from Protex's design, Securex opted to take a spade full of inspiration. This has resulted in a significant reduction of the perceptual distance between the two brands' design*

[2] Dealt with in para 9 below.

architecture. Consumers can be forgiven for getting confused between the two brands when standing in front of a supermarket shelf'. The FAC ruling directed Bliss to comply with the ACC ruling by 30 September 2020.

[8] Bliss sought to interdict the implementation of the ARB's award, which failed before Yacoob J on 28 September 2020, who dismissed the application. Bliss launched a review application, which was heard by Fisher J, who *mero motu* raised a constitutional issue pertaining to the ARB's jurisdiction and sought submissions from the parties. Bliss had submitted to the ARB's jurisdiction. Bliss amended its notice of motion to incorporate such constitutional issue. Fisher J resolved the jurisdictional issue in favour of Bliss on 21 May 2021, based on findings of unconstitutionality, resulting in no findings being made on the merits of the review application. An appeal to the Supreme Court of Appeal followed, resulting in the order of Fisher J being overturned and the constitutional challenge being dismissed.[3] The merits of the review application was remitted to the High Court. Bliss approached the Constitutional Court which, in refusing leave to appeal, held that because Bliss consented to the jurisdiction of the ARB, it was not in the interests of justice to entertain any other issue in the matter. It further held that where a non-member submits to the ARB's jurisdiction, the ARB can make directions which are binding on the non-member.[4]

[9] The review application was heard by Manoim J, who on 21 February 2024, granted an order dismissing the review and upholding the relief granted by the FAC. He held that there was no reason to review the findings of the FAC that Bliss had contravened clauses 8 and 9 of the ARB's Code. He further did not review the sanction imposed by the FAC. An order was further granted reconsidering and discharging an interim interdict granted by Fisher J in favour of Bliss on 30 November 2020. Manoim J further granted an order

[3] *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* [2022] ZASCA 51; 2022 (4) SA 57 (SCA).
[4] *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and Others* [2023] ZACC 19 para 18.

that *'Bliss must comply with the FAC decision within three months of date of this order. This applies to dissemination of new packaging, and does not require on-shelf removal.'*

[10] Bliss indicated that it would comply with the order and launched new packaging in the market in May 2024. Colgate, being of the view that the new packaging too closely resembled the infringing packaging and only slightly modified it and that Bliss still continued to market the offending packaging on various online platforms, took the matter to the ARB on 17 July 2024 with a detailed breach complaint. The issue was whether or not the slightly modified packaging sufficiently departed from the offending packaging under clause 3.6 of Section 1 of the Code.

[11] The matter came before the Chairperson of the FAC, Ngoepe JP. On 12 August 2024, he ruled that the May 2024 packaging was not compliant and that the new packaging was a continuation of and part and parcel of the offending packaging. He held that *'minor alterations were effected but those were insignificant*'. He ordered Bliss to, amongst others, remove the offending packaging and the slightly modified packaging from all mediums in which it appears (the breach ruling). Colgate sought an undertaking that Bliss would respect the Manoim J order and Ngoepe JP's breach ruling. No undertaking was forthcoming. Bliss adopted the stance that the ruling was incorrect and as a result it would not be complying with it.

[12] Colgate thereafter approached the High Court for urgent interdictory relief. Bliss in turn launched an urgent application to suspend the breach ruling pending a review. The applications were heard on the same date by Vally J. Colgate contended that Bliss was in contempt of the Manoim J order in two respects: (i) tampering with the old packaging in such a way that in all material and important aspects it remained unchanged; and (ii) failing to remove the advertisement of Securex in the old packaging from certain websites.

[13] Bliss adopted the stance that it had made significant changes to the old packaging, departing from the characteristics identified in the ruling as being offensive and had

complied with the Manoim J order. Bliss argued that the correct approach in determining the allegation of contempt was to compare the new Securex packaging with that of Protex.

[14] On 11 October 2024, an order was granted by Vally J, holding Bliss in contempt of the Manoim J order, together with certain costs orders. Bliss was further ordered *'to comply with paragraph 3 of the Manoim J order, forthwith, and no later than 30 calendar days from the date of this order, by withdrawing the offending packaging and the slightly offending packaging …from every medium in which it appears'.*

[15] It was further ordered: *'In the event that the First Respondent [Bliss] fails to comply with this order the Applicants are authorised to approach the Court on the same papers, duly supplemented, for further relief',* thus entitling Colgate to merely supplement those papers in any further application, whilst relying what had already been stated. Vally J struck Bliss' suspension application from the roll, directing that it was not entitled to enroll the matter until it had purged its contempt of the Manoim J order.

[16] Whilst finding that there appeared to be significant differences between the packaging of Securex (old and new) and that of Protex, Vally J held that such comparison was irrelevant as it had already taken place and was the focus of the hearings before the ARB, the FAC and the review application before Manoim J. He held that a decision on the similarities between Protex and Securex occurred in those fora and it was not a matter that could be revisited. Vally J found that the old and new Securex packaging had to be compared.[5] Vally J concluded that the Manoim J order had not been complied with as the changes to the old packaging were insufficient and Bliss continued to advertise with the old packaging.[6] He held that the May packaging was *'willfully designed so as not to be materially distinguishable from what existed previously'.*[7]

[5] Judgment Vally J para 10.
[6] Para 12-14.
[7] Para 17.

[17] The contempt order is the subject of a pending appeal before the Supreme Court of Appeal, and an enforcement application under s 18(3) of the Act. That enforcement application remains pending. Leave to appeal to the Supreme Court of Appeal was granted by Vally J on 6 November 2024.

[18] During November 2024, Colgate launched a further urgent contempt application which was heard by Manoim J. That resulted in the December judgment, delivered on 13 December 2024. In that application, Colgate incorporated the contents of its founding affidavit in the proceedings before Vally J in its founding affidavit. Bliss in its answering affidavit, did the same. Bliss maintained that it was obliged to change its packaging and did so in October 2024, pursuant to Vally J's order. The main debate on the merits was what Manoim J termed 'the measurement issue'. Bliss contended that in determining whether it has infringed, the correct comparison was between the Colgate packaging which was found to have infringed and the present Bliss packaging (the October packaging), i.e. the visual distance between the 2019 Protex packaging and the October 2024 Securex packaging. It argued that applying that metric it would be clear that the October packaging has a number of features which differentiate it from the 2019 Protex packaging. Bliss further argued that even if the correct metric was a comparison of its May 2024 to October 2024 packaging there would still be no infringement given the sufficient visual distance between the two. Colgate contended the opposite, arguing that the correct comparison was between the different versions of Securex and that there was still infringement.

[19] Manoim J compared the May 2024 and October 2024 Securex versions. Relying on Rule 3.6 of the Code[8], he concluded that the visual distance was slight. Reliance was further placed on the approach adopted by courts in relation to visual distance in trademark cases, such as *Broderick*[9] *and PPI Makelaars*[10]*.* In the latter, the Supreme

[8] It provides: '*When objections in respect of advertisements that were amended resulting from an ARB ruling are received, both the original and amended version will be taken into consideration'.*
[9] *Broderick & Bascomb Rope CO v Manoff* 41F (2d) 353 (1010) pp 18-1071-18-1072, referred to in Manoim J's December 2024 judgment para 29.
[10] *PPI Makelaars v PPS Provident Society of South Africa* 1998 (1) SA 595 (SCA).

Court of Appeal held that once a party has been found to be in breach, they must keep a 'safe distance' from the margin line, even if it involves a 'handicap'. Reference was also made to *Milestone Beverage CC*, wherein it was held that the memory and impression created in the mind of the public was not erased and hence the advertising material 'cast its shadow backwards'[11]. Manoim J held that Bliss had continued to operate too close to the margin line and was reluctant to introduce the kind of change the law required. An order was granted that the October 2024 packaging infringed the Manoim J order and that Bliss was in breach of it, together with an order directing Bliss to comply with paragraph 3 of the Manoim order, already referred to.

[20] Bliss sought leave to appeal the judgment. Colgate in turn, launched the s 18(3) enforcement application forming the subject matter of this appeal and an application for leave to appeal a portion of the order to extend the ambit of the relief granted in its favour to non ARB members. The underlined portion of that order is repeated for ease of reference.

> *'Directing Bliss to comply with paragraph 3 of the Manoim J order, forthwith and no later than 15 working days from the date of the order by withdrawing the offending packaging depicted in Annexures B and C annexed to the Notice of motion and the latest offending packaging from every medium in which they appear, <u>over which the ARB has jurisdiction, by virtue of them being members</u>' (Emphasis added.)*

[21] In granting leave to appeal to Bliss, it appears by necessary inference that the court *a quo* considered the fact that leave to appeal on the same issues had already been granted to the Supreme Court of Appeal by Vally J, as a compelling reason under s 17(1)(a)(ii) of the Act to grant leave to appeal. In considering the s 18(3) application, the court *a quo* held that Colgate had strong prospects of success on appeal, by necessary

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[11] *Milestone Beverage CC and Others v the Scotch Whiskey Association and Others* (1037/20190 [2020] ZASCA 105 (18 September 2020) para 27.

inference, that Bliss did not. Colgate's counter application for leave to appeal was also granted. Bliss noted its appeal on 6 February 2025.

[22] Against this backdrop I turn to consider the merits of the appeal. Section 18 in relevant part provides:

"18. Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders'.

[23] The relevant principles are well established The most recent judgment of the Supreme Court of Appeal on the issue, *Tyte Security Services CC v Western Cape Provincial Government and Others,*[12] was quoted extensively in the judgment of the court *a quo* and it is not necessary to repeat it. In *University of the Free State v Afriforum ('UFS'),* the Supreme Court of Appeal confirmed that the existence of exceptional circumstances must be fact-specific and *'be derived from the actual predicaments in which the given litigants find themselves'.* It further confirmed that a court may take into account a party's prospects of success on appeal when considering whether to grant enforcement relief.[13]

[24] Colgate's application under s 18(3) was centrally predicated on the Manoim J order granted on 21 February 2024. Its case was that exceptional circumstances existed to direct enforcement as Bliss on an ongoing basis failed to comply with paragraph 3 of that

[12] *Tyte Security Services CC v Western Cape Provincial Government and Others* 2024 (6) SA 175 (SCA).
[13] *University of the Free State v Afriforum* 2018 (3) SA 428 (SCA) paras 13 and 15.

order by continuing to advertise the offending packaging, introducing packaging with barely perceptible changes in the slightly modified offending packaging (May 2024) and the latest offending packaging (October 2024), both with imperceptible changes from what the FAC and Manoim J had found to be breaches of the Code. It submitted that the effect was that Bliss essentially reintroduced the very packaging it was ordered to withdraw, twice, under the guise of compliance. It submitted that the suspension of the breach order would allow Bliss to perpetuate its failure to comply with the Manoim J order and further undermine the authority of this court. This argument rested on four pillars: that suspension would (i) allow Bliss to perpetuate its disobedience of court orders; (ii) would result in a loss of efficacy of the strict timeline imposed for compliance; (iii) would allow Bliss to continue its four-year campaign to evade accountability for its breaches of the ARB Code and continue to mislead the public and; (iv) would result in a loss of efficacy of the Manoim J order and Colgate's rights to enforcement.

[25] Bliss on the other hand submitted that no truly exceptional circumstances had been illustrated. It contended that Colgate's founding affidavit had two fatal flaws: first, it failed to allege any conduct which would fall within the scope of the breach order. Second; it failed to allege that despite the withdrawal of its 2019 Protex packaging from the marketplace, it retained a goodwill in that packaging which would justify any finding that exceptional circumstances or irreparable harm were illustrated.

[26] These arguments are flawed. The substance of the enforcement order was to give effect to the February 2024 order which remains extant and was not the subject matter of any appeal. The goodwill of Colgate in the 2019 packaging was established in the proceedings before the ARB and was dealt with in the review proceedings. The finding of the FAC that Bliss exploited the advertising goodwill of Colgate's Protex packaging architecture, in contravention of clause 8 of the Code stands. Similarly, the finding that Bliss imitated the Protex packaging architecture, in contravention of clause 9 of the ARB code, stands. These finding were never challenged. There is also no basis to conclude on the papers that Colgate has not retained any goodwill in its Protex packaging and its

architecture, which endures beyond any changes thereto. It is not open to Bliss to mount what is effectively a collateral challenge to those findings in the present proceedings.

[27] Insofar as the order further refers to the 'latest offending packaging' which Bliss commenced using in the marketplace during October 2024, the court *a quo* considered that packaging, comparing it to its previous iterations, and found it was lacking as it was 'too close to the margin line' and remained confusingly similar. It cannot be concluded on the papers that such conclusion was wrong. It was not disputed that Bliss still marketed its products and has not been excluded from the market place. Bliss' stance was that it was entitled to do so. The existence of exceptional circumstances is not solely reliant on whether Bliss is presently in factual breach by selling to ARB members, as Bliss appears to suggest.

[28] Bliss' contention that the court *a quo* erred in considering the three requirements holistically, does not bear scrutiny if the judgment of the court *a quo* is read in totality and in context. A court of appeal must not scrutinise the language of a judgment as if it were a statute.[14] It cannot be concluded that the court *a quo* failed to apply the relevant test correctly or deviated from the relevant principles.

[29] Bliss' submission that the s 18(3) application constitutes an oddity, given that Colgate has cross appealed, loses its force if considered in context. In the appeal, Colgate wishes only to extend the ambit of the order to include non ARB members, an issue expressly excluded from the enforcement order. It does not seek to disturb the order granted in its favour.

[30] Bliss placed reliance on the fact that the very issue of breach of the Manoim J order and whether Bliss had done enough to distance its May 2024 and October 2024 packaging were issues that the Supreme Court of Appeal ('SCA') must determine. It was

[14] *General Council of the Bar of South Africa v Geech and Others, Pillay and Others v Pretoria Society and Another, Bezuidenhout v Pretoria Society of Advocates* 2013 (2) SA 52 (SCA) paras 62 and 172.

argued that the consequence was that if Bliss were to be successful in the SCA and a proper comparison requires a comparison with the 2019 Protex packaging, Bliss would not have been in breach and everything underpinning Colgate's exceptionality fell apart as there would be no basis for the enforcement order.

[31] These submissions disregard that what Bliss has secured is a suspension of paragraph 3 of the Manoim J order, which judgment is extant, thus thwarting any attempt by Colgate to enforce its rights. That points to the existence of exceptional circumstances, specifically when considered with the history of the litigation already referred to.

[32] It was undisputed that to assess exceptional circumstances, a court will also have regard, as best as it is able in the given case, to the applicant's prospects of success in the pending or prospective appeal'.[15] Bliss argued that, as leave to appeal had been granted in its favour, that was the end of the debate and an argument surrounding prospects of success was no longer open to Colgate. I do not agree. The principle applies both to a pending application for leave to appeal and an appeal. The principle was stated thus in *Justice Alliance*[16], approved in *UFS:*

> '*The less sanguine a court seized of an application in terms of s18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18(3)*'.

[33] Considering the architecture of s 18(1), which refers to the operation and execution of a decision that is the *'subject of an application for leave to appeal or appeal*', It is thus one of the jurisdictional facts which must be present before an enforcement order may be sought.[17] It envisages a situation where enforcement may be sought also in proceedings

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[15] *UFS* supra, paras 14 and 15; referring with approval to *The Minister of Social Development Western Cape & others v Justice Alliance of South Africa & another* [2016] ZAWCHA 34.
[16] Ibid.
[17] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) para 26-31.

which are the subject matter of an appeal, put differently, where leave to appeal has been granted. That fact that leave to appeal has been granted is thus not destructive of an application to enforce, nor does is weigh against the granting of relief. It is a neutral fact and a consideration of the prospects of success on appeal should still be considered, if the facts permit it. In the present instance, the record of the proceedings which culminated in the December 2024 order is available and it is thus possible to gauge the prospects of success of appeal, as the court *a quo* did.

[34] Seen in this context, Bliss' argument that the entire substratum of Colgate's case of exceptionality, rests on a basis which would fall away if the appeal is successful, does not avail it as it equates the existence of the granting of leave to appeal, with a reasonable prospect of success on appeal.

[35] The basis on which Bliss obtained leave to appeal the breach order, was a compelling reason, rather than good prospects of success. The court *a quo* held that Colgate's prospects of success on appeal were good and, by necessary inference, that those of Bliss were not. The court *a quo* was well placed to consider the issue, given that he granted both the Manoim J order and the breach order. In the present instance the appeal record is available and it cannot be concluded that the court ***a quo's*** stance or basis of evaluation of the prospects of success on appeal were incorrect.

[36] The very test proposed by Bliss was rejected in each of the fora in which the issue was determined, including the proceedings before Ngoepe JP, Manoim J and Vally J. Moreover, in considering clause 3.2[18] and clause 3.6[19] of the ARB Code and the relevant legal principles which require Bliss to depart significantly from the offending packaging rather than to present blurring versions thereof, it cannot be concluded that Colgate's

[18] It provides: *"In assessing an advertisement's conformity to the terms of this Code, the primary test applied will be that of the probable impact of the advertisement as a whole upon those who are likely to see or hear it. Due regard will be paid to each part of its contents, visual and aural, and to the nature of the medium through which it is conveyed.'*

[19] It provides: *'When objections in respect of advertisements that were amended resulting from an ARB ruling are received, both the original and amended version will be taken into consideration'.*

prospects of success are so poor as to preclude a finding of a sufficient degree of exceptionality to justify an order under s 18. Rather, the facts support the conclusion reached by the court *a quo* that Colgate's prospects of success on appeal are strong.

[37] Bliss' contention that the infringement of rights contended for by Colgate was not of itself exceptional circumstances without proof of any adverse consequences, does not bear scrutiny. The court ***a quo's*** finding that the history 'shows that Bliss was, despite constant failure, undeterred from pursuing its goal, first of keeping the infringing packaging in the market, and when that avenue was closed by the Manoim J order, opting to introduce variants that closely resembled the infringing packaging. Its strategy has paid off for it thus far'[20]*,* is supported by the facts. Colgate's complaint that Bliss has benefitted from exploiting its rival's goodwill undeterred from adverse findings against it for a considerable period whilst remaining in and expanding its advertisement footprint in the market, and thus continuing the 'windfall' which it has received, evidences the adverse consequences suffered by it.

[38] Considering the facts, there are thus exceptional circumstances present which justify the deviation from the norm[21] and the court *a quo* cannot be faulted in its conclusion. The factual background to the litigation as set out in some detail, illustrates this as well as existence of the Manoim J order. In the words of the court *a quo: 'The lengthy history viewed holistically takes the matter beyond the ordinary to the exceptional'.*[22]

[39] Although the factual matrix is somewhat different, there are some analogies to be drawn between the present facts and the decision of the Full Court in *Matinyarare and Another v Innscor Africa and Another,*[23] bearing in mind that each case is to be decided on its own facts.[24] There, the appellant defied orders which had been granted against him

[20] S 18(3) judgment para 25.
[21] *Ntlemeza* paras 36.
[22] Para 26.
[23] *Matinyarare and Another v Innscor Africa and Another* [2024] ZAGPJHC 945.
[24] Ibid, paras 34 to 35 and the authorities cited therein.

without taking any of the orders on appeal. Bliss in the present instance, did not appeal the Manoim J order, which must be obeyed. As held in *Matinyarare*, a party must expect to suffer harm of a kind that is ordinarily associated with the appellate process taking its course, without interim redress. But harm that is out of the ordinary requires intervention. Where a party runs the real risk of irreparable damage to its good name and reputation, built up over many years, this constitutes an exceptional circumstance in addition to representing irreparable harm.[25] The same applies in the present instance in relation to Colgate's goodwill.

[40] I am persuaded that Colgate has established that it would suffer irreparable harm if relief is not granted and that it has done so with reference to an actual predicament rather than a theoretical one. Colgate is deprived of the right to enforce the Manoim J order and the ARB rulings which underpin it, which order remains extant. Colgate's two successful attempts to enforce that order, have both been taken on appeal, resulting in the order which was not appealed, being suspended. Any future endeavour by Colgate to enforce the order is likely to suffer the same fate. It is well established that unless orders made by courts are capable of being enforced by those in whose favour the orders were made, the constitutional right of access to courts will be rendered an illusion.[26]

[41] Bliss contended that it is not currently marketing any version of its offending packaging with ARB members. It was undisputed that Bliss marketed those products via Makro. Although the court *a quo* found that it was not able to definitively determine that Makro (Masstores (Pty) Ltd t/a Makro) was an indirect member of the ARB, by virtue of its membership of the Marketing Association of South Africa ('MASA'), and thus that Bliss breached the Manoim J order, that is not a determinative issue. If the relevant affidavits are read in context, including the parties' affidavits in the proceedings before Vally J, incorporated therein by reference, Makro's membership of MASA and hence of the ARB was accepted by the parties. More importantly, Bliss' failure to give any undertaking not

[25] Ibid, para 38.
[26] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18, paras 59-60.

to market the offending packaging with ARB members pending the conclusion of the appeal processes, lends credence to Colgate's stated apprehension of ongoing and irreparable harm and bolsters Colgate's case of exceptionality.

[42] Colgate, in my view, established that, if relief were not granted, Bliss would get a windfall. The high water mark of its defences were that an incorrect test was applied by both Vally J and Manoim J and that Colgate had not established the necessary goodwill. It never disputed that Bliss has benefited from the current position or that it has received a windfall by being able to market the impugned packaging until the appeal against Manoim J's December judgment is decided. I agree with the proposition that if Bliss is retaining or increasing its market share on the basis of packaging that is based on Colgate's goodwill, it will have improved its position in the marketplace illegitimately at Colgate's expense, as held by the court *a quo.*[27] The refusal by Bliss to provide any undertaking that pending the finalisation of the appeals, it would not market any of its offending packaging with ARB members, is significant. Given the history of the matter, there is a cogent basis for Colgate's reasonable apprehension of ongoing and irreparable harm, were the enforcement order not granted.

[43] Bliss' submission that Colgate can recover damages in a passing off action, and thus has a suitable alternative remedy does not bear scrutiny. Not only are such damages notoriously difficult to prove, but as pointed out by the court *a quo,* it would mean that such relief would have to be based on a different cause of action, not the present contravention of the ARB Code. An award for damages is in any event a poor substitute for diminished goodwill.[28]

[44] Colgate's case is that Bliss' offending packaging and latest offending packaging continue to imitate and infringe the goodwill in Colgate's Protex packaging, resulting in ongoing irreparable commercial harm. It has been deprived of its rights to enforce the ARB's rulings against Bliss for some four years. The breach order imposes strict timelines

[27] Section 18(3) judgment para 34.
[28] *Tullen Industries Ltd v A de Souza Costa (Pty) Ltd* 1976 (4) SA 218 (T) at 219H-220B.

of 15 working days, which will expire long before exhaustion of the appeal. Each of the forums which dealt with the matter found that Bliss must be accountable. Its response was to reintroduce on two occasions, similar iterations of the very packaging it was ordered to withdraw. It benefitted in the process, doubling down on its advertising, exponentially increasing its revenue and market share with the offending packaging and its variations, after it was found in breach of the Code. The May 2024 and October 2024 iterations are so close that only careful scrutiny would detect any difference and are not visually distant in any manner detectable to ordinary shopper who does not engage in detailed scrutiny exercise. The effect of the last offending package is that Bliss will be permitted to cast the shadow backwards. The factual similarities between the various offending packages are self- evident as held by both Vally J and Manoim J and the tests applied fall within the mainstream of the applicable decisions, as held by the court *a quo*. Bliss consciously elected to stay as close as possible to the margin line and did not elect to stay well away from it. Considering the facts and the visual similarities between Bliss' various packaging iterations, Colgate's case is compelling.

[45] The court *a quo* was correct to find that Colgate has illustrated irreparable harm and that the present scenario is aligned to that in *Tyte*.[29] Here too, if the court does not grant relief to Colgate, Bliss would get a windfall by being able to market the impugned packaging until the appeal is decided without Colgate having an effective remedy at its disposal. It must be borne in mind that both the Manoim J order and the breach order set specific and narrow timelines for compliance, which have long passed. To argue, as Bliss does, that it is open to Colgate to institute further breach proceedings, rings hollow, considering the passage of time and the history of the litigation between the parties. To criticise Colgate for not providing a detailed substantiation of the financial harm at issue, does not pass muster, considering the type of financial harm at stake.

[46] On the issue of an absence of irreparable harm to Bliss, the court *a quo* held:[30]

[29] Section 18(3) judgment para 32.
[30] Section 18(3) judgment para 36, 38 and 39.

'[36] In contrast Bliss has not made out a case for irreparable harm to itself. In relation to this as was observed in Tyte *the respondent in an 18(3) application whilst not facing an onus at least has an evidential burden. But Bliss has not made out any case here of how it will be prejudiced in the market going forward. …*

[38] Nor should there be any sympathy for Bliss. It has had ample time to change its packaging. Given that it has tweaked its packaging twice since the Manoim J order was issued in February 2024, the logistics and expense of changing packaging has clearly not proved insuperable. The fact that it has chosen to make changes so close to the margin line is the reason why it has been found in contempt by Vally J, and in breach by me, in my December order. This is an outcome it could have avoided. There is no reason why Colgate must be further prejudiced as a result of Bliss' decision to take the most minimal steps to comply.

Bliss has not been excluded from the market. Only insofar as its packaging contravenes the ARB Code. Moreover, the order which I granted in December contains a carve out permitting it to market even the impugned October packaging, in non-member outlets'.

[47] It is clear that the court *a quo* performed a balancing exercise of the irreparable harm to be suffered by Colgate and the absence thereof to Bliss and determined the issue in favour of Colgate, albeit that Bliss did not present evidence in rebuttal of Colgate's contentions. The court *a quo* clearly took the position of Bliss into account. As held in *Tyte*, the enquiries as to irreparable harm to Colgate and the absence thereof to Bliss are two sides to the same coin, both enquiries to be informed by the same facts and circumstances and hardly mutually exclusive.[31] In coming to its conclusion, the court *a quo* took account of all the facts and circumstances and its conclusion cannot be faulted.

[48] It cannot be ignored that Bliss had two opportunities to amend its packaging and did so, shortly after the Manoim J order and the Vally J order. In the process it elected exactly changes it wanted to effect to the offending packaging. For Bliss to simply adopt the position that Colgate had not made out a case because it contends that Bliss does

[31] Para 17.

not have any loss worthy of legal protection,[32] disregards the entire basis of Colgate's case and does not bear scrutiny. Colgate contends that Bliss has no entitlement to the protection of any financial or reputational benefits improperly garnered from its continued breaches of the ARB Code, the FAC ruling and the Manoim J order. It further contends that any harm occasioned to Bliss is not as a result of the breach order, but in consequence of the Manoim J order and the FAC ruling and that the beach order merely seeks to enforce the pre-existing legal obligations. Were Bliss to have contented otherwise, it should have produced facts in discharge of its evidentiary burden on the issue. It chose not to, despite any such facts being peculiarly within its knowledge.

[49] In these circumstances, Bliss' submission that Colgate failed to allege that enforcing the judgment would not cause Bliss harm and hence has not discharged its onus, does not bear scrutiny.

[50] In conclusion, the court *a quo's* finding that the requirements of s 18(3) have been met, cannot be faulted. For the reasons provided, I agree with those conclusions. It follows that the appeal must fail.

[51] There is no reason to deviate from the normal principle that costs follow the result. Considering the complexities involved, the employment of two counsel was warranted. Colgate sought a punitive costs order on the scale as between attorney and client. I am not persuaded that such a costs order is warranted in the present circumstances.

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

> The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel, one being senior counsel, on scale C.

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[32] *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) para 56.

[redacted]

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

HEARING

DATE OF HEARING	: 18 FEBRUARY 2025
DATE OF JUDGMENT	: 28 FEBRUARY 2025

APPEARANCES

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THIRD RESPONDENTS' ATTORNEYS	: Willem De Klerk Attorneys Mr W De Klerk No appearance.