

IN THE HIGH COURT OF ZAMBIA

2012/HPC/0373

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

**IN THE MATTER OF: SECTION 51 OF THE TRADE MARKS ACT
CAP 401 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: AN APPEAL FROM THE DECISION OF
THE
REGISTRAR OF TRADEMARKS**

BETWEEN:

N.R. INVESTMENTS LIMITED

APPLICANT

AND

**TIGER FOODS BRANDS INTELLECTUAL
RESPONDENT
PROPERTY HOLDINGS COMPANY (PTY)
LIMITED**

**BEFORE HON. MR. JUSTICE NIGEL K. MUTUNA THIS 7TH DAY OF
APRIL, 2015**

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

For the Dependant: Ms M.H. Masengu of Messrs Musa Mwenya
Advocate

J U D G M E N T

CASES REFERRED TO:

1) Pianotist Company Limited's Application (1906) 23 R.P.C. 774 chd

- 2) *William Baileys (Birmingham) Limited's Application (1935) 52 RPC 137 ch*
- 3) *Trade Kings Limited vs. Unilever Plc and Others (2000) ZR 16*
- 4) *British Sugar Plc vs. James Robertson and Sons (1996) RPC 281*
- 5) *Lloyd Schuhfabrik Meyer & co. GmbH vs. Klijsen Handel BV case c - 342/97 ECJ*
- 6) *Cowbell AG vs. Ics Holdings Ltd (2001) 3 SA 941 (SCA)*
- 7) *Trade Kings Limited vs. The Attorney General (1999) ZR 53*
- 8) *Ranbaxy Laboratories vs. Glaxosmithkline 2010/HPC/0586*
- 9) *Australian Wine Importers TM (1889) 47 chd 278*
- 10) *Minister of Home Affairs and Attorney General vs. Habasonda (2007) ZR 207*
- 11) *Leoparding Consulting (PTY) Ltd vs. Apple Inc (2009) Bip 55 RTM*
- 12) *Intel Corporation Ltd vs. CPN United Kingdom Ltd (2007) RPC 35*
- 13) *Aristoc Ltd vs. Rysta Ltd (1945) 62 RPC 65*
- 14) *Frison Plc vs. Norton Health Care Ltd (1994) FSR 745 (Ch)*
- 15) *Re Jellinek's Application (1946) 63 RPC 59*
- 16) *Daiquri Rum Trade (1969) RPC 600*
- 17) *British Sugar Plc vs. James Robertson and Sons (1996) RPC 281*
- 18) *Clarke vs. Sharpe (1898) 15 RPC 14*
- 19) *Plascon-Evans Paints Ltd vs. Van Reibeeck Paints (PTY) LTD 1998 (3) SA 623 (CA)*

OTHER AUTHORITIES

- 1) *Trade Marks Act, Cap 401*
- 2) *Black's Law Dictionary 2004 by Bryan A. Garner, Thomson West, 8th Edition USA*
- 3) *Websters Third New International Dictionary of English Language, by Philip Babcock, 1961, Bell & Sons Ltd, London*
- 4) *Kerly's Law of Trade Marks & Trade Names, 13th edition, 2001*
- 5) *The Enforcement of Intellectual Property Rights: A Case Book, by LTC Harms, 2nd Edition 2008, World Intellectual Property Organisation*

The delay in delivering of this judgment is deeply regretted. The reasons for the delay are well known to the parties as they are a matter of public notoriety.

This is an appeal from the decision of the Registrar of Trademarks (The Registrar) given at Lusaka on 16th April 2012. The decision of the Registrar was prompted by an objection lodged by Tiger Foods Brands Intellectual Property Company (PTY) Limited, a South African based company, the Respondent in this appeal, which opposed the registration of trade mark number 593-600/2008, TIGER label in class 30 by N.R. Investments Limited, a Zambian company, the Appellant in this matter.

The record of appeal which reflects the proceedings before the Registrar shows that the trade mark applications from which the opposition arose was lodged on 28th July, 2008 and was made pursuant to the **Trade Marks Acts** (the Act) in which the Appellant was seeking registration of trade mark number 593-599/2008 in respect of biscuits and wafers and trade mark number 600/2008 in respect of puffs, crisps, cereals for human consumption. The ground upon which the opposition was lodged was that the Respondent is the lawful proprietor in Zambia and many other countries around the world of the trade mark, TIGER, in particular in Zambia by virtue of trade mark registration number 730/2006, TIGER BRAND and Tiger Device in class 30, lodged on 10th September, 2006. The Respondent contended that its trade mark has for many years been registered in numerous countries throughout the world long before the Appellant lodged its application for registration, consequent upon which it has become well known in Zambia as capable of distinguishing the Respondent's goods from all other goods. It was also contended that the goods specified in the Appellant's application for registration are the same goods and or the same description as the Respondent's goods subject to the registered mark TIGER. Therefore, the registration should not be allowed because confusion would arise in the minds of the purchasing public and as such it would be in contravention of sections 16 and 17(1) of the Act. Further that the Appellant has no legal claim at law or equity to

own or use the Respondent's mark and that the Appellant made the application whilst being fully aware of the reputation of the Respondent's TIGER mark.

In responding to the opposition, the Appellant argued that the mark TIGER Label does not infringe the Respondent's TIGER mark because the goods for which it is intended to be used are not the same as those for which the TIGER mark is registered. It was argued that the TIGER Label sought by the Appellant was in respect of biscuits and wafers whilst the Respondent's TIGER mark does not have a specific description of any goods which is in contravention of section 8 of the Act. Further that, an infringement under section 9 of the Act can only occur when the trade marks relate to the same or identical goods which is not the case in this matter.

The evidence that was led by the parties before the Registrar was by way of affidavits sworn by Ian Wilson Martin Isdale on behalf of the Respondent and Rahim Virani, for the Appellant

The evidence of Ian Wilson Martin Isdale, was that the Respondent is a progressive consumer company with a broad portfolio of leading goods and household names such as jungle oats, morvite, ace, Fattis and Monis, Oreos, roses, Super 7, brooks, energade, all gold, monis, halls, beacon, koo, enterprise, crosse and blackwell and purity. Further that the Respondent is proprietor in Zambia of trade mark registration number 730/2006, TIGER BRANDS logo whose category of goods specifically include flour and preparations made from cereals as well as pastry and confectionary. He also testified that the specification of goods pursuant to which the Appellant's application is made include biscuits and wafers which by definition, are included in the specification of goods in the Respondent's trade mark number 730/2006, TIGER BRANDS. It was also his testimony that the Respondent consistently uses its trade mark TIGER BRANDS logo as an endorsement mark in respect of all its products including its well-known cereal products jungle oats, morvite and ace, for purposes of identifying its various brands as emanating from the

Respondent and as such distinguish its goods from the goods of other entities.

In conclusion the witness stated that the Respondent has extended its jungle oats breakfast cereal products to various healthy snack bars, chocolate bars, biscuits and wafers which can be consumed with ease and convenience at ones school or workplace. The product jungle oats which includes jungle oats cereal and jungle oats easy cereal is sold through Pick 'n' Pay, Shoprite and Spar retail chains.

Testifying on behalf of the Appellant Rahim Virani stated that the Appellant's trademarks are not identical with nor are they confusingly similar to the Respondent's registered trade mark. That there would be no confusion in the minds of consumers if the Appellant's trade mark is registered having regard to the overall impression that would be created by the two trademarks including: the visual impression of the respective logos of the two trademarks; the description of the goods to which each trade mark relates; and the channels of distribution of the particular products to which trademarks are applied. Further that, the Appellant's trade mark and logo relates to goods which are not covered by the Respondent's registered trade mark and that its contention that it is a growing company that would extend its cereal products to possibly cover the goods specified in the Appellant's application has no support of the law. He also testified that the Appellant's trade mark was created independent of the Respondent's trade mark to identify and distinguish its products and it is not in any way intended to pass off its products as belonging to the Respondent or in any way related to the Respondent's products. Further that, he had been advised by his advocates and he verily believes that the Registrar is empowered to register similar or identical trademarks under certain circumstances and that this case presents such circumstances as the Appellant's trademarks relates to goods not covered by the Respondent's trademarks. That the Appellant's trade mark is not identical to the Respondent's trade mark and that no

prejudice will be caused to the Respondent or indeed either of the parties if the Appellant's trademarks is registered.

In the arguments in support of the Respondent's opposition, Ms M. H. Masengu argued as follows: that the Appellant's proposed trademarks are not only identical to the Respondent's mark registered under number 730/2006 but are also the same, which fact has been admitted by the Appellant; the nature and description of the goods that relate to the two marks are the same and renders the use of the trade mark by the Appellant illegal in terms of section 17 of the Act; that since the Respondent has in the recent past extended its product range to include snack bars and confectioneries which are sold in close proximity to products like chocolate bars, biscuits and wafers, it is highly likely that an ordinary customer may confuse these products to other products; the Tiger Label trade mark would in this regard cause confusion in the minds of customers who would mistake the Appellant's products for those of the Respondent; and that the Respondent's trade mark TIGER BRAND logo has been long established and has been in existence in Zambia since 2006, prior to the Appellant's applications for registration. Further that, the trade mark is available in many African countries and the Middle East.

In response, counsel for the Appellant Ms F. Kalunga argued that the trade marks TIGER BRANDS and LOGO and TIGER are not identical or similar so as to cause confusion to the consumers. She relied on the case of ***Pianotist Company Limited Application (1)*** which she argued lays down the test to be applied in matters such as this one. It was argued that the test to be applied is whether there is a visual or phonetic similarities between the trade marks. Further that, in accordance with the case of ***William Baileys (Birmingham) Limited's Application (2)*** a comparison of two trademarks cannot be made by splitting the trade mark's name in two and comparing one portion only of the name to the other trade mark. It was argued to this end that an analysis of whether or not there is a conflict between the Respondent's and Appellant's trademarks should encompass the Respondent's trade mark in full as

registered and not just the name TIGER. Counsel argued that even a comparison of the pictures on the two logos indicates that an average consumer cannot be confused by the two trademarks. Reliance in this regard was made to the case of ***Trade Kings Limited vs. Unilever Plc & Others (3)*** in which counsel argued the test of what constitutes an average Zambian consumer is laid down.

The other limb of counsel's argument was that a reading of sections 17 and 18 of the Act indicates that protection of a trade mark is granted to a particular set of goods that have been provided for in the registration. She argued that such classification is mainly for administrative purposes as it is not intended to grant blanket monopoly to a proprietor of goods falling in a particular class. Consequent upon this it was argued, the Respondent cannot claim a monopoly of all goods falling in class 30.

With respect to the argument by the Respondent that it is expanding its product range to include lunch bars and candy, it was argued that such expansion does not grant automatic protection to such of the Respondent's goods. As regards the argument that the Respondent's trade mark is long established in Zambia since 2006, it was argued that no evidence was adduced by the Respondent, to prove this fact. Further, and arguing in the alternative counsel submitted that this is a case fit for invoking the provisions of section 17(2) of the Act.

In counsel's concluding remarks, it was argued that the refusal to register the Applicant's mark would create unnecessary monopoly contrary to the spirit of competition.

In response to the Appellant's arguments, counsel for the Respondent Ms M. H. Masengu submitted that the test for determining similarities and dissimilarities was set in the case of ***Trade Kings Limited vs Unilever Plc & Others (3)*** that, it is whether the ordinary sensible Zambian consumer would be confused by the use of the two marks. It was submitted that the two marks in issue sound the same, notwithstanding the additional words, label and brand which distinguishes them. Further that, a perusal of both trade marks will reveal that both marks have an

animal on them being a tiger, and not tigers on the Respondent's mark as alleged by the Appellant, as such applying the visual test, an ordinary member of the public would be confused by the two marks. It was also argued that the nature and description of the goods the marks seek to protect are the same. Further that, the phrase "preparations from cereals" is a term which includes "biscuits" and "wafers", which goods the Respondent's trade mark TIGER BRAND LOGO is intended to protect. Counsel relied on section 8 of the Act and argued that the provisions of that section are applicable not only to particular goods but also goods falling in a particular class.

In the concluding remarks it was argued that this case does not fall within the ambit of section 17(2) because the Appellant, had not adduced sufficient evidence to warrant registration of its trade mark under that section.

This was the evidence and the arguments laid before the Registrar for his consideration. After considering this evidence and the arguments, the Registrar held that there was a reasonable probability of the average consumer confusing the Respondent's trade mark TIGER BRANDS logo with the Appellant's trade marks TIGER Label. The basis of his finding was that the marks and associated goods are so similar that the consumer may or is likely to mistakenly pick one product for the other. For these reasons, the Registrar found that the Appellant's mark offends sections 16 and 17 of the Act.

In arriving at the foregoing finding the Registrar considered the provisions of section 16 and 17 of the Act and explained that in determining whether marks are confusingly similar, regard must be had to all the circumstances.

The Registrar also considered the case of ***British Sugar Plc vs. James Robertson & Sons (4)*** and explained that Jacob, J in that case summed up the factors to be taken into consideration when determining whether marks are confusingly similar. These factors he stated are: 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. This principal he explained was applied with approval by the Supreme Court in the case of ***Trade Kings Limited vs. Unilever & Others (3)***. He explained further that the pertinent point of inquiry in this case 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 Respondent for those of the Appellant and vice versa. The average consumer he explained, should be expected to be reasonably well informed about the product, allowance being made for the consumers' imperfect recollection. He made reference in this regard to the case of ***Lloyd Schuhfabrik Meyer & Co. GBMH vs. Khijzen Handel BV (5)***.

The Registrar then applied the tests he had laid down to the Respondent's and Appellant's two marks. He stated that whilst there may be dissimilarities between the two marks, the question is, whether the overall impression of the marks as a whole give a clear distinction between them, so as to avoid the danger that they may be confusingly similar. In addressing this issue he explained, that 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. He concluded that a comparison of the two marks reveals that not only does the Appellant's mark bear the word TIGER like the Respondent's, it also has the idea of the tiger device although differently portrayed. As a consequence of this, he found that there were conceptual similarities. Before concluding his finding the Registrar considered the holding in the South African case of ***Cowbell AG vs. ICS Holdings Ltd (6)*** that it is sufficient to find likelihood of confusion if there is a reasonable probability of one being confused. Further that the term, "likelihood of confusion" is synonymous with "reasonable probability". As such he found that there is a reasonable probability of the average consumer confusing the Respondent's trade mark, TIGER BRAND Logo with the Appellant's trade mark, TIGER Label.

His reasoning was that the marks and associated goods are so similar that the consumer may or is likely to mistakenly pick one product for the other. Consequent upon this, he found that the Appellant's mark offends sections 16 and 17 of the Act.

The Registrar also dismissed the Appellant's alternative argument on the ground that there were no special circumstances in the case that warranted the registration of the trade mark under section 17(2) of the Act.

The Appellant being dissatisfied with the foregoing decision, appealed to this court pursuant to section 51 of the Act. The grounds of appeal are contained in the Notice of Appeal filed on 11th July 2012 and they are as follows:

- 1) *The Learned Registrar of Trade Marks erred in law and in fact when he held that the opponent's trade mark "TIGER BRANDS Logo and the Applicant's" trade mark "TIGER Label" are so similar as to be likely to cause confusion to the average consumer notwithstanding that the two trade marks when considered as a whole, are neither identical nor so similar as to cause likelihood of confusion.*
- 2) *The learned Registrar of Trade Marks erred in law and in fact when he decided that "likelihood of confusion" is synonymous with "reasonable probability" and upheld the opposition without due regard to the dissimilarities between the goods to which the two trade marks are applied*
- 3) *The Learned Registrar of Trade Marks erred in law and in fact in applying the test of reasonable probability to dissimilar goods without having taking (sic) into account the objective considerations on likelihood of confusion the distinctiveness of the opponent's trade mark as well as the reputation of the opponent's trade mark*
- 4) *The Learned Registrar of trade marks erred in law and infact when he found that the Applicant's trade mark was confusingly similar with the opponent's trade mark without showing any legal basis or compassion.*

5) *The Learned Registrar of Trade Marks erred in law and in fact when he rejected the opponent's alternative argument for registration under section 17(2) without due regard to the circumstances surrounding the use of the respective trade marks and the arguments advance by the Applicant.*

These were the grounds the Appellant presented before this court when the appeal came up for hearing on 27th March 2013. At the hearing, the Appellant (which is referred to as the Applicant in the grounds of appeal and record of appeal) was represented by Ms F. Kalunga of Messrs Ellis & Co., whilst the Respondent (which is referred to as the opponent in the grounds of appeal) was represented by Ms M.H. Masengu of Messrs Musa Mwenye Advocates. In advancing arguments for and against the appeal counsel made both verbal and written arguments.

On ground 1, counsel for the Appellant, Ms F. Kalunga argued that the two trade marks in contention are neither identical nor similar as to cause likelihood of confusion. She argued that the two marks must be considered as a whole and the examiner being the Registrar must consider all relevant factors when comparing the marks. Counsel defined the word "similarity" as applied in intellectual property law in accordance with ***Black's Law Dictionary*** and stated that the word means, how closely a trade mark resembles another to amount to infringement. She then explained the guidelines in determining similarity by reference to the ***Pianotist*** case and stated that the two competing marks must be judged by their look and their sound. It was argued that the said guideline was applied with approval in a number of decisions in Zambia to include ***Trade Kings Limited vs. The Attorney General (7)*** case and ***The Ranbaxy Laboratories vs. Glaxosmithkline (8)***.

Counsel argued that the guideline for comparison is on the standard test of the consumer. She argued that the Supreme Court in the case of ***Trade Kings Limited vs. Unilever & Others (3)*** set the standard

of the consumer as being that of a reasonable and circumspect consumer and declined to accept that the average Zambian consumer is some kind of a retard. Counsel then summarised the four tests to be considered as being: any visual or phonetic similarity between the trade marks; the goods to which the trade marks apply; the overall impression likely to be created in the minds of a consumer; and what is likely to happen if each trade mark is used in a normal way as a trade mark for the goods of the respective owners of the marks?

On the first consideration of the visual and phonetic similarity, counsel argued that when assessing similarity of the trade marks regard should be had to the overall impression caused by the trade mark to the customer when seen or spoken. She argued that the comparison should not involve an element by element comparison such that a part of one trade mark is compared with the other trade mark so that the one word is compared to the part of the other without considering the overall appearance or sound of the two trade marks in question. Further that, the comparison should focus on the visual and phonetic similarities of the two marks when each is seen or spoken as a whole. She relied on the case of ***William Baileys Application (9)*** in which she stated it was held that one word must be considered as a whole and compared with the other as a whole. Counsel argued that the Registrar erred in law and in fact when he held the two trade marks to be similar without regard to established principles on comparison of trade marks. Further that, the ruling of the Registrar does not reveal that any comparison was undertaken. It was argued that the two trademarks are not similar in visual terms as one consists of one word and a logo whilst the other consists of two words and a logo. Therefore, she argued, it is highly unlikely that a reasonable and circumspect consumer would confuse one trade mark for the other in the course of trade.

On the issue of phonetic similarity counsel defined the phrase phonetic as “relating to spoken language or speech”. This was in accordance to

Websters Third New International Dictionary of English Language by Philip Babcock.

It was argued that phonetic similarities relate to the similarities in sound between the words being compared. Further that in this case even though the two marks contain the word "tiger" it is not correct to take part of the mark "Tiger Brands" and compare it with the mark "Tiger" without considering both trademarks as a whole. She therefore submitted that there is no similarity between the two trademarks when each is spoken as a whole.

Counsel proceeded to argue ground 2 of the Appeal and submitted that when the comparison is being made for purposes of determining likelihood of confusion, it should not be confined to the appearance or sound of the relevant mark. The test she argued is an objective test that takes into consideration all the relevant factors including the similarity of goods to which the trademarks are to be applied and the impression created in the mind of an average consumer. Counsel made reference to **Kerly's Law of Trade Marks and Trade Names** in articulating the foregoing argument. She then discussed the cases of **Lloyd Schuhfabrick Meyer & Co. GMBH vs. Khijesn Handel B (5)** and **Trade Kings Limited vs. Unilever Plc & Others (3)** with respect to the standard to be applied in determining what constitutes the average consumer and the need to take into account all relevant factors in determining similarities.

Counsel also considered the provisions of section 17(1) and sections 8 and 9 of the Act. It was argued that it is clear from the provisions of these sections that the Registrar's task is not limited to comparing the trade marks but also extends to examining the goods to which the trade marks apply. Further that, the trade mark registration and protection is given in respect of particular goods or classes of goods. It does not give a blanket protection to a proprietor to all goods falling in a class under the classification. As a consequence of this, counsel argued that the fact that the Respondent's trade mark is registered in

class 30 does not give the Respondent a monopoly over all goods falling in that class. Counsel demonstrated that in class 30 goods ranged from cocoa, sugar, vinegar and ice. The intention of the Act, she argued is not the creation of a blanket protection. In articulating the foregoing arguments counsel referred to ***Kerly's Law of Trade Marks and Trade Names***, section 99 of the Act and the case of ***Australia Wine Importers TM (9)***. As a consequence of this, counsel argued that it is not legally correct to describe flour and biscuits as the same goods or goods of similar description. Further that, the Respondent's trademarks number 73/2006 "Tiger Brands & Tiger device" in class 30 are in respect of coffee, tea, cocoa, sugar, bread, pastry and confectionary, ice, honey, treacle, yeast, baking powder, salt, mustard, vinegar, sauces (condiments and spices). On the other hand, the Appellant's trademarks are in class 30 is in respect of biscuits and wafers which although falling in the same class according to the nice classification, do not fall under the particular goods or class of goods in respect of which the Respondent's trade mark is registered. She concluded by submitting that: taking into consideration the dissimilarities pointed out between the two trademarks; the difference in goods specified in the Appellant's applications and the registered trade mark; and the method of distribution of the goods to which they relate, the Registrar erred when he upheld the opposition.

As regards ground 3 counsel restated the arguments made earlier regarding the test that the Registrar should apply when rejecting an application; and the need to guard against creation of unnecessary monopolis.

It was also argued that in deciding on the distinction of the mark, courts offer protection to more distinctive marks such as invented words as opposed to words or names of people or things. Counsel discussed section 14 of the Act and argued that the Registrar or a court on appeal should strictly abide by the provisions of the section. Further that, the only departure from the section is in instances where the

registered trademark is well known which the Respondent has not proved. It was argued that the evidence led in this regard by the Respondent is in relation to its trade mark being well known outside Zambia. This evidence, counsel argued is irrelevant because the protection provided by registration of trademarks is territorial in nature.

As regards ground 4, counsel argued that there is no reasoning or analysis of the facts contained in the ruling of the Registrar. This it was argued is contrary to the decision of the Supreme Court in the case of ***Minister of Home Affairs and The Attorney General vs. Habasonda (suing on his own behalf and on behalf of Southern African Centre for the Constructive Resolutions of Disputes) (10)*** which it was argued stresses the need for a trial court to review evidence and analyse arguments and illustrate the reasoning of the court on the facts and applicable law. It was argued that the Registrar's ruling merely reproduces the affidavit evidence and submissions and does not properly review the evidence and findings. Further that, although the Registrar correctly set out the principles of law, he failed to show the basis for his conclusion that the trademarks are similar as to cause likelihood of confusion to the customer. It was also argued that he did not analyse the undisputed evidence on record which warranted the invoking of the provisions of section 17(2) of the Act.

As regards ground 5 counsel argued that there are special circumstances that exist to warrant the application of section 17(2) of the Act. It was argued that the Respondent's trade mark is used as a manufacturer's name and it is at the back of the packet. She argued that in contrast to this, the Appellant's trade mark is the main trade mark. Further that, all the products that the Respondent has exhibited to its affidavit have different trademarks. As such, the Respondent does not use the "TIGER BRAND" trade mark on any of its products, that are so exhibited.

Counsel prayed that the appeal should be allowed.

In her argument counsel for the Respondent, Ms M. Masengu advanced submissions on each ground.

As regards ground 1, counsel argued that the Registrar was on firm ground when he held that the Respondent's trade mark Tiger Brands Logo and that of the Appellant, Tiger Label are so similar as to likely cause confusion to the average consumer. She argued that the Act disqualifies from registration any trade mark that is similar or nearly resembles another trade mark that is likely to cause confusion with another or cause deception. It was argued that sections 9, 16 and 17 of the Act are instructive on this issue.

Counsel argued that the phrase "confusing similarity" is not defined in the Act and neither is there precedent which defines the phrase. However, she argued that **Halsbury Laws of England**, Volume 28, 4th edition at paragraph 70 provides guidelines as to what constitutes "confusing similarity" and the test for determining whether there is likelihood of confusing. Further that, the case of **Leoparding Consulting (Pty) Ltd vs. Apple Inc (11)** states in this regard that if people, when considering the mark of the applicant, merely wonder whether the goods have not perhaps been manufactured by the opponent, then the mark applied for is one which is likely to cause confusion.

Counsel submitted that the authorities cited, indicate that trademarks may be similar in three respects, namely: visually; phonetically; or conceptually. Further that, in accordance with the case of **Trade Kings vs. Unilever, Plc & Others (3)** the most important of these three categories is the visual consideration.

Relating the foregoing to this case, counsel argued that the points of resemblance which the Registrar considered were as follows:

- 1) That both trademarks when looked at as a whole, constitute the word "TIGER" which is prominent, notwithstanding that the Respondent's trade mark includes the word "BRANDS".

- 2) Both trademarks have a logo which consist of the tiger animal which is displayed on the products for which the trade mark is registered in respect of both parties as is evident from pages 109 to 110 and 51 of the record of appeal.
- 3) And visually and phonetically, both trademarks having the prominent word TIGER in them, nearly look and sound the same.

She argued that the only distinction is that the Appellant's trade mark only has one word whilst the Respondent's has two words. It was argued that based on these three points of resemblance, which outweigh the points of distinction, the two marks are not only identical but are infact similar. As a consequence of which there is reasonable probability or likelihood of the average consumer confusing the Respondent's trade mark with the Appellant's.

Counsel discussed the case of ***Trade Kings vs. Unilever Plc & Others (3)*** further and argued that the Supreme Court reasoned that similarity in marks and goods is but one factor that ought to be considered and that the most preferred approach is to consider all factors surrounding the purchase of the products. Further that, the standard against which the potential confusion should be gauged is that of an average consumer which is, whether the ordinary sensible Zambian consumer would be confused by the use of the two marks. She argued that the average consumer has been defined in the case of ***Intel Corporation Ltd. vs. CPM United Kingdom Ltd (12)*** as a reasonable sensible individual familiar with a number of trade marks in different fields, some of which may resemble trade marks in other fields. This definition she argued was cited with approval by the Supreme Court in the case of ***Trade Kings vs. Unilever Plc & Others (2)*** and in doing so the court cautioned that the average consumer should not be regarded as a retard or a fool; yet not too clever or too careful. Counsel argued further that, allowance should be given to the fact that a consumer has an imperfect memory and cannot therefore have a photographic recollection of a mark. Reliance in this regard was made on the cases of ***Aristoc Ltd vs. Rysta Ltd (13)*** and

Fisons Plc vs. Norton Healthcare Ltd. (16). She also discussed the holding in the case of **Lloyds Schuhfabrik Meyer & Co. GMBH vs. Klijsen Handel BV (5)** and concluded that the average consumer would be inclined to remember general impressions of the marks which for most of the part consist of the logo tiger and word tiger. That it is very unlikely that the average consumer will take time to differentiate between the Respondent's mark and that of Appellant's because the word tiger is pronounced in both. As a consequence of this, counsel submitted that the overall impression of the marks as a whole do not give a clear distinction to eliminate the danger that they are confusingly similar. It was argued that the Registrar took these factors into account when he held thus:

"... 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 the opponents mark. It is thus arguable that there are, conceptual similarities."

As regards ground 2 counsel argued that the Registrar was on firm ground when he decided that "likelihood of confusion" is synonymous with 'reasonable probability.' It was argued that the Registrar's finding in this regard was therefore correct especially in view of the holding in the South African case of **Cowbell AG vs. ICS Holdings Ltd (6)** in which the court found that it is sufficient to find likelihood of confusion if there is reasonable probability of one being confused. Counsel argued further that, the Registrar did consider all relevant factors in determining the likelihood of confusion. This she argued is evident from the Registrar's findings at page 13 of his ruling that it is settled at common law that in determining whether marks are confusing similar regard must be had to all the surrounding circumstances. She argued further that, after making the said finding, the Registrar proceeded to compare the trade marks in question and established that the two trade marks had conceptual similarities. Arising from this she argued, the Registrar held that there was a reasonable probability of the average consumer confusing the

Respondent's mark with that of the Appellant's. Further that, the ordinary consumer may therefore mistakenly pick one product for the other.

As regards the issue of similarities, counsel argued that it is one of the factors that must be taken into account in determining confusing similarity in accordance with sections 16 and 17 of the Act. Further that, the classification of trade marks is merely for administrative purposes and does not give blanket protection to a proprietor of all goods falling in a class under the classification. The registration of a trade mark she argued further, gives exclusive right to protection in respect of the specific goods or description of goods for which the trade mark is registered.

As regards the test for determining whether goods are of the same description, counsel argued that the case of the ***Re Jellineks Application (15)*** lays down the test thus: regard should be had to the nature and composition of the goods; the respective uses of the articles; and the trade channels through which the commodities are respectively bought and sold. The test she argued was approved in the cases of ***Daiquri Rum Trade Mark (16)*** and ***British Sugar Plc vs. James Robertson & Sons (17)***. Counsel argued that the specification of goods to which the Respondent's trade mark TIGER BRANDS logo is registered specifically includes "flour and preparations made from cereal" as well as "pastry and confectionery." On the other hand, the specification of goods in respect of which the Appellant's seeks protection are "biscuits, wafers,". She argued that by virtue of the registration, the Respondent has the exclusive right to use the TIGER Brands logo for any "preparations made from cereals." This she argued does not offer a blanket protection to the Respondent but merely offers protection in respect of the particular description of goods which is "flour and preparations made from cereals." Counsel argued that considering the nature and composition of the goods of the Appellant and Respondent, biscuits and wafers which the Appellant intends to protect are specifically included in the specification of goods of the respondent's trade mark, Tiger Brand logo as preparations from cereal. This it was argued further, has been demonstrated in the

Respondent's affidavit sworn by one Ian Wilson Martin Isdale and is in line with the test laid down in the ***Re Jellinek's (15)*** case.

Counsel submitted further that by virtue of the Respondent's right to use its trade mark in respect of preparations from cereals, it has in the recent past extended its cereal products to include snacking options such as snack bars, chocolate bars, biscuits and other confectionaries. These products she argued are distributed in Zambia in super markets such as Pick 'n' Pay, Shoprite and Spar retail chains. In these shops, she argued these products are usually displayed within the aforesaid retail stores alongside or in close proximity to products such as chocolate bars, biscuits and wafers, which include the Appellant's products. Owing to this counsel argued, the likelihood of an ordinary consumer being deceived or confused with the obvious similarities between the products is extremely high. The registration of Tiger labels is therefore likely to cause confusion and deceive ordinary sensible members of the Zambian public. As a consequence of this, the registration of the trade mark has the effect of contravening sections 16 and 17 of the Act, it was argued.

In concluding arguments on this ground counsel submitted that with products such as snack bars, chocolates, biscuits and wafers, the average Zambian rarely has the time to make comparisons between the two products bearing two different brands. For this reason she argued, the risk of deception is increased.

As regards ground 3 counsel submitted that the Registrar was on firm ground when he applied the test of reasonable, probability to the trade marks. She argued that ***Halsbury's Laws of England Volume 48, 4th edition*** at paragraph 71 is on registration of trade marks in respect of dissimilar goods. It was argued that a trade mark which is similar to an existing trade mark but relates to dissimilar goods will not be registered if the earlier one in time has established a reputation in Zambia. She argued that the Respondent's TIGER BRANDS Logo has been in existence in Zambia since 2006 and has sold various products bearing its trade mark.

As regards ground 4, counsel argued that the Registrar clearly based his ruling on the principles of law that he ably explained when he held that the Appellant's trade mark was confusingly similar with that of the Respondent. Further that, the Registrar correctly cited the various principles to be taken into account and reminded himself that all relevant considerations must be borne in mind when determining whether a mark is confusingly similar to an existing one, being the basis for rejecting registration under sections 16 and 17 of the Act.

As regards ground 5, counsel argued that the Registrar was on firm ground when he rejected the appellant's alternative prayer for registration of the trade mark under section 17(2) of the Act. It was argued that the section gives the discretion to the Registrar or a court on appeal to decide whether or not to invoke the said provision. Further that, the Registrar was on firm ground when he found that special circumstances did not exist in this case to warrant the invoking the provisions of section 17(2).

Counsel concluded her submission by praying that the appeal should be dismissed.

I have considered the arguments by counsel and the record of proceedings before the Registrar. The gist of this appeal lies in determining whether the finding by the Registrar that the TIGER Label trade mark is confusingly similar to the TIGER BRANDS trade mark to warrant his refusal to register it correct. This is the issue that I intend determining by examining the two trademarks and applying the appropriate test and concluding whether or not the two are confusingly similar so as to deceive the average consumer. As a consequence of this I will not deal with the grounds of appeal as they have been presented individually but will consider them all at once. It is important that I also mention that there appears to be confusion as to the Respondent's trade mark name. The Registrar in his ruling referred to it only as TIGER, while counsel have variously referred to it as TIGER, TIGER BRANDS and TIGER BRANDS LOGO. The Respondent in its notice of opposition referred to it

as TIGER. It is important that I identify what name it actually goes by if I am to do justice in this case.

A perusal of the affidavit of one Ian Wilson Martin Isdale which is at page 50 of the record of appeal reveals that the Respondent's trade mark name is TIGER BRANDS. This is confirmed by the details at page 51 of the said record where the mark and registration number ZM/T/2006/730 are depicted. The other affidavit by the same deponent which is at page 57 also confirms this at exhibits "IWMI4" at page 69, "IWMI6" at page 73, "IWMI8" at page 77 and "IWMI10" at page 81 which are pictures of the Respondent's products bearing the trade mark. I will therefore, hereinafter refer to it as TIGER BRANDS.

Before I undertake the task I have explained in the preceding paragraphs it is important that I define the meaning of the phrase trade mark and what purpose registration of trademarks serves. It is necessary that I proceed in this manner because it will have a bearing on the decision or conclusion I will arrive at. I will also discuss sections 16 and 17 of the Act which have been cited repeatedly by the parties.

The phrase "trade mark" is defined in section 2 of the Act as follows:

"... a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, ..."

Similarly, ***Black's Law Dictionary*** by Bryan A. Garner defines trade mark at page 30 as:

"A word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of other. The main purpose of a trade mark is to designate the source of goods or services. In effect, the trade mark is the commercial substitute for one's signature."

(The underlining is the court's for emphasis only.)

The important portions in the definition are those that I have underlined which essentially set out the purpose that a trade mark serves. Which is that, it is the connecting factor between the goods and the producer of the goods. This connection is in the course of trade of such goods and as such the mark is the person's identification mark in the market where the goods are traded. As a consequence of this, the mark assists the customers identify their preferred choice of goods which are labelled as such with such mark or signature.

I now turn to discuss sections 16 and 17 of the Act. Section 16 of the Act states as follows:

" 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.

(The underlining is the court's for emphasis only)

In explaining the definition of the phrase trade mark I did indicate that its purpose is to assist customers to easily identify their preferred choice of products. As such, the protection that section 16 offers, as indicated by the portions I have underlined, is to ensure that the market is free from similarly presented or packaged products that are likely to cause confusion. This is done by preventing the registrar from registering a mark that is likely to cause confusion in the market.

As regards section 17 it reads as follows:

"1. 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 resemble such a trade mark as to be likely to deceive or cause confusion.

2. In the case of honest use or other special circumstances which, in the opinion of the Registrar, or the High Court in the event of 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 nearly resemble each other in respect of the same goods or description of goods by more than one proprietor subject to such conditions and limitations, if any, as the Registrar or the High Court may think it right to impose.”

I have not quoted subsection (3) of section 17 because it is not relevant to this application. I shall therefore not discuss it.

Subsection (1) prohibits the registration of a trade mark in respect of any goods, where that particular trade mark is identical to a trade mark that is already registered and belongs to another proprietor of the same goods. The essence of this is protection to a trade mark that is already registered. On the other hand subsection (2) provides an exception to subsection (1) where circumstances exist for the Registrar or the High Court on appeal to exercise its discretion.

Having defined the phrase trade mark and stated its purpose and also discussed sections 17 and 18, I now turn to describe or explain what my role is as an appellate court in determining this appeal. My task has been ably spelt out in the holding in the case of ***Trade Kings Limited vs. Unilever Plc and 3 Others (3)***. In the said case Ngulube, C.J. (as he then was) had this to say at page 16:

“In Trade Mark cases, it must always be kept in mind that the actual issue is not whether or not the Judge would or would not have personally been deceived, but whether or not after hearing the evidence comparing the articles and having had all the similarities

pointed out, the true conclusion is that the ordinary average customer or retail dealer is likely to be deceived."

Quoting from the case of **Clarke vs. Sharp (18)** Ngulube, C.J. (as he then was) stated further as follows:

"... it is obvious that the judgment of the eyesight is a most important, if not the most important element in its determination, so much so that, there are many cases in which it practically determines the case and that, notwithstanding the views of many witnesses and the most careful and elaborate discussion of the difference of opinion. On the other hand, there are cases in which the evidence satisfies one that the eyesight alone and unguarded, misleads. It is necessary to consider the nature of the article sold, the classes 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. A man may be entitled to use every single dissected item of the whole, and any of such items, and yet be disentitled to use the whole; being the items arranged in a particular form or manner. Another matter of vital importance to be considered is whether there is, or is not, some essential points of difference or resemblance which overcomes or establishes the effect of other points of resemblance i.e. how much of the matter complained of is common to the world, how much to the trade in other similar articles, and how much to the trade in the specific commodity; colour, shape, form, originality of arrangement, all these have to be considered; but the ultimate decision must become to, having

regard to all considerations, as a matter of judgment on the question of fact."

What is clear from the two excerpts from the judgment is that the test for determining similarity is very broad. Put simply however, it can be broken down as follows:

- 1) *To hear the evidence;*
- 2) *Compare the articles; in doing so ascertaining;*
 - 2.1 *whether or not there is a likelihood of the similarities deceiving the average customer;*
 - 2.2 *whether or not there are points of dissimilarity;*
 - 2.3 *what is the collective effect of the findings in 1 & 2, above*
- 3) *whether or not there is some essential point of difference or resemblance which overcomes or establishes the effect of the other points of resemblance and in so doing, determine;*
 - 3.1 *how much of the matter complained of is common to the world;*
 - 3.2 *how much of the matter complained is common to the trade in other similar articles;*
 - 3.3 *how much of the matter complained of is common to the trade in the specific commodity i.e. is it the colour, shape, form or originality of arrangements;*

I will now deal with these tests in the order they are presented in the preceding paragraph. As regards test 1, I have heard and considered the evidence of both parties. It is contained in the records of appeal in the form of affidavit evidence and other documentary evidence. The affidavit evidence as I have demonstrated above, is by Ian Wilson Martin Isdale, for the Respondent and Rahim Viram, for the Appellant. This evidence has been summarized in the earlier part of this judgment. On the other hand, the documentary evidence comprises exhibits to the affidavits. I have

considered the evidence as a whole and as such able to make a determination in the matter.

I now turn to test number (2) which is comparing the articles. The comparison is a two step task because the complaint relates to both the names or wording, "TIGER BRANDS" (belonging to the Respondent) and "TIGER Label" belonging to the Appellant, and the actual logos for the two.

As regards the first step, it is obvious that both names have the word TIGER in them and it is the prominent feature in the name because the words that follow both names are fairly common, that is to say the words "Brands" and "label". Further, by definition the two words more or less mean same thing. Brand, from which Brands is derived from is defined at page 119 of **Blacks Law Dictionary** as:

"a name or symbol used by a seller or manufacturer to identify goods or services and to distinguish them from competitor's goods or services; the term used colloquially in business and industry to refer to a corporate or product name, a business image, or a mark, regardless of whether it may legally qualify as a trade mark."

Whilst label is defined at page 890 as follows:

"An informative display of written or graphic matter, such as a logo, title, or similar marking affixed to goods or services to identify their source."

The meaning of these two words is therefore that, they are identification marks or signatures that define the parentage of the product they relate to. In my considered view, in view of the prominence of the word "TIGER", which has the effect of defusing the other words that follow, which are fairly common words, I find that there is similarity in the names TIGER BRANDS and TIGER LABEL such that there is a likelihood of the similarities deceiving the average customer.

As regards the second step which is an examination of the logos, the Respondent's is at page 51 of the record of appeal while the Appellant's is at pages 109 and 110. Both logos bear the animal tiger mark, they are therefore similar in this respect. The dissimilarity is in the posture that the tigers have taken in the two logos. That is to say, in the Respondent's logo, the tiger appears to be in a position that suggests that it is moving towards one as he views it, whilst in the Appellant's logo it appears to be stationary. One is able to discern this difference after a very critical examination of the two logos, not the casual or fleeting glance an average customer gives to products.

As a consequence of what I have stated in the preceding paragraphs I find the two trademarks are similar to the extent that the likelihood of an average consumer being confused by the two trademarks is high.

Considering the points of dissimilarity, these lie in the words that follow the word TIGER in both names. These words are BRANDS and LABEL respectively and since they are spelt differently they are pronounced differently.

The dissimilarities I have stated in the preceding paragraph do not however, in my considered view, result or have the effect of causing a significant departure from the main purpose attached to the name which is contained in the first word "TIGER". The words in issue are fairly common words and are not distinctive enough to cause or bring about a significant distinction in the names they form a part of. The dissimilarities therefore, do not diffuse the similarities.

The collective effect of my findings under tests (1) and (2) is essentially that the similarities in the two names are such that we cannot eliminate the chance of the average customer being deceived and thereby disentitle him or her to their preferred choice of product.

As regards test (3) which is a determination of whether there is some essential points of difference or resemblance which overcomes or establishes the effect of the other points of resemblance, I shall begin by

first examining how much of the matters complained of are common to the world. The main complaints by the Respondent is that the names are similar with emphasis on the word TIGER. It is also contended that the products for which the trade mark is required by the Appellant, being biscuits and wafers are some of the products that the Respondent already uses its mark for.

The word TIGER is derived from the animal species of a tiger and it is therefore a very common name. As for the products, biscuits and wafer for which the mark is intended, these too are very common. The significance of this test and commonality implies that the possibility of a conflict is high.

I now turn to determine how much of the matter complained of is common to the trade in other similar articles. It is common cause, and as has been established by the undisputed evidence of the Respondent's witness, that biscuits and wafers are commonly traded. These products, as has been demonstrated are common in Pick 'n' Pay, Spur and Shoprite which are amongst the most popular supermarkets. The significance of this test is that it demonstrates the high chances of an average customer picking up a product as one of the parties' believing it to be the product of the other. I have in the earlier part of this judgment when defining the phrase trade mark, stated that the purpose of a trade mark is to identify the source or owners of products so that the customer can identify his or her preferred choice of product. This is for purposes of eliminating confusion.

As regards how much of the matter complained of is common to the trade in the specific commodity, this has adequately been dealt with in the preceding paragraph.

Therefore, having regard to all the considerations I have made in the preceding paragraphs, I can only come to one inescapable conclusion being that the average customer of the retail dealers is likely to be deceived that the Appellant's intended trade mark is that of the Respondent. In arriving at this conclusion I have considered the decision of the Registrar when the matter came up before him at first instance. I

find that his decision cannot be faulted because he clearly considered the evidence, set out the law and applied the law properly to the issues before him. He also considered the arguments by the two sides and examined the two trademarks. This can be discerned from the summary of the proceedings before him and the findings he made that I have set out in the earlier part of this judgment. I therefore dismiss the arguments made on all the five grounds by the Appellant that the Registrar erred at law and in fact as regards similarity of the two trademarks and that he did not review the evidence or apply the law and justify his findings.

I have also considered the argument made by counsel for the Appellant under ground 1 regarding visual and phonetic similarity. She did submit that the comparison should not involve an element by element comparison such that a part of one trade mark is compared with the other trade mark, so that one word is compared to part of the other without considering the overall appearance or sound. In articulating this argument she referred to the case of **William Baileys Application (9)** in which she argued Farwel, J stated as follows:

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

I agree with the argument by counsel and indeed the decision by Farwel J. I may appear to have fallen prey of this sound argument by counsel and reasoning by Farwel, J when I considered test number (2) of comparing the two trade marks names when I separated the first word TIGER on both trade marks from the other words at page 26 of this judgment. In my considered view, I did not offend the arguments by counsel or indeed the sound principle laid down by Farwel, J because I applied the test laid down in the case of **Plascon-Evans Paints Ltd vs. Van Reibeeck Paints (Pty) Ltd (19)** in which the following guideline was laid down in making comparisons of marks:

“The comparisons must be made with reference to the sense, sound and appearance of the marks. The marks must be encountered in the market place and against the background of relevant

surrounding circumstances ... *If each of the marks contains a main or dominant feature or idea the likely impact made by this on the mind of the customer must be taken into account.*"

(Underlining is the court's for emphasis only)

In my analysis of the two marks I did find that the word TIGER is the prominent feature. Further, the word and indeed animal tiger is (and to use the words from the quotation), the "main or dominant feature" which in my considered view, has a major impact on the mind of the average customer in the market place. I have therefore, in so finding not departed from the principle in the **William Baileys Application (9)** case.

It is also important for me to point out that I have relied on the **Plascon - Evans Paints (19)** case although it is a South African case because it is quoted in the book by LTC Harms entitled **The Enforcement of Intellectual Property Rights: A Case Book**. The said book is a compilation of cases on intellectual property and approved by the World Intellectual Property Organisation (WIPO) which is a worldwide regulator on intellectual property law. Further, the scope of the book in the introduction section clearly indicates that the judgment's referred to are from both common law and civil law jurisdictions. Zambia being a common law jurisdiction, the book and authorities contained therein can safely be applied to this country especially that the book reminds the reader that the difference between the substantive provisions of IP laws in common law and civil law countries are relatively small (c.f. page 10 of the text).

In view of the findings I have made in the preceding paragraphs, I find no reason to fault the Registrar's decision and that if he had decided otherwise, the provisions of section 16 and 17 of the Act would have been contravened.

I now turn to consider the Appellant's alternative argument that this is a proper case for invoking the provisions of section 17(2). It has been argued under ground 5 that special circumstances exist which warrant

registration of the Appellant's mark under section 17(2). These special circumstances it has been contended are: that the Respondent uses its trade mark as a manufacturer's name and it is at the back of its products' packets; the Appellant's trade mark on the other hand is the main trade mark; all products exhibited by the Respondent have different trademarks; and that the Respondent does not use its trade mark on any of its products as exhibited in its supporting affidavits.

Section 17(2) which the Appellant has called to its aid under ground 5 has been quoted and explained in the earlier part of this judgment. Suffice to say that the section is a two step section. The first step is that the Appellant in this case must satisfy that special circumstances exist to permit the registration of its trade mark despite its being identical or nearly resembling the Respondent's. The second is that, I must be satisfied that this is a proper case for invoking the provisions of section 17(2). I have considered the arguments advanced by counsel for the Appellant under ground 5 which are an attempt at showing that special circumstances exist. By and large these arguments are allegations of fact which facts were not adduced in the affidavit and documentary evidence. They are therefore, in my considered view, not sufficient to convince me that there are special circumstances in this case. The Appellant's fate is compounded by the fact that the actions by counsel for the Appellant under ground 5 of laying before me these facts, amount to testifying at the Bar which is not permissible.

In view of my findings in the preceding paragraphs there is therefore nothing laid before me upon which I can address my opinion on.

By way of conclusion I find no merit in the appeal and accordingly dismiss it. In doing so I award the Respondent costs of this action, to be agreed in default taxed.

Leave to appeal is granted.

Dated this 7th day of April, 2015

NIGEL K. MUTUNA
HIGH COURT JUDGE