

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 10 March 2017

Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Herbal Zone v Infitech Technologies [2017] ZASCA 8

Herbal Zone CC, a South African entity, claimed that Infitech Technologies and a related company were passing off a product directed at enhancing male sexual performance as their own product Phyto Andro for Him. The competing product was being marketed in similar packaging to that of Herbal Zone and under the same name. It also published certain advertisements and a pamphlet to its customers saying that the competing product was counterfeit. This prompted Infitech and its associates to seek and obtain an interdict against Herbal Zone on the basis that this claim was defamatory.

The SCA today dismissed an appeal against the judgment of the Western Cape, Cape Town, Division of the High Court dismissing the claim based on passing off. It held that Herbal Zone had failed to prove that the necessary reputation in the product vested in it as opposed to a Malaysian company Herbal Zone International Sdn Bhd. However it upheld Herbal Zone's appeal against the interdict. Such an interdict constitutes a prior restraint on free speech and can only be granted where the party seeking the interdict can show that it has both a clear right and an infringement of that right. It was for Infitech to show that the

statement that its product was counterfeit was defamatory and that Herbal Zone did not have a defence that the publication was true and made in the public interest. This it had failed to do. A fair order in those circumstances was that all parties should pay their own costs.