



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### JUDGMENT

**Reportable**

Case No: 983/2016

In the matter between

**PEPSICO INC**

**APPELLANT**

and

**ATLANTIC INDUSTRIES**

**RESPONDENT**

**Neutral citation:** *PepsiCo v Atlantic Industries* (983/16) [2017] ZASCA 109 (15 September 2017)

**Coram:** Lewis, Cachalia & Petse JJA & Lamont & Rogers AJJA

**Heard:** 28 August 2017

**Delivered:** 15 September 2017

**Summary:** Trade marks: respondent's registered marks TWIST, LEMON TWIST and DIET TWIST inherently capable of distinguishing its soft drinks: such marks not purely descriptive of products or their characteristics: appellant's expungement application correctly dismissed.

Trade marks: appellant's proposed marks, consisting of or incorporating the words PEPSI TWIST, likely to deceive or cause confusion by virtue of similarity to respondent's marks: respondent's opposition to appellant's trade mark application correctly upheld.

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## ORDER

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**On appeal from:** A full court of the Gauteng Division of the High Court, Pretoria (per Louw J, Prinsloo & Meyer JJ concurring), sitting on appeal from a judgment of the Gauteng Division of the High Court, Pretoria (Preller J)

The appeal is dismissed with costs, including those attendant on the employment of two counsel.

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## JUDGMENT

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**Rogers AJA (Lewis, Cachalia & Petse JJA and Lamont AJA concurring)**

### Introduction

[1] The appellant, PepsiCo Inc (PepsiCo), is the registered proprietor in South Africa of various trade marks consisting of or incorporating the words PEPSI and PEPSI-COLA. The respondent, Atlantic Industries (Atlantic), a wholly owned subsidiary of The Coca-Cola Company, is the registered proprietor in South Africa of the trade marks TWIST, LEMON TWIST and DIET TWIST. Both parties' registrations are in class 32, a class which includes 'mineral and aerated waters and other non-alcoholic drinks'.

[2] In 2006 PepsiCo applied for the registration, also in class 32, of a word mark PEPSI TWIST and of a device mark incorporating the words PEPSI TWIST. The representation of the device mark in the record is monochrome though I assume there is no colour limitation.<sup>1</sup> Below is a monochrome depiction of the proposed device mark as it would appear on a canned beverage (the small text above the words 'Pepsi Twist' does not form part of the proposed mark):

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<sup>1</sup> Section 32 of the Trade Marks Act 194 of 1993.



[3] Atlantic opposed the registrations. PepsiCo countered by applying for the expungement of Atlantic's marks. In accordance with a request by the parties, the Registrar of Trade Marks referred the matter to the Gauteng Division of the High Court, Pretoria, for determination. On 5 May 2014 that court (per Preller J) dismissed PepsiCo's application for the expungement but granted PepsiCo's application for the registration of its PEPSI TWIST marks. Each side appealed to a full court against their respective defeats. On 24 May 2016 the full court upheld Atlantic's appeal and dismissed PepsiCo's cross-appeal. Having obtained special leave, PepsiCo appeals to this court against the whole of the full court's judgment.

### **Expungement of Atlantic's marks**

[4] It is convenient to start with PepsiCo's expungement application. Section 24 of the Trade Marks Act<sup>2</sup> entitles an interested party to apply to have the trade mark register rectified inter alia by removing any entry 'wrongly made in or wrongly remaining on' the register. PepsiCo's expungement application asserted that Atlantic's marks wrongly remained on the register because they fell foul of ss 10(2)(a) and 10(2)(b). Section 10 provides that certain marks shall not be registered as trade marks or, if registered, shall be liable to be removed from the register. Sections 10(2)(a) and (b) apply to a mark which:

'(a) is not capable of distinguishing within the meaning of section 9; or

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<sup>2</sup> Act 194 of 1993.

(b) consists exclusively of a sign or an indication which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services’.

[5] Section 9(1) requires that in order to be registrable a mark must be capable of distinguishing the goods or services of the proprietor from the goods or services of another person. Section 9(2) states that a mark shall be considered to be capable of so distinguishing if, at the date of application for registration, it is inherently capable of so distinguishing or if it is capable of so distinguishing by reason of prior use. By virtue of the proviso to s 10, a registered mark is not liable to be removed if, by the date of the expungement application, it has become capable of distinguishing within the meaning of s 9.

[6] PepsiCo’s case on ss 10(2)(a) and (b) rests on the same essential contention, namely that the word ‘twist’ is a common English word which is merely descriptive of the kind, quality or characteristics of the goods to which Atlantic’s marks relate and is not inherently capable of distinguishing its beverages from those of other proprietors. In support of these contentions PepsiCo referred to the *New Shorter OED*<sup>3</sup> which includes, among the meanings of ‘twist’ as a noun, ‘a curled piece of lemon etc. peel used to flavour a drink’ and ‘a drink consisting of a mixture of two different spirits or other ingredients, such as gin and brandy etc’.

[7] The courts below were right to reject these contentions. ‘Twist’ as meaning a beverage of mixed ingredients is described by the *New Shorter OED* and in the unabridged *OED*<sup>4</sup> as slang. In the 1961 edition of Eric Partridge’s dictionary of slang,<sup>5</sup> this slang was said to be obsolete. It does not appear in other dictionaries of slang.<sup>6</sup> This obsolete British slang is likely to be known to very few, if any, South Africans, even those whose first language is English. Those familiar with cocktails may know that ‘twist’ can mean a curled piece of citrus peel though the word would

<sup>3</sup> *The New Shorter Oxford English Dictionary*.

<sup>4</sup> *The Oxford English Dictionary* 2 ed (1989).

<sup>5</sup> Partridge *Dictionary of Slang and Unconventional English* 5 ed (1961). This remained the recordal in the last edition (8 ed, 1984). The entry was omitted altogether in Dalzell & Victor *The New Partridge Dictionary of Slang and Unconventional English* (2006).

<sup>6</sup> See *The Oxford Dictionary of Slang* (1998) and Duckworth’s online *Dictionary of Slang: English Slang and Colloquialisms Used in the United Kingdom*.

not be so used in isolation – one would speak of ‘a twist of lime peel’ etc.<sup>7</sup> ‘Twist’ in this sense would at most create a mental association between the word and a refreshing or exotic drink.

[8] It is probable that for most South African consumers the word ‘Twist’ as applied to Atlantic’s beverages is an arbitrary brand name without meaning. Like a made-up word, a common word which is arbitrary when applied to a particular product is the exemplar of a mark inherently capable of distinguishing.<sup>8</sup> Such words are to be contrasted with descriptive words. It is a common feature of trade mark legislation that purely descriptive marks may not be registered. The reason is that other traders should not be barred from using them in relation to their goods. Lord Parker in *W & G Du Cros*<sup>9</sup> formulated the test as being ‘whether other traders were likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark . . . in connection with their goods’. More succinctly, in order for a word to be really distinctive of a proprietor’s goods it ‘must generally speaking be incapable of application to the goods of anyone else’ (see this court’s decision in *On-line Lottery*<sup>10</sup> quoting with approval a dictum of Lord Russell in *Shredded Wheat*<sup>11</sup>). For as Lord Simonds said in *Copper Works*:<sup>12</sup>

‘Paradoxically perhaps, the more apt a word to describe the goods of a manufacturer, the less apt it is to distinguish them: for a word that is apt to describe the goods of A, is likely to be apt to describe the similar goods of B.’

[9] In the High Court of Australia, Kitto J in *Clark Equipment*<sup>13</sup> expressed the same idea well when he said that the question whether a mark is adapted to distinguish should be tested

‘by reference to the likelihood that other persons, trading in goods of the relevant kind and being actuated only by proper motives - in the exercise, that is to say, of the common right

<sup>7</sup> This is borne out by the illustrative quotations given in the unabridged *OED*.

<sup>8</sup> See eg *Orange Brand Services Ltd v Account Works Software (Pty) Ltd* [2013] ZASCA 158 para 15.

<sup>9</sup> *Registrar of Trade Marks v W & G Du Cros Ltd* [1913] UKHL 588; [1913] AC 624 at 634, cited with approval inter alia in *Joshua Gibson Ltd v Bacon* 1927 TPD 207 at 203 and *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Ltd* 1979 (1) SA 532 (T) at 536G-H.

<sup>10</sup> *On-line Lottery Services (Pty) Ltd v National Lotteries Board & another* [2009] ZASCA 86; 2010 (5) SA 349 (SCA) para 16.

<sup>11</sup> *Shredded Wheat Co Ltd v Kellogg Co of Canada Ltd* [1938] 55 RPC 125 (PC).

<sup>12</sup> *Copper Works application* (1953) 71 RPC 150 at 153.

<sup>13</sup> *Clark Equipment Co v Registrar of Trade Marks* [1964] HCA 55; (1964) 111 CLR 511 para 5.

of the public to make honest use of words forming part of the common heritage, for the sake of the signification which they ordinarily possess - will think of the word and want to use it in connexion with similar goods in any manner which would infringe a registered trade mark granted in respect of it.'

[10] The approach in *Du Cros* and *Clark Equipment* was recently affirmed by the High Court of Australia in *Cantarella*<sup>14</sup> where the following was stated:<sup>15</sup>

'When the "other traders" test from *Du Cros* is applied to a word . . . the test refers to the legitimate desire of other traders to use a word which is directly descriptive in respect of the same or similar goods. The test does not encompass the desire of other traders to use words which in relation to the goods are allusive or metaphorical.'

[11] As I have said, 'twist' is not descriptive of Atlantic's beverages. No trader, acting legitimately and not wishing to take advantage of the reputation of Atlantic's brand, would wish to use the word 'twist' in relation to its soft drinks. To adapt Kitto J's words, such a trader could not honestly say that he desired to apply the word 'twist' to his soft drinks for the sake of the signification which the word ordinarily possesses. If 'twist' has any meaning as applied to soft drinks, it is 'allusive or metaphorical'.

[12] The present case is readily distinguishable from one of the authorities to which we were referred, *Pepkor Retail*,<sup>16</sup> where this court found that the mark THE LOOK in relation to apparel was not inherently capable of distinguishing the proprietor's goods. This was because of a factual finding that in the fashion retail industry the expression 'the look' carried 'the universal ordinary meaning of fashionable or trendy clothing or outfits' rather than being a 'covert or skilful allusion' to such goods.<sup>17</sup>

[13] I am thus satisfied that the mark TWIST, as applied to soft drinks, is inherently capable of distinguishing Atlantic's beverages from those of other

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<sup>14</sup> *Cantarella Bros Pty Limited v Modena Trading Pty Limited* [2014] HCA 48; (2014) 254 CLR 337, particularly paras 70-71.

<sup>15</sup> Para 59.

<sup>16</sup> *Pepkor Retail (Pty) Ltd v Truworths Ltd* [2016] ZASCA 146.

<sup>17</sup> Para 17.

producers and that its registration was not precluded by virtue of its being purely descriptive. It is thus unnecessary to explore whether possible deficiencies when the marks were registered have been cured by subsequent use. I content myself by saying that there is overwhelming evidence that Atlantic and its predecessors have used TWIST widely as a trade mark on millions of cans and bottles of soft drinks and through substantial advertising expenditure. The following statement by Harms JA in *Groupe LFE*<sup>18</sup> concerning the use of the SWARTLAND mark in relation to wine could equally be applied to the present case:

‘The Winery’s wines have been known for many decades as Swartland wines and by no other name (save for the use of the non-distinctive ‘Winery’ suffix). No other wine has been sold under that name. How, under these circumstances, it can be suggested that the mark did not become distinctive is impossible to fathom.’

[14] The courts below were thus correct in concluding that PepsiCo’s expungement application should fail.

### **Registration of PepsiCo’s marks**

[15] PepsiCo’s proposed marks cannot be registered if PepsiCo has no bona fide claim to proprietorship thereof (s 10(3)). And in terms of s 10(14), registration of a mark is prohibited if it is

‘... identical to a registered trade mark belonging to a different proprietor or so similar thereto that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which such trade mark is registered, would be likely to deceive or cause confusion, unless the proprietor of such trade mark consents to the registration of such mark’.

[16] These are the two grounds on which Atlantic opposed registration of the marks. In view of my conclusion on s 10(14) it is unnecessary to consider the scope and applicability of s 10(3).

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<sup>18</sup> *Groupe LFE (SA) (Pty) Ltd v Swartland Winery Ltd & another* [2011] ZASCA 4 para 16.

[17] The proposed mark PEPSI TWIST is not identical to Atlantic's registered marks. The question is whether there is sufficient similarity to create a likelihood of deception or confusion.

[18] Since similar language is used in s 34(1) in relation to infringement, cases dealing with infringement can be consulted for guidance. In *Yuppiechef*<sup>19</sup> this court summarised the test thus:

'What is required is a value judgment on the question of the likelihood of deception or confusion based on a global appreciation of the two marks and the overall impression that they leave in the context of the underlying purpose of a trademark, which is that it is a badge of origin. The value judgment is largely a matter of first impression and there should not be undue peering at the two marks to find similarities and differences.'

[19] There is an inter-relationship between the similarity of the marks and the similarity of the goods to which the marks apply. Lesser similarities in the marks might be counter-balanced by stronger similarities in the goods but ultimately the question remains whether in combination there is a likelihood of confusion or deception.<sup>20</sup> In regard specifically to the goods to which the respective marks are applied, relevant considerations will include (i) the uses of the respective goods; (ii) the users of the respective goods; (iii) the physical nature of the goods; and (iv) the trade channels through which the goods respectively reach the market.<sup>21</sup>

[20] In testing for deception and confusion, courts will usually identify the features, if any, of the respective marks which are dominant. If they share a dominant feature, there is ordinarily a greater likelihood of deception or confusion. As recently affirmed by this court, in the global assessment of the marks 'the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components'.<sup>22</sup>

[21] Here the goods to which the competing marks would be applied are identical. If the proposed marks were registered, PepsiCo would be entitled to use them in

<sup>19</sup> *Yuppiechef Epson Holdings (Pty) Ltd v Yuppie Gadgets Holdings (Pty) Ltd* [2016] ZASCA 118 para 26.

<sup>20</sup> *Mettenheimer & another v Zonquasdrif Vineyards CC & others* 2014 (2) SA 204 (SCA) para 11.

<sup>21</sup> *Mettenheimer* para 13.

<sup>22</sup> *Distell Ltd v KZN Wines and Spirits CC* [2016] ZASCA 18 para 10.



relation to carbonated beverages with similar flavours to Atlantic's carbonated beverages. From the proposed device mark one can infer that PepsiCo intends to apply the proposed marks to a lemon-flavoured carbonated beverage. At any rate, if the marks were registered, their notional fair and reasonable use would include use in relation to a lemon-flavoured carbonated beverage. Such a product might be practically indistinguishable, in taste, from Atlantic's Lemon Twist.

[22] The soft drinks to which PepsiCo would be entitled to apply the proposed marks would be directed at the same consumers who buy Atlantic's soft drinks. The trade channels, too, would be the same – supermarkets, cafes, convenience stores, retail outlets, bars and restaurants. In some instances the beverages might be displayed in close proximity to each other; in other instances an outlet might carry the one product but not the other or might display them apart from each other.

[23] As to similarity in the marks, PepsiCo's proposed marks will incorporate the whole of Atlantic's mark TWIST and part of Atlantic's marks LEMON TWIST and DIET TWIST. In the latter two instances TWIST is the dominant and distinctive feature, LEMON and DIET being purely descriptive. In the case of LEMON TWIST there is an endorsement on the registration that the mark gives no right to the exclusive use of the word 'lemon' in its ordinary signification and apart from the mark. Although there is no similar disclaimer for DIET TWIST, Atlantic could not claim a monopoly on the word 'diet' in relation to beverages.

[24] PepsiCo's proposed marks thus incorporate the sole distinctive feature of Atlantic's marks. Does the insertion of PEPSI before TWIST avoid the confusion which would undoubtedly arise without the insertion? Aurally, the two elements have equal prominence. In their barest written form, PEPSI and TWIST have equal prominence (they each comprise five letters) but in fair and reasonable notional use PepsiCo could choose to give TWIST greater visual prominence than PEPSI. In the device mark, TWIST is more prominent than PEPSI – the font is larger and fancier. And in fair and reasonable notional use Atlantic could depict its mark TWIST in much the same way as the same word appears in PepsiCo's proposed device mark and in any of the ways in which PepsiCo might choose to depict its proposed word mark.

[25] The appellant's contention that PEPSI is the dominant component rests on an assertion that PepsiCo has an existing mark PEPSI which is so widely known that consumers will instantly notice and remember it (I shall call this conceptual prominence). Whether, in making the comparison for purposes of s 10(14), we may have regard to the existence and reputation of PEPSI as a registered mark is doubtful. The appellant's own counsel opened the appeal by submitting that in applying s 10(14) one must simply place the marks side by side in the market place; the court is not entitled to have regard to extraneous matter arising from the actual use of the marks, though the comparison must take account of all fair and normal uses to which the proprietors might notionally put their marks. Although counsel was making this point in support of an argument that in the opposition proceedings we should disregard evidence of Atlantic's use of the TWIST marks, the argument, if sound, applies equally to extraneous matter such as the existence and reputation of the PEPSI mark. That such extraneous matter should be disregarded was certainly the view of Harms J writing for the full court in *Upjohn Company*<sup>23</sup> and he returned to this question, without finally deciding it, in *Cowbell*.<sup>24</sup>

[26] We were not fully addressed on the question and it is unnecessary to decide it because on either approach the result is the same. If, in line with *Upjohn Company*, one were to disregard the existence and reputation of PEPSI as an existing mark, one could not say that PEPSI enjoys greater conceptual prominence than TWIST in the proposed marks. Because TWIST in this context is non-descriptive, it has the same ability as the made-up word PEPSI to be memorable and distinguishing. As I have said, in fair and reasonable use PepsiCo could choose to give more prominence to TWIST than PEPSI. In the proposed device mark, TWIST is visually more prominent than PEPSI though this prominence may be offset to some extent by the non-verbal components of the device.

[27] Assuming, on the same basis, that one must ignore the evidence of the actual use by Atlantic and its predecessors of the TWIST marks, what one cannot ignore is that TWIST is on the register and is thus recognised as being distinctive of

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<sup>23</sup> *The Upjohn Company v Merck & another* 1987 (3) SA 221 (T) at 226H-227D, dealing with s 17(1) of the Trade Marks Act 62 of 1963, the equivalent provision of the current s 10(14).

<sup>24</sup> *Cowbell AG v ICS Holdings Ltd* 2001 (3) SA 941 (SCA) para 17.

Atlantic's beverages.<sup>25</sup> The incorporation of the sole distinctive feature of Atlantic's TWIST marks into the proposed PEPSI TWIST marks as an element with no less prominence than the word PEPSI, and in relation to identical products, is such as to create a likelihood of deception or confusion.

[28] If, on the other hand, the court may take into account the existence and reputation of the PEPSI mark, this means no more than that the average South African consumer would take it for granted that a beverage called Pepsi Twist is a product from the same stable as other Pepsi beverages. While the incorporation of PEPSI into the proposed mark would avoid creating in the minds of ordinary consumers the mistaken belief that Pepsi Twist was produced by a party independent of the Pepsi stable, consumers might be deceived into thinking that, or be confused about whether, the producer of beverages under the name Twist (ie Atlantic) is part of the Pepsi stable. The greater the similarity in the ways in which the producers chose to depict TWIST on their products, the greater the likelihood of this confusion. I have already observed that in fair and reasonable notional use the parties might depict TWIST in similar styles. Having regard to actual use, there is already some similarity in the way in which Atlantic depicts TWIST on its products and the manner in which PepsiCo depicts TWIST in the proposed device mark – in each case the word slants upwards from left to right and the letter 'i' is not capitalised and has a dot above it.

[29] Another relevant consideration is that PEPSI would be regarded by most consumers as a primary identifying mark of all PepsiCo's products. Where a second word is added to a primary mark in order to distinguish the producer's products from each other, the second word has a unique and important function in identifying the product – eg Pepsi-Cola, Pepsi Zero, Pepsi Max, Pepsi Wild Cherry and (if it is registered) Pepsi Twist. In the case of primary and sub-brands, the sub-brand is important to consumers. They will not look for Pepsi products in general but for a particular product. Because Pepsi-Cola was the first and probably still is the most widely sold Pepsi beverage, the word 'Pepsi' on its own would probably be

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<sup>25</sup> *Danco Clothing (Pty) Ltd v Nu-Care Marketing Sales and Promotions (Pty) Ltd & another* 1991 (4) SA 850 (A) at 861G-H; *Lawsa* 2 ed vol 29 para 110.

understood as referring to Pepsi-Cola. For other Pepsi products, the emphasis would fall on the sub-brand, in the present case the TWIST component.

[30] It is not necessary to find that all or most consumers would be confused. It is enough that a substantial number of them are likely to be confused. And the confusion need not be a settled belief that Pepsi is the source of all beverages under the name Twist. It is sufficient that uncertainty on that score would be created in the minds of consumers.<sup>26</sup> In that regard one must remember that the universe of consumers for carbonated soft drinks is large: it includes persons of all ages, the rich and the poor; the sophisticated and unsophisticated. Soft drinks are often bought on a whim. Consumers would not ordinarily subject the bottle or can to careful scrutiny.

[31] One should also bear in mind that consumers will not always have the bottles or cans in front of them when choosing their soft drink. In a bar or restaurant setting consumers would order beverages from a bar attendant or waiter. Because consumers are likely to equate a 'Pepsi' with the well-known Pepsi-Cola beverage, a consumer wanting a Pepsi Twist might drop 'Pepsi' and simply ask for a 'Twist'. I can envisage that a bar attendant or waiter might, in response to a request for a 'Twist', bring the customer either a Pepsi Twist or a Lemon Twist.

[32] The respondent's counsel referred us to *Medion*,<sup>27</sup> a judgment of the European Court of Justice (ECJ), which is particularly apposite. Medion was the registered proprietor of the trade mark LIFE for leisure electronic devices. It brought infringement proceedings in Germany against Thomson for using the mark THOMSON LIFE in relation to leisure electronic devices. The German court referred the interpretation of Article 5(1)(b) of the European Union's Trade Mark Directive to the ECJ. Article 5(1)(b) is similar to our s 10(14). The ECJ distilled the essence of the referring court's question as being:

'whether Article 5(1)(b) . . . is to be interpreted as meaning that where the goods or services are identical there may be a likelihood of confusion on the part of the public where the

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<sup>26</sup> *Roodezandt Ko-operatiewe Wynmakery Ltd v Robertson Winery (Pty) Ltd & another* [2014] ZASCA 173 para 6; *Shimansky & another v Browns the Diamond Store (Pty) Ltd* [2014] ZASCA 214 para 12.

<sup>27</sup> *Medion AG v Thomson multimedia Sales Germany & Australia GmbH* [2005] EUECJ C-120/04.

contested sign is composed by juxtaposing the company name of another and a registered mark which has normal distinctiveness and which, although it does not determine by itself the overall impression conveyed by the composite sign, has an independent distinctive role therein.'

[33] After setting out the general principles on which a comparison should be made for purposes of Article 5(1)(b) – very similar to the principles applied in this country<sup>28</sup> – the ECJ continued (citation of authority omitted).<sup>29</sup>

'However, beyond the usual case where the average consumer perceives a mark as a whole, and notwithstanding that the overall impression may be dominated by one or more components of a composite mark, it is quite possible that in a particular case an earlier mark used by a third party in a composite sign including the name of the company of the third party still has an independent distinctive role in the composite sign, without necessarily constituting the dominant element.

In such a case the overall impression produced by the composite sign may lead the public to believe that the goods or services at issue derive, at the very least, from companies which are linked economically, in which case the likelihood of confusion must be held to be established.

The finding that there is a likelihood of confusion should not be subject to the condition that the overall impression produced by the composite sign be dominated by the part of it which is represented by the earlier mark.'

[34] The respondent's counsel also referred us to a decision of an appeal court in Paris<sup>30</sup> where the court found in favour of the proprietor of the registered mark E.ON in its opposition to the registration of a proposed mark HYUNDAI EON. The appeal court agreed with the earlier proprietor that the HYUNDAI element of the proposed mark had 'no defined semantic value which would be added to that of the brand EON to form a conceptually different whole with regard to the previous brand E.ON'. The same conclusion, I may add, was reached in the United Kingdom in

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<sup>28</sup> Paras 23-29.

<sup>29</sup> Paras 30-32.

<sup>30</sup> *E.ON AG v Hyundai Motor Company* Appeal Court of Paris Division 5 Case 12/05489, 22 December 2011. The respondent's counsel provided us with a sworn translation of the French decision.

proceedings between the same parties before the Registrar of Trade Marks<sup>31</sup> where the Hearing Officer spoke of the trend towards the use of sub-brands (in that case HYUNDAI as the primary brand and EON as the sub-brand) and said that the average consumer would assume that the identical and similar goods at issue came from undertakings which were economically linked.

[35] The exposition in *Medion* is consistent with the principles of our law and fortifies me in the conclusion I have reached on the s 10(14) issue. I thus consider that the full court was right to uphold Atlantic's appeal against the dismissal of its opposition to the registration of PepsiCo's marks.

### **Conclusion**

[36] Accordingly the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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OL Rogers  
Acting Judge of Appeal

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<sup>31</sup> *In re Hyundai Motor Corporation* Appn 2577601 per Hearing Officer, Mr CJ Bowen, 14 November 2012; upheld on appeal to the Appointed Person, Ms A Michaels, Appeal 0-313-13, 1 August 2013.

## Appearances

For the Appellant

R Michau SC (and with him I Joubert)

Instructed by

Spoor & Fisher, Centurion c/o Phatshoane

Henney Attorneys, Bloemfontein

For the Respondent

P Ginsberg SC (and with him F Southwood)

Instructed by

Adams & Adams, Pretoria c/o Honey

Attorneys, Bloemfontein