

FIRST MUTUAL LIFE ASSURANCE SOCIETY OF ZIMBABWE  
APPLICANT  
and  
INTERMARKENT HOLDINGS LIMITED  
RESPONDENTS  
and  
SIX OTHERS  
RESPONDENTS

HLATSHWAYO J  
HARARE, 17 January, 2006

### **Opposed Application**

*Advocate J C Andersen*, for the applicant  
*Mr. P. Masamba*, for the respondents

HLATSHWAYO J: The applicant, First Mutual Life Assurance Society of Zimbabwe (hereinafter “FML” or “the applicant”), a mutual society and body corporate registered in terms of the Insurance Act (Chapter 24:07) was established in January 1990 following the merger of the local interests of Prudential Assurance Company of Zimbabwe (Pvt) Ltd, Colonial Mutual Life Assurance Society and Norwich Union Life Assurance Society all three of which had operated in Zimbabwe for a number of years prior to the merger. The principal business of the applicant is life assurance and group pensions. Other services offered by the applicant include short-term insurance, unit trust services asset fund management.

The 1<sup>st</sup> respondent is Intermarket Holdings Limited, a holding company for the various companies in the Intermarket Group, some of which are cited as respondents in this application, viz; Intermarket Reinsurance Limited (2<sup>nd</sup> respondent), Southampton Assurance Company of Zimbabwe (3<sup>rd</sup> respondent), a registered life assurance company which became a subsidiary of 1<sup>st</sup> respondent in 1998 and applied in 2001 to change its name to Intermarket Life Assurance Limited, Intermarket Discount House (4<sup>th</sup> respondent), Intermarket Unit Trusts Limited (5<sup>th</sup> respondent), offering unit

trusts and fund management services, Intermarket Stockbrokers (6<sup>th</sup> respondent) and Intermarket Managers (Pvt) Ltd (7<sup>th</sup> respondent). On 31 October 2001, the Intermarket Group changed its corporate identity and adopted a new logo and corporate image. It is this logo, which is the subject of this application.

The applicant is the proprietor of Zimbabwean trade mark registration nos. 61/1990 and 62/1990 TRIANGLE DEVICE in classes 35 and 36 and 667/99 TRIANGLE DEVICE in class 36 (hereinafter referred to as “the trade marks”). The applicant’s trade marks are registered in respect of services in Class 35 and Class 36 which include insurance, financial and monetary services. The applicant has been using the Trade Marks in Zimbabwe in respect of these services since January 1990 when the merger mentioned above occurred. The use of the triangle device as the applicant’s logo represented the merger of the three bodies: Prudential Assurance Company of Zimbabwe (Pvt) Ltd, Colonial Life Assurance Society and Norwich Union Life Assurance Society.

It is common cause that the respondents are involved in the provision of services either in the insurance, financial or monetary fields, the same field of business in respect of which the applicant has been operating in Zimbabwe using the trade mark. The applicant’s contention is that the use of the logo in question by the respondents is confusingly similar to its registered trade mark and constitutes an infringement of it. The registered trade mark and logo are shown in the papers both with and without the addition of colour.

It is also common cause that the applicant’s trade mark was registered in 1990 both with and without colour since when it has been extensively used, and that the respondents only came to use their logo relatively recently. It is also not disputed that considerable expenditure has been made on and goodwill derived from the trade mark and that the parties carry on very substantial business in similar fields.

Section 8(1)(a) of the *Trade Marks Act (Chapter 26:04)* states:

- (1) "Subject to this section and section ten and eleven, the rights acquired by registration of trade mark in Part A and Part B of the Register shall be infringed by-
  - (a) unauthorized use as a trade mark in relation to goods or services in respect of which the trade mark is registered, of a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion; or
  - (b) .....

Thus, the test as to whether there has been an infringement depends essentially on whether there is a sufficient similarity which is likely to lead to confusion. *Kellogg Co. v Cairns Foods Ltd* 1997 (2) ZLR 230 (SC), *American Chiate Co. v Gower N.O. & American Chewing Products Corp.* 1947 (4) SA 49 (SR).

According to the applicant, both logos are based on the use of two triangles with one placed upside down in relation to the other. The applicant's registered trade mark consists of one triangle within another resulting in four triangles within the shape of a triangle as a whole. The respondent's trade mark has one triangle upside down over the other. A bisecting line drawn where the sides cross achieves an identical result of four triangles within each of the two triangles. It was submitted on behalf of the applicant that the external shape made by the outside lines is dominated by the shapes of the two triangles and triangles within them with the resultant similarity of concept and design with the applicant's registered trade mark.

On the other hand, the respondents contended that the shape of their logo, unlike a triangle, is solid like a star or a trapezoid, consisting of six triangles, arranged in an irregular pattern, accompanied by the name "Intermarket". The logo of the applicant, as seen by the respondents, consists of four triangles, with three shown on their base pointing upwards and one on its apex pointing downwards. The four triangles are organized so as to form a single triangle, through which run three white lines, and in colour the middle triangle is presented in red. According to the respondents, the dominant features of the applicant's logo are a representation of a

triangle, with a red triangle in the middle thereof, superimposed on the outline of a white triangle, and it is this feature “which strikes the eye and fixes itself in the recollection” (*Saville Perfumery Ltd v June Perfect Ltd & Anor* [1941] 58 RPC 147 at 162.

While the respondents’ submission that their logo, unlike a triangle, is solid like a star or trapezoid does not bear much scrutiny as it is patently not so, there is merit in their contention that as opposed to the single triangle concept of the applicant’s mark, with its dominant features of a middle red triangle bounded in white lines, the mark used by the respondents gives the impression of an irregular collection of triangles in gold and black together with the name. In my considered view, these differences are not mere distinguishing additions to an otherwise infringing trade mark, but are essential features which set the two logos apart.

The test as to deception or confusion is that of the normal, average person. (*Mobil Oil Zimbabwe (Pvt) Ltd v Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 at 76. Significantly, the applicant could produce only one specific instance of such confusion, without any information as to the type of person who claimed to be confused. The bisecting of the triangles to achieve the striking similarity is an exercise unlikely ordinarily to be carried out by the normal average person. I do not find, therefore, that there is a likelihood of deception or confusion. The two logos viewed together are distinctive and easily distinguished.

I am strengthened in my conclusion by the view that the concept of similarity should not be construed so widely as to create unacceptable monopoly in the use of designs, in this case incorporating the use of triangles. (See *Bata Ltd v Face Fashions CC & Anor* 2001 (1) SA 844 (SC) pp. 851-852 and registered trade marks do not create monopolies in relation to concepts or ideas, see comments by HARMS JA in *Cowbell AG v ICS Holdings Ltd* 2001 (3) SA 941 (SCA) at p.948. Likewise, in *National Brands Ltd v Blue Line Manufacturing (Pty) Ltd* 2001 (3) SA 563 (SCA) at p. 570, the Appeal

Court held that the word 'similar' had to have its ordinary meaning, that is a 'marked resemblance or likeness', and 'marked' meant 'easy to recognize'.

For the reasons set out above, I have come to the conclusion that the logo used by the respondents is not identical with or so nearly resembling the registered mark of the applicant as likely to deceive or cause confusion as required by section 8(1) of the Trade Marks Act. In other words, the logo of the respondents does not offend the registered rights of the applicant and the applicant is not entitled to prevent the respondents from using their logo. As far as costs are concerned, I found no reasons to depart from the general rule that costs follow the outcome.

This application is dismissed with costs.

*Gill, Godlonton & Gerrans*, applicant's legal practitioners  
*Dube, Manikai & Hwacha*, 1<sup>st</sup> - 7<sup>th</sup> respondents' legal practitioners